

National Legal Profession Reform Taskforce

Interim report on key issues and funding

Background

In May 2010, the National Legal Profession Taskforce released its draft National Law and National Rules for a three-month consultation period. During the consultation period the Taskforce received 162 submissions; consulted widely with a range of stakeholders through briefings in each jurisdiction, and meetings with the profession, regulators, most Attorneys-General and Chief Justices; and engaged a consultant to undertake an intensive consumer consultation process. On 6 August and 15 October 2010, Taskforce members attended meetings with Attorneys-General to discuss the reforms.

Key issues

Some key issues identified during the consultations have been:

1. The constitution of the National Legal Services Board
2. The need for a National Legal Services Ombudsman
3. The need for SCAG policy directions
4. The role of SCAG in disallowing National Rules
5. The application of certain provisions to ‘commercial or government’ clients
6. The centralisation of admissions applications
7. The conduct of compliance audits
8. The funding for the proposed national regulatory bodies.

Taking into account the submissions made to it, the Taskforce has made the following decisions in relation to these key issues.

The National Legal Services Board

The Taskforce considers that the Board should represent a balance of interests and expertise, and should reflect the range of larger and smaller jurisdictions.

During the consultation, the Taskforce heard concerns about the proposed constitution of the National Legal Services Board (‘Board’). The Law Council of Australia (‘LCA’) and members of the legal profession raised concerns that the proposal may undermine the independence of the profession. Other stakeholders emphasised the need to ensure the Board represents a balance between members drawn from the legal profession and those with broader skills and experience, and expressed support for appointments being made by the executive.

Proposal: the Taskforce proposes that the 7 member Board be constituted as follows:

- Two members appointed on the recommendation of the LCA.
- One member appointed on the recommendation of the Australian Bar Association (‘ABA’).

- Three members appointed on the recommendation of the Standing Committee of Attorneys-General ('SCAG'). SCAG would recommend appointees on the basis of their expertise in one or more of the following areas: the practice of law; the protection of consumers; regulation of the legal profession; or financial management.
- The Chair (the seventh member) would be appointed on the recommendation of SCAG, on the condition that:
 - it has consulted with the President of the LCA, the President of the ABA and a member of the Council of Chief Justices nominated by the Council for this purpose;
 - the President of the LCA, the President of the ABA and the member of the Council of Chief Justices nominated by the Council for this purpose have had an opportunity to nominate candidates for the Chair; and
 - it does not recommend a person without the concurrence of the President of the LCA, the President of the ABA and the member of the Council of Chief Justices nominated by the Council for this purpose.

In addition, the National Law would require SCAG to ensure that:

- the members are appointed so that, as far as practicable, the members are representative of all State and Territory jurisdictions and reflect a balance of expertise; and
- over each cycle of two terms, at least one member is drawn from each State and Territory jurisdiction.

SCAG would be required to consult with the LCA and ABA in this process, and more detailed provisions addressing these consultations would be included in a Memorandum of Understanding with them.

The National Legal Services Commissioner

The Taskforce considers that the overriding principle in relation to compliance and complaint functions is that they be subject to independent oversight.

The draft National Law provides a uniform set of provisions in relation to compliance and complaint handling. If implemented, this should provide significant benefits in terms of consistency for regulators, the profession and consumers.

The Taskforce's consultation proposal involved the establishment of a national Legal Services Ombudsman as a separate body with the capacity to carry out complaints handling and compliance functions, as well as overseeing its local representatives in doing so. Concerns were raised as to the potential cost of such a body, and the potential for duplication.

The Taskforce now proposes that in each jurisdiction there must be an independent statutory body or office holder to oversee the exercise of compliance and complaints functions. If this is in place, the role of national oversight can be limited to monitoring and reporting on the independent local representatives.

Proposal: the Taskforce proposes that:

- the National Legal Services Ombudsman will be titled the 'National Legal Services Commissioner' and, as under the Victorian system, will also be the Chief Executive Officer of the Board;
- the Commissioner will be appointed with the concurrence of the Board;
- in order to promote national consistency, the Commissioner will monitor and report on his or her local representatives, and will have the power to issue guidelines and directions to local representatives (but not in relation to an individual case or matter);

- the Commissioner’s local representative in each jurisdiction must be an independent statutory body (not being a professional legal association) or office holder—and this will be provided for in the Intergovernmental Agreement;
- in jurisdictions that do not have independent statutory bodies or office holders to carry out this function, consideration could be given to nominating existing independent statutory bodies or office holders to carry out this function, or they could make use of a body or office holder established in another jurisdiction; and
- local representatives will be able to delegate any functions to professional associations, and will have call in and monitoring functions in relation to their delegates.

SCAG power to give directions to the Board

The Taskforce considers that the main role of the Standing Committee under the proposed regime should be to oversee the legislative and administrative framework.

The draft National Law provides that the Standing Committee may give policy directions to the Board. This is consistent with several other national schemes, such as the Exposure Draft of the National Occupational Licensing Law, and the *Health Practitioner Regulation National Law Act 2009* (Qld).

Several stakeholders have expressed concerns about the proposal, and have suggested that this provision be removed.

The Taskforce considers that this role is adequately accommodated in the National Law.

Proposal: The Taskforce proposes to remove the power for the Standing Committee to give policy directions to the Board.

Disallowance of National Rules

The Taskforce recognises the need for accountability in the making of subordinate legislation.

Concerns have been expressed about the proposal that the Standing Committee may veto proposed National Rules.

The draft National Law provides that the Board may make a National Rule as submitted to the Standing Committee if: the Standing Committee approves the National Rule within 30 days of its submission to the Standing Committee; or the 30-day period expires without the National Rule being vetoed during that period.

Rather than providing for a parliamentary regime that would involve eight separate parliaments, the draft National Law provides for the Standing Committee to exercise this accountability role. The Taskforce considers this appropriate, and the Standing Committee’s role should be limited only where there is strong justification.

In relation to legal profession rules, the Taskforce recognises that in a number of jurisdictions these are subject to disapproval by the executive and/or parliament. The Taskforce considers an appropriate limitation on the Standing Committee’s power of disapproval in relation to Legal Practice Rules, Legal Profession Conduct Rules and Continuing Professional Development Rules, would be for it to be available only on public interest grounds.

Proposal: the Taskforce proposes that the Standing Committee should retain its power to veto proposed National Rules, but it may do so in relation to Legal Practice Rules, Legal Profession Conduct Rules and Continuing Professional Development Rules only on public interest grounds. In addition, the Standing Committee should be required to give reasons for disallowance.

Commercial or government clients

The Taskforce agrees that, given their sophisticated nature, commercial and government clients do not need to be covered by the same consumer protection provisions in relation to legal costs and consumer complaints as other consumers of legal services.

The National Law defines a range of legal services consumers as ‘commercial or government clients’. Several stakeholders, including the Law Council and the Large Law Firm Group, submitted that commercial or government clients do not require the same degree of consumer protection afforded to other clients under the National Law. They suggested that commercial or government clients are well equipped to negotiate legal costs without the need for mandatory disclosure, and to resolve costs disputes directly with their law practice.

Proposal: the Taskforce proposes that:

- commercial or government clients should not be covered by the legal costs regime—subject to certain exceptions based on public policy grounds (eg, certain restrictions on conditional costs agreements), and subject also to the power of these consumers to ‘contract in’ to the provisions with their legal services provider; and
- commercial or government clients should not be covered by the consumer complaint regime on the basis that they are sufficiently sophisticated to address such concerns directly with the legal practitioner or law practice involved. Commercial or government clients may, however, make complaints of a disciplinary nature in relation to a legal practitioner.

Processing of Admissions

The Taskforce supports the Board being responsible for processing admission applications to ensure consistency in decision-making across jurisdictions. However, where an application raises a significant local issue (for example, a serious disclosure about previous conduct) the Taskforce considers it appropriate that advice may be sought from a local jurisdiction.

Concerns have been expressed about the proposal to allocate the processing of admissions applications to the Board. In particular, there is a concern that this may create an inefficient regime that does not sufficiently incorporate the views of the local Supreme Courts. On the other hand, others believe consistent decision-making in relation to admission across Australia is crucial to the development of a truly national legal profession, and the development of the international legal services market.

Proposal: the Taskforce proposes that:

- The National Law will establish an independent Admissions Committee of the Board to determine applications for admission to the legal profession and advise the Board on National Rules concerning admission.
- The Admissions Committee will act on behalf of the Board in making determinations in relation to applications for admission and compliance certificates, and the Committee’s decision would not be reviewable by the Board.
- The Admissions Committee would be appointed by the Board, and would comprise nine members, as follows: 3 current or retired Supreme Court judges; 3 members nominated by the LCA; 1 member nominated by the ABA; 1 Dean of an Australian law school; and 1 member representing a State or Territory justice department. The Committee would appoint its own Chair.
- The Board would be required to ensure that the Admissions Committee includes a member drawn from each State and Territory.

- Jurisdictions may maintain Local Committees to assist in relation to admissions for certain purposes.
- The Admissions Committee would be able to refer an application to a Local Committee for advice where the application raises a significant local issue (for example, a serious disclosure about previous conduct).
- The Admissions Committee would be able to delegate matters such as the conduct of any litigation in relation to admission to a jurisdiction.

Compliance audits

The Taskforce supports a compliance audit function that is appropriately targeted and applied in the interests of effective regulatory oversight.

Concerns have been expressed that the Commissioner's power to conduct compliance audits is unnecessarily broad. Under the draft National Law, if the Ombudsman considers it necessary to do so, it may conduct an audit of the compliance of a law practice with the National Law, the National Rules and the applicable professional obligations (including the management of the provision of legal services by the law practice). If the Ombudsman considers it necessary to do so, the Ombudsman may give a management system direction to a law practice.

The Taskforce now proposes a more clearly defined power. Under the proposal, the Commissioner may conduct an audit of the compliance of a law practice with the National Law, the National Rules and the applicable professional obligations if he or she considers there are reasonable grounds to do so, based on: (a) the conduct of the law practice or one or more of its associates; or (b) a complaint against the law practice or one or more of its associates. As with other compliance matters, this function would be carried out at the State and Territory level. In addition, the Commissioner may give a management system direction to a law practice if, after conducting a compliance audit, he or she considers it reasonable to do so.

Funding of the National Body

The Taskforce initially considered a highly centralised model for complaints handling and regulation that would have substantially reduced the number of State and Territory regulatory bodies and the costs of legal profession regulation. However, the submissions from governments, the judiciary and the legal profession were overwhelmingly in favour of retention of locally based regulatory bodies with national oversight.

The Taskforce's current proposal, while creating a strong independent national oversight mechanism, retains and builds on the locally based structure. The consequence of this is that there is some additional cost in implementing the national regime.

The Taskforce has estimated the cost of the Board (including the National Legal Services Commissioner) as follows:

- Start up costs of \$1,692,356 (including capital costs of \$957,232); and
- An operating cost of \$4,027,224 per annum.

Start up costs

The Taskforce proposes that each jurisdiction be asked to fund the start up costs for the national body according to the number of practising certificates issued in the jurisdiction during 2008/09.

Based on the information provided by jurisdictions, the number of practising certificates issued in 2008/09 was as follows.

	NSW	Vic	WA	NT	SA	Qld	Tas	ACT
Solicitors	24,715	13,587	4,112	456	3,439	8,209	450	1,399
Barristers	2,107	1,831	192	43	N/A	981	39	73
Total	26,822	15,418	4,304	499	3,439	9,190	489	1,472

Total figure: 61,633

Based on estimated start up costs of \$1,692,356, this would equate to the following contributions (to the nearest \$100):

NSW	Vic	WA	NT	SA	Qld	Tas	ACT
\$736,500	\$423,400	\$118,200	\$13,700	\$94,400	\$252,400	\$13,400	\$40,400

Ongoing costs

The Taskforce proposes that the cost of the Board (including the Commissioner) be met from Admission fees.

Based on the information provided by each jurisdiction, there were an estimated 5,073 admissions in 2008/09 (however, these numbers are only estimates given some limitations in the data received from several jurisdictions).

The Taskforce proposes a standard Admission fee of \$795 per applicant, which would generate an estimated revenue of \$4,033,035 per annum (based on 2008/09 figures). This would replace the existing admission fees levied under State and Territory laws. If jurisdictions wish to impose additional levies on admission for their own uses, they may do so.

National Rules would authorise the Board to enter into arrangements with an applicant for admission who is suffering hardship to pay the admission fee in instalments; or to waive the whole or part of the fee if the Board is satisfied that the applicant is unable to pay the fee under an instalment arrangement.

An Admission fee of \$795 would recover the entire estimated annual operating costs of the Board (including the Commissioner), and no additional contribution would be sought from jurisdictions.

The Board's initial budget would be approved by the Standing Committee and reflected in the Intergovernmental Agreement. In accordance with existing practice, budgets would be submitted on a triennium basis for the Standing Committee's approval. If additional funds are required, the Board would need to make an application to the Standing Committee for approval for a one-off contribution by jurisdictions in accordance with this formula.

Funding formula

The Taskforce has proposed that law practices operating in several jurisdictions could opt to maintain a general trust account in one jurisdiction only. The Taskforce is developing a funding formula for the redistribution of interest earned on these trust accounts to ensure that jurisdictions will not be adversely affected by the proposal.

At this stage, it is intended that the factors to be included in the formula would be:

- The population in each jurisdiction;
- The number of practising certificates issued to solicitors in each jurisdiction; and

- The trust account balances in each jurisdiction over a period of time.

The Taskforce has sought financial information regarding trust accounts from jurisdictions and is awaiting a response from a number of them.

Areas of potential savings for jurisdictions

The Taskforce has identified a number of potential savings for each jurisdiction resulting from the reforms. Jurisdictions would be expected to offset their contribution to the national body through these savings.

In the short term, the main areas of savings for jurisdictions will be in the transfer of the following functions from their local regulatory bodies:

- Developing professional conduct rules (which will in future be done by the LCA and ABA).
- Independent bodies reviewing professional conduct rules (which will instead be reviewed by the Board and SCAG).
- Developing draft legislation and regulations (as most matters would be addressed in the National Law and National Rules, rather than on a jurisdictional basis).
- The processing of foreign lawyer registrations (which will be centralised in the Board).

Some jurisdictions will have more savings than others, due to the particular functions of their regulatory bodies, and the funds currently allocated to those functions.

The Australian Legal Profession Register will be developed over time. The development of the Register is likely to result in savings to regulatory bodies in each jurisdiction.

The Taskforce notes that legal practitioners and law practices will benefit from savings resulting from nationally uniform rules and consistent regulation (in particular, for those operating in several jurisdictions). ACIL Tasman has revised its consultation Regulatory Impact Statement figures¹ and calculates that the benefits of these reforms to the legal profession will be up to \$16 million each year after the first year. The overall benefit to regulators and the profession is estimated at up to \$15.7 million², which accounts for the annual costs of the new national bodies and the benefits of uniformity and national cooperation between regulators. These economic benefits are likely to be reaped (and potentially increase beyond these estimates) over time as the benefits of uniformity are progressively realised.

Next steps

The Taskforce intends to meet its deadline by presenting COAG with its final proposals by the end of 2010, but COAG would not be asked to endorse the package until early 2011.

¹ Figures are based on the Taskforce's revisions to proposals to date. Some proposals are still being settled.

² Calculations are based on constant figures and the standard Office of Best Practice Regulation discount rate.