

The Regulatory Framework: A National Legal Profession 16 September 2009

Introduction

1. The Council of Australian Governments (COAG) has decided to establish uniformity in the regulation of the legal profession. Simplification and substantive and enduring uniformity are the goals of this reform process. To achieve these goals in the most efficient and effective way, the National Legal Profession Reform Taskforce is considering a range of options for the establishment of a national legal profession and national regulatory framework, while retaining State and Territory involvement and engagement by professional associations.

2. The Taskforce would like to start with consideration of the high-level framework of the system. Its consideration of more specific issues will be guided by this. The views on the Consultative Group are sought on how a nationally consistent, simplified and efficient regulatory framework might be structured.

Key aims

3. The key aims are to establish a regulatory framework that:
- creates and supports a national legal profession and a national legal services market through simplified uniform legislation and regulatory standards.
 - provides for setting national standards, policies and practices wherever possible and appropriate.
 - ensures that legal practitioners can move freely between Australian jurisdictions and that law practices can operate on a national basis.
 - provides clear and accessible consumer protection, so that consumers have the same rights and remedies available to them regardless of where they live in Australia.
 - is efficient and effective, and

- is robust, relevant and effective over time.

A national system of regulation through a national standard-setter

4. To achieve substantive and ongoing uniformity, the new regulatory framework should contain a single national standard-setter to produce uniform regulatory standards that will be applied across Australia, eg a National Legal Services Board. A national standard-setter can be established as one of three types of bodies:

1. National Model	2. Commonwealth Model	3. Standard-Setter Model
A national standard-setter and decision-maker regulating all jurisdictions with the power to delegate to local entities and with stakeholder input through advisory committees	A Commonwealth standard-setter and decision-maker (a Commonwealth body regulating all jurisdictions) with stakeholder input through advisory committees	A national council as a standard-setter only; without a decision-making role, with stakeholder input through advisory committees

Taskforce Preferred Model 1 – A national body (ie joint State and Territory body)

5. The national model would involve establishing a national body that would regulate all jurisdictions uniformly. It is likely that it would be established under either: legislation enacted in one jurisdiction that is then applied in all others; or uniform State and Territory legislation.

6. Under this model, the national body would have a range of powers including setting national standards (ie, binding rules under the uniform legislation), maintaining a national register, and other operational and decision-making functions.

7. The national body could delegate powers to State and Territory bodies, who would then operate as the agents of the national body. However, a number of powers, including the standard-setting role would not be delegable.

8. This model would achieve the main objective of these reforms—ongoing uniformity and a seamless national legal profession. It would simplify and centralise legal profession regulation and reduce jurisdictional differences in regulation, which can lead to unnecessary regulatory burden. It could utilise existing State and Territory capacity and expertise by maintaining a local presence in the States and Territories. The model would not require a referral of powers from the States to the Commonwealth. Existing State and Territory courts and tribunals would review

decisions where appropriate, and would determine disciplinary matters, thereby overcoming the potential constitutional issues that could arise under a Commonwealth legislative framework. Any differences in interpreting and applying the legislation by different State and Territory courts and tribunals is likely to be minimised by the clear enunciation of regulatory principles in the legislation and unambiguous national standards for the implementation of those principles.

9. For these reasons, the Taskforce considers that the national model is the most appropriate and effective model.

Other models

10. The Taskforce has considered other models but does not think that these provide a good solution. The model of a national regulator established under Commonwealth legislation could raise certain constitutional issues. The Commonwealth lacks comprehensive power to regulate the legal profession, and therefore would require a referral of power from the States in relation to at least some aspects of a national regulatory scheme. At least one State has already indicated it does not support such a referral of power.

11. In addition, the Commonwealth's legislative powers do not extend to making laws that deny the continued existence of State governments (including State courts) as independent entities. Accordingly, it is unlikely that a Commonwealth legislative scheme could operate to the exclusion of State supervision of State legal practitioners in relation to matters arising before State courts. Further, current funding flows and expertise in regulating the legal profession is located at the State and Territory level. For these reasons, this model is not the Taskforce's preferred model.

12. Model 3 would involve establishing a national regulator to set uniform standards only; it would not have any decision-making function. Uniform State and Territory legislation would provide for the application of the standards set by the regulator/standard-setter. This model would provide for uniform standards and would necessitate minimal structural and funding changes to existing regulatory arrangements. However, unlike the other models, it would not involve any alteration in the existing autonomous State and Territory arrangements in relation to regulatory authorities, ie those applying the standards set by the national standard-setter. Law practices offering multi-jurisdictional legal services, legal practitioners crossing jurisdictional borders and international legal service providers would all continue to be required to deal with separate regulatory bodies. Also, there would be no direct oversight mechanism to ensure ongoing national uniformity in the application of uniform standards. For these reasons, this is not the Taskforce's preferred model.

Proposed national regulatory framework

Legislative basis

13. The new national framework would be established under either: legislation enacted in one jurisdiction that is then applied in all others; or uniform State and Territory legislation. The legislation would be supported by an inter-governmental agreement. The legislation would contain high-level principles for the regulation of matters including admission, practising rights, professional conduct and business practice. The legislation would also establish the National Legal Services Board and the National Legal Services Ombudsman, and stipulate their respective roles and powers.

14. The legislation would be administered at the political level by the State and Territory Attorneys-General through their Ministerial Council, the Standing Committee of Attorneys-General.

National Legal Services Board

15. The National Board would be a small body of around five members appointed on the advice of the Standing Committee of Attorneys-General. Board members would be appointed on the basis of the member's expertise in one or more of the following areas:

- the practice of law
- the protection of consumers
- the regulation of a profession.

16. The Board would reflect a balance of expertise across these areas and would be broadly representative across different Australian jurisdictions.

17. The Board would determine National Standards for matters including:

- *admission*, including academic qualifications and practical legal training; suitability for admission; and assessment of overseas qualified lawyers;
- *practising entitlements*, including the grant, renewal, suspension and cancellation of practising certificates; conditions on practising certificates of Australian legal practitioners and practising entitlements of Australian-registered foreign lawyers; professional indemnity insurance requirements; and continuing professional development;
- *professional conduct*, including duties to clients, the Court and other practitioners, such as requirements for confidentiality; and

- *business practice*, including requirements for trust money and trust accounts; costs disclosure, billing and costs assessments; management of fidelity fund claims; legal practice interventions and external management; and the regulation of business structures.

18. The Board’s role in standard-setting would be informed by subject-specific advisory committees comprising representatives from the relevant stakeholder groups, including the professional bodies, the Courts, education institutions, consumers and Australian governments.

19. The Board would also:

- maintain a National Register of Australian lawyers (ie those admitted), Australian Legal Practitioners, Australian-registered foreign lawyers and all disciplinary orders, and
- establish protocols and standards for the exchange of regulatory information with foreign regulatory authorities.

20. The Board could administer admission and practising certificates through State and Territory authorities or professional associations—this would depend on the resourcing demands, capacity and existing structure in each jurisdiction, and whether it is appropriate for the function to be delegated. Those functions would include: assessing applicants for admission and issuing Certificates of Compliance; and granting and renewing practising certificates. The Board would also bear responsibility for, or have oversight of, other decision-making and operational functions, such as interventions and external management—some of those functions may also be delegated to professional associations where appropriate.

21. The Board could not, however, delegate its national standard setting role to any other person or body.

Standards Advisory Committees

22. The Board would have the flexibility to appoint advisory committees to assist it in its work. Advisory committees could comprise representatives, as appropriate, from the legal profession, the Courts, professional indemnity insurance providers, consumers, education institutions, and State and Territory governments.

Courts

23. Supreme Courts would continue to be the admitting authorities, with the National Legal Services Board (or its delegate) recommending to the Court in the applicant’s jurisdiction whether or not an individual is eligible for admission. Admissions would be relayed to the Board and reflected on a National Register.

24. Admissions by one Supreme Court, once reflected on the National Register, would be recognised by all other Supreme Courts and the High Court of Australia.

25. The Courts would retain their inherent jurisdiction to discipline those appearing before them. Disciplinary orders for cancellation or suspension of practising certificates, or the imposition of conditions on practice, would be also reflected on the National Register.

National Legal Services Ombudsman

26. A National Legal Services Ombudsman would be appointed to administer and oversee a national complaints-handling scheme.

27. The Ombudsman would be able to delegate functions to local bodies, which would act as the agent of the Ombudsman in dealing with complaints. As agents of the Ombudsman, the State and Territory bodies generally would exercise the same powers and functions across Australia. The Ombudsman would monitor their work to ensure that they are exercising their powers appropriately.

28. Further consideration will need to be given to questions such as which local entities would be involved and whether any existing bodies will need to be reshaped. As the same standards and procedures will be applied, there is also increased opportunity for cooperation between States and Territories in providing local services.

29. Complaints would be assessed as either consumer disputes or disciplinary matters, and both categories of complaints would be addressed. The Ombudsman or its delegate would determine whether a complaint meets the criteria for disciplinary proceedings to be commenced.

30. Complaints would be handled in accordance with the principles stipulated in the uniform legislation and any relevant standards set by the National Legal Services Board. Within these boundaries, the Ombudsman or delegate should have flexibility in determining how disputes are to be resolved.

31. Where a matter is a purely consumer complaint and does not involve issues of discipline, the Ombudsman should be able to deal with the matter quickly and without formality.

32. The Ombudsman (and its State and Territory agents) could have power to: facilitate mediation or conciliation; issue binding determinations for consumer disputes and minor misconduct matters; and initiate disciplinary proceedings in the relevant tribunal, and then the Supreme Court, in the jurisdiction with the closest connection to the matter.

33. The Ombudsman and/or its delegate could call on the assistance of others, including professional associations.

Disciplinary Tribunals

34. State and Territory disciplinary tribunals would continue to deal with complaints brought against Australian Legal Practitioners by the National Legal Services Ombudsman or its delegates.

35. The jurisdiction of, and remedies available through, the tribunals would be made uniform under the legislation.

Proposed Regulatory Framework

