

# NATIONAL LEGAL PROFESSION REFORM

By Michael Lavarch

To date, incremental progress has been made towards establishing a national legal profession in Australia, but the expected changes fall short of bringing about a truly national profession. This article outlines the background to the national legal profession reform proposals, as well as the nature of the changes and the expected impact on structures, costs and processes associated with the legal profession.



## BACKGROUND

Australia has been moving inexorably towards a truly national legal profession for the last three decades. Commencing with national competition policy reforms of the 1980s and followed by initiatives from the Law Council of Australia and state and territory attorneys-general, there has been a gradual harmonisation of standards applying to legal practice regulation.

While important progress has occurred, the reform process was spasmodic and limited until legal profession regulatory reform became an agenda item of the Council of Australian Governments (COAG) in 2009, which provided some impetus. This heralded a new phase, marked by three key differences from earlier reform attempts.

Firstly, the focus of reform extended beyond regulatory standards to encompass the actual bodies involved in regulation. Secondly, the Commonwealth government moved from bystander to principal driver of the reform process. Thirdly, the cost of regulation and where these costs should rest was taken into consideration for the first time.

COAG's involvement was prompted by disappointment at the rate of earlier progress and a recognition of the burden of compliance for law practices and the inconsistent consumer protection associated with disparate state and territory regulations. At the direction of COAG, the commonwealth attorney-general appointed a taskforce which was charged with preparing draft uniform legislation to regulate the legal profession, and to recommend a national regulatory framework.

A consultative group was also created to advise and assist the Legal Profession Reform Taskforce in its work, with membership from every state and territory as well as expertise from regulators, the courts, consumers, the legal profession and legal educators.

In April 2010, the taskforce produced a consultation report with the following key themes underpinning its reform proposals:

- the creation of a national regulatory framework;
- the establishment of an Australian legal profession;
- a reduction in the regulatory burden for Australian legal practitioners;
- enhanced consumer protection; and
- maintenance of the independence of the legal profession.

In addition, the taskforce produced a draft *Legal Profession National Law* and *Legal Profession National Rules*. The commonwealth attorney-general also commissioned a cost:benefit analysis of the proposed reforms which estimated a net annual benefit of around \$17 million (a large proportion of which is from estimated savings on compliance costs) as well as an increase to the GDP by around \$24 million per annum due to improved productivity in the legal sector.<sup>1</sup>

The consultation report, draft *National Law* and *National Rules* and the economic analysis together made up the consultation package released in May 2010 for public comment. Following input from the public, including key stakeholders such as the National Justice CEOs, a revised draft *National Law* was released in September 2011 and is available on the commonwealth attorney-general's website.<sup>2</sup>

## PROPOSED STRUCTURES

### National Legal Services Board

The draft *National Law* requires the establishment of a National Legal Services Board to oversee regulation of the legal profession and the maintenance of professional standards, provide for consumer protection and promote national consistency. The Board, in turn, will be supervised by the Standing Committee of Law and Justice Ministers, which also has the role of considering *National Rules*.

The Board will consist of seven members, two of whom will be appointed by the relevant host state (that is, NSW) attorney-general on the recommendation of the Law Council of Australia, one on the recommendation of the Australian Bar Association and three on the recommendation of the Standing Committee on the basis of expertise in the practice of law, the protection of consumers, the regulation of the legal profession and/or in financial management. The chair will be appointed by the host attorney-general on the recommendation of the Ministerial Standing Committee following consultation with and concurrence by the presidents of the Law Council and Bar Association. There is the additional aim of drawing membership from each participating jurisdiction, with the Inter-Governmental Agreement to provide detailed arrangements for rotating Board membership among jurisdictions.

### National Legal Services Commissioner

The role of National Legal Services Commissioner will be established under the *National Law*, and will have the objectives of dealing with complaints and disputes involving legal practices and consumers in a timely and effective manner. The Commissioner is to ensure compliance with the *National Law* and the accompanying Rules, educating the legal profession about issues of concern to the profession and its clients, and promote national consistency in the application of the *National Law* and *Rules*. The Commissioner will also assume the role of Chief Executive of the Board, with responsibility for administering its affairs in accordance with its policies and directions.

### Admissions Committee

The Board will delegate responsibility for the admission of Australian legal practitioners to the Admissions Committee, which is the only committee required under the *National Law* (although other committees may be established from time to time). The membership of the Admissions Committee will consist of three current or former Supreme Court judges, three persons nominated by the Law Council of Australia, one person nominated by the Australian Bar Association, one person representing a state or territory justice department or equivalent, and one dean of a law school or faculty, or equivalent. Each jurisdiction must be represented on the Board, and the chair is appointed from the Committee's membership. The Admissions Committee will exercise the admissions function on behalf of the Board, as well as providing advice to the Board regarding the *National Rules* relating to admission, and on any other matter as requested by the Board. >>

### Admissions function

The requirements for admission to the Australian legal profession remain the same under the new *National Law* – that is, to be eligible an applicant must hold an appropriate academic qualification, have undertaken practical legal training and be a fit and proper person to be admitted. However, under the new system, an applicant will apply to the National Board for a compliance certificate, nominating the jurisdiction where he or she proposes to be admitted, rather than their local admissions body as at present. If the Board is satisfied that the applicant meets the requirements, a compliance certificate is provided to the Supreme Court of the nominated jurisdiction, which then admits the applicant. There is no residence requirement for admission to a specific jurisdiction, and an applicant may seek admission by any Supreme Court. The Supreme Court is required to maintain a roll of all Australian lawyers for the relevant jurisdiction.

Where an application is not straightforward, the Board may seek advice from a local body regarding the suitability of an applicant for admission.

### Australian Legal Profession Register

The Board is required to maintain an Australian Legal Profession Register containing the names of all Australian legal practitioners and Australian-registered foreign lawyers and their legal practice address or addresses, as well as the names of disqualified persons and entities. The Register is required to be made publicly available.

### National Rules

Under the legislation, the Board will be expected to develop *Legal Profession National Rules* to cover legal practice, legal profession conduct rules and continuing professional development rules, with input from the Law Council and the Bar Association as appropriate. There is also provision for the development of additional *National Rules* that may be identified in consultation with the Commissioner and other key bodies, and which require an opportunity for public input to their development. A draft set of *Rules* was produced by the taskforce,<sup>3</sup> which will be reviewed by the Board in consultation with stakeholders before the national scheme commences.<sup>4</sup>

### Complaints mechanism

Under the new structure, complaints against a legal practitioner or practice must be made to the Commissioner, who will conduct a preliminary assessment of the complaint. Disputes may concern consumer issues (such as a costs dispute), disciplinary issues (where professional conduct is unsatisfactory), or both. The *National Law* provides for complaints to be dealt with in the jurisdiction with which the complaint has the most connection, which means that, in practice, local bodies will have a key role to play in handling complaints.

Complaint-handling and the discipline function is expected to be delegated to an independent state body, such as the Legal Services Commission, while trust accounting may be handled by law societies.<sup>5</sup>

### CURRENT STATUS OF CHANGES

In October 2011, the commonwealth attorney-general announced that NSW would be the home for the new National Legal Services Board and National Legal Services Commissioner,<sup>6</sup> which will be the key entities in the regulation of the national legal profession. NSW, Queensland, Victoria and the Northern Territory were reported as taking part in the reforms, covering around 85 per cent of Australia's practising lawyers. Victoria has agreed to be the lead jurisdiction for the legislation to implement the reforms. The scheme has adopted an 'Application Act' approach, where each participating jurisdiction will pass a single-line Act legislating the terms of the Victorian Act in their jurisdiction. An Inter-Governmental Agreement is required to support the scheme over time.

At the time of writing, however, it is not clear whether Queensland will remain a participant in the reforms, as the newly elected government of that state has stated that it will review its participation in the scheme.

### COSTS OF NEW STRUCTURES

A contentious point throughout the reform process has been the cost of the national structures and where these costs would rest. The commonwealth government has committed to a one-off contribution for start-up costs, with ongoing costs to be met from the fees paid by applicants for admission as legal practitioners. While this avoids existing lawyers meeting the cost via practising certificate fees, it will place the new National Board on a very limited budget.

The current cost of practising certificates varies significantly according to jurisdiction, and each state or territory has different methods for differentiating fees. For example, NSW differentiates fees for practising certificates by type of practising certificate and length of admission, while Victoria differentiates according to whether trust account authorisation is provided, and Queensland by whether the applicant has principal or non-principal status.<sup>7</sup>

The processing of practising certificates will continue to be undertaken by jurisdictions, so the local regulatory costs will remain largely unchanged. However, the admission fee will no longer be received by the local jurisdiction.

The legislation and the draft *National Rules* are both silent on the matter of setting and receiving admissions application fees.

### COMMENTARY

Although significant progress has been made towards achieving a national legal profession through the establishment of national structures as described above, the fact that the local bodies appear to remain part of the regulatory regime for key functions such as admissions and complaints-handling is somewhat disappointing. Under this structure, the number of regulatory bodies relating to the legal profession will increase from 54 to 55. However, further progress may yet be made if the new national bodies exercise the full extent of their power over the state bodies with a view to future consolidation of these entities.



**Admissions**

There will need to be a process of reconciliation regarding different state and territory practices around non-straightforward applications for admissions if national uniformity is to be achieved. The draft *National Rules* are silent on this point.

There is also the question of whether the Law Admissions Consultative Committee (LACC) and the state admissions bodies will have an ongoing role, or whether the national Admissions Committee will have responsibility for accrediting curriculum and law programs in future. This could continue to be delegated to the state and territory bodies, which currently have the capacity to decline to follow LACC recommendations, resulting in wide variations in practice in the ways states apply LACC standards. This need not be the case. A national system of accreditation would create national consistency on issues such as a requirement to disclose academic dishonesty, for example. Given that the overarching aim of the *National Law* is to achieve national consistency, this is one area where this aim can be put into practice.

From a legal education perspective, the make-up of the new Admissions Committee is a cause for concern, given the paucity of the representation of legal educators on the Committee. This concern will multiply if the Admissions Committee extends its reach to the areas of standards and accreditation of law degrees, particularly in light of existing university regulatory mechanisms such as the Tertiary Education Quality and Standards Agency (TEQSA) and the Australian Qualifications Framework (AQF), as well as the statement of standards for the LLB issued by the Council of Australian Law Deans (CALD) and the Threshold Learning Outcomes that have been endorsed for the law discipline. It is crucial for decision-makers to understand these intersecting demands on legal education when debating and setting standards and mechanisms for accreditation for the legal profession.

**Costs**

The estimated cost savings and GDP growth associated with a national legal profession are unlikely to be realised while there is still a hybrid model in place. However, a reduction in the income at local level with the transfer of admission fees to the National Board may precipitate further changes towards consolidation.

**CONCLUSION**

The changes outlined above make some progress towards the establishment of a national legal profession, but there is still some distance to travel. At best, a benchmark has been established that will mark a certain level of progress, and allow the main advocates for nationalisation to regroup before the next steps forward can be taken.

Whether a truly national legal profession can be achieved will depend largely on the performance of the National Board and National Legal Services Commission, and whether remaining state and territory bodies will begin to fade in importance. ■


**Notes:** **1** March 2010, 'Cost Benefit Analysis of Proposed Reforms to National Legal Profession Regulation,' ACIL Tasman consultants, [http://www.ag.gov.au/Documents/National+Legal+Profession+Reform+Project+--+Consultation+Regulation+Impact+Statement+\(Attachment+D\).pdf](http://www.ag.gov.au/Documents/National+Legal+Profession+Reform+Project+--+Consultation+Regulation+Impact+Statement+(Attachment+D).pdf), accessed 21 March 2012. **2** See [http://www.ag.gov.au/Consultationsreformsandreviews/Pages/Archive/CouncilofAustralianGovernments\(COAG\)NationalLegalProfessionReform.aspx](http://www.ag.gov.au/Consultationsreformsandreviews/Pages/Archive/CouncilofAustralianGovernments(COAG)NationalLegalProfessionReform.aspx), accessed 21 March 2012. **3** 14 May 2010, 'Legal Profession National Rules under the Legal Profession National Law: Consultation Draft,' <http://www.ag.gov.au/Documents/Legal%20Profession%20National%20Rules%20-%20CONSULTATION%20DRAFT.PDF>, accessed 22 March 2012. **4** See [http://www.ag.gov.au/Consultationsreformsandreviews/Pages/Archive/CouncilofAustralianGovernments\(COAG\)NationalLegalProfessionReform.aspx](http://www.ag.gov.au/Consultationsreformsandreviews/Pages/Archive/CouncilofAustralianGovernments(COAG)NationalLegalProfessionReform.aspx), accessed 22 March 2012. **5** Based on a conversation with John Briton, Queensland Legal Services Commissioner, 8 February 2012. **6** 19 October 2011, [http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll\\_corporate.nsf/pages/LL\\_Homepage\\_lawlink\\_news\\_archive\\_2011#191011](http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/pages/LL_Homepage_lawlink_news_archive_2011#191011), accessed 21 March 2012. **7** May 2010, 'National Legal Profession Reform Project: Consultation Regulation Impact Statement,' [http://www.coag.gov.au/coag\\_meeting\\_outcomes/2010-04-19/docs/ris\\_national\\_legal\\_profession\\_reform.pdf](http://www.coag.gov.au/coag_meeting_outcomes/2010-04-19/docs/ris_national_legal_profession_reform.pdf), accessed 22 March 2012.

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