

**NATIONAL LEGAL PROFESSION REFORM**

**RESPONSE TO TASKFORCE DISCUSSION PAPER ON THE REGULATORY FRAMEWORK**

1. This response to the Taskforce's 16 September 2009 paper on the Regulatory Framework, as subsequently elaborated, has been approved by the following members of the Consultative Group:

Tony Abbott – Past President, Law Society of South Australia; Past President, Law Council of Australia

Barbara Bradshaw – CEO, Law Society of NT

Joe Catanzariti – Immediate Past President, Law Society of NSW

Harold Cottee – General Manager, Professional Standards, LIV

Noela L'Estrange – CEO, Queensland Law Society

Martyn Hagan – CEO, Law Society of Tasmania

Philip Selth – Executive Director, NSW Bar Association

Dudley Stow – Immediate Past President, Law Society of Western Australia

2. Our views as set out here may be revised upon seeing the complete package of the draft Bill, draft Initial Rules, Regulatory Impact Statement and Financial Impact Statement (or other costing of the scheme and projected savings), as only then will the suggested new regulatory framework be able to be assessed as compliant, or not, with the regulatory principles established by COAG and the Taskforce.

3. On the basis that the new regulatory framework, as a whole, will not add to the direct cost of regulation, nor to the cost of compliance by practitioners, we support a national legal services board with the functions of:

- 3.1 setting standards as to admission, professional conduct (subject in both cases to the conditions as to content and amendment contained in paragraphs 8.2-8.4 below), PI policy and fund requirements, and trust account regulations, setting other standards, binding on regulators, as to the manner of administration and interpretation of the national law, and, in order to deal flexibly with any problems emerging in the national regulation in operation, exempting practitioners or classes of practitioners from compliance with any part of the national law, absolutely or on terms;

- 3.2 maintaining high level oversight of the effectiveness of the new system of national regulation, including making recommendations for reform to the national law;

- 3.3 establishment and maintenance of the national register of lawyers (although the actual work may be sub-contracted).

4. We strongly support the Chief Justice of the High Court's positions that:
  - 4.1 a majority of the board should be appointed directly by the profession, through its national representatives the LCA and ABA. Appointment by SCAG from a panel nominated by the profession would not meet the Chief Justice's position;
  - 4.2 the Council of Chief Justices should, if they wished, nominate the Chair of the Board. (It would be expected that any judge nominated for chair should have strong chairmanship skills in addition to judicial eminence and, desirably, legal profession regulatory experience).
5. No case has been made for a separate ombudsman, with a separate function and staff from that of the board. Apart from adding to the costs of regulation, the extra layer of regulation will introduce significant complexity, without any compensating benefit.
6. Except as above, for reasons of cost, simplification and efficiency, as well as for reasons of principle, the board should not have any administrative functions or decision-making powers in relation to day-to-day application of regulation. That should all be left to the local bodies to whom these functions will be devolved by the local legislatures in the application legislation. Specifically, the board should not have any power to:
  - 6.1 receive admission applications;
  - 6.2 issue compliance certificates (these should remain local functions and respect the dominant role of the Supreme Courts in admission – the board would have the power to issue guidelines on matters such as foreign lawyers qualifications, but recommendations as to the admission of foreign lawyer applicants should be provided to be the role of one local admissions board or board of examiners only);
  - 6.3 receive (via the ombudsman, as initially proposed) all complaints, and triage them (although we understand that the taskforce is now not proposing this);
  - 6.4 "call in" and handle particular complaints or a particular type of complaint which are thought to show "systemic" issues;
  - 6.5 handle sensitive complaints, or complaints where there is a clash of jurisdictions
7. For the same reasons of cost, simplification, efficiency and principle, the board's function (paragraph 3.2 above) of monitoring the oversight of the effectiveness of regulators should not include any power to withdraw the authority of a local regulator to exercise any regulatory function devolved on it by a state or territory legislature, nor a power to delegate that function to the same or another body, whether absolutely or on terms.
8. At this stage, before we see the draft bill and Initial Rules, we have reservations about the board having rule-making power beyond the standard-setting power contemplated in paragraph 3.1 above. Clearly the board should not have power to make rules on or which affect matters of principle, all of which should be contained in the legislation. And, any standard-setting or rule-making power of any degree should be limited to what is necessary rather than general, and consultation with appropriate profession and other bodies should be prescribed. Much will therefore depend upon the structure of the bill and the rules and on the content and comprehensiveness of the proposed Initial Rules and the extent to which it is proposed the board may amend any of them. In the meantime, we make the following other, preliminary, comments:

- 8.1 it is desirable for many reasons that rules or standards directly impacting on the rights of lawyers and their clients should be found in the legislation rather than be made and be able to be amended from time to time by the board, by some sort of legislative instrument. This is particularly so in the costs area (refer to our response and supplementary response to the legal costs paper)
  - 8.2 insofar as the Initial Rules include admission rules, these initial admission rules should be approved by the Council of Chief Justices, after consultation, before being established as part of the Initial Rules. Not only does this reflect the principal and peak constitutional and historical role of judges in the admission of practitioners, and the Court's inherent jurisdiction over practitioners, it is likely to be necessary in order to ensure that judges of the Supreme Courts of each state and territory make uniform admission rules of court in the form to be suggested by the taskforce.
  - 8.3 for similar reasons, the board should not have any power to make subsequent amendments to fundamental parts of the initial admission rules component of the national rules except on the recommendation of its admissions advisory committee.
  - 8.4 insofar as the Initial Rules include the professional conduct rules developed by the LCA and the ABA (which is our understanding), then any amendments to such rules made by the LCA or ABA, after consultation with the board, should have the same force of law as the initial conduct rules, and the board itself should have no power to amend the conduct rules component (although it may from time to time suggest to the LCA and ABA amendments which could be considered).
  - 8.5 to provide certainty and stability for lawyers and clients, consideration could be given to quarantining some areas from amendment for an initial period of, say, eighteen months.
9. The legislation, or the intergovernmental agreement, should provide that the effectiveness of the regulatory framework is to be comprehensively reviewed after three years. A board member should not be appointed for a term going well beyond the period of the review. Mechanisms should be put in place now so that the costs and effectiveness of the new national framework can be assessed from year to year and compared to the costs of the current frameworks in each state and territory. These measurements should be published regularly.
  10. The timing of transition to a new framework is important to the profession and clients, as well as local regulatory bodies. It is desirable for any national board to be established and in operation in a preparatory way well before the formal commencement of a national scheme – for example, if only to establish the national register of lawyers. However, the board should not be established until the legislation is passed and the detailed content of the Initial Rules is clear. The regulatory impact statement and financial impact statement, anticipated at the same time as the draft bill and Initial Rules, should include reasonably detailed consideration of timing and transition issues and logistics.
  11. We expect that there will be an adequate period of consultation after the release of the draft bill, Initial Rules, regulatory impact statement and financial impact statement. Ideally, the taskforce, with sufficient resources including Dennis Murphy and Rowena Armstrong, should continue as the COAG and profession focal point for consultation on the drafts, and ideally that consultation should be iterative, possibly involving alternative drafts of parts of the legislation and the rules.

12. We have appreciated the opportunity to make this and other submissions direct to the taskforce, and we continue to look forward to working together to achieve an effective system of national regulation which meets the objectives set for it by governments and the legal profession.

28 January 2010