

NATIONAL LEGAL PROFESSION REFORM
RESPONSE TO TASKFORCE DISCUSSION PAPERS ON THE
REGULATORY FRAMEWORK AND THE NATIONAL LEGAL
SERVICES OMBUDSMAN

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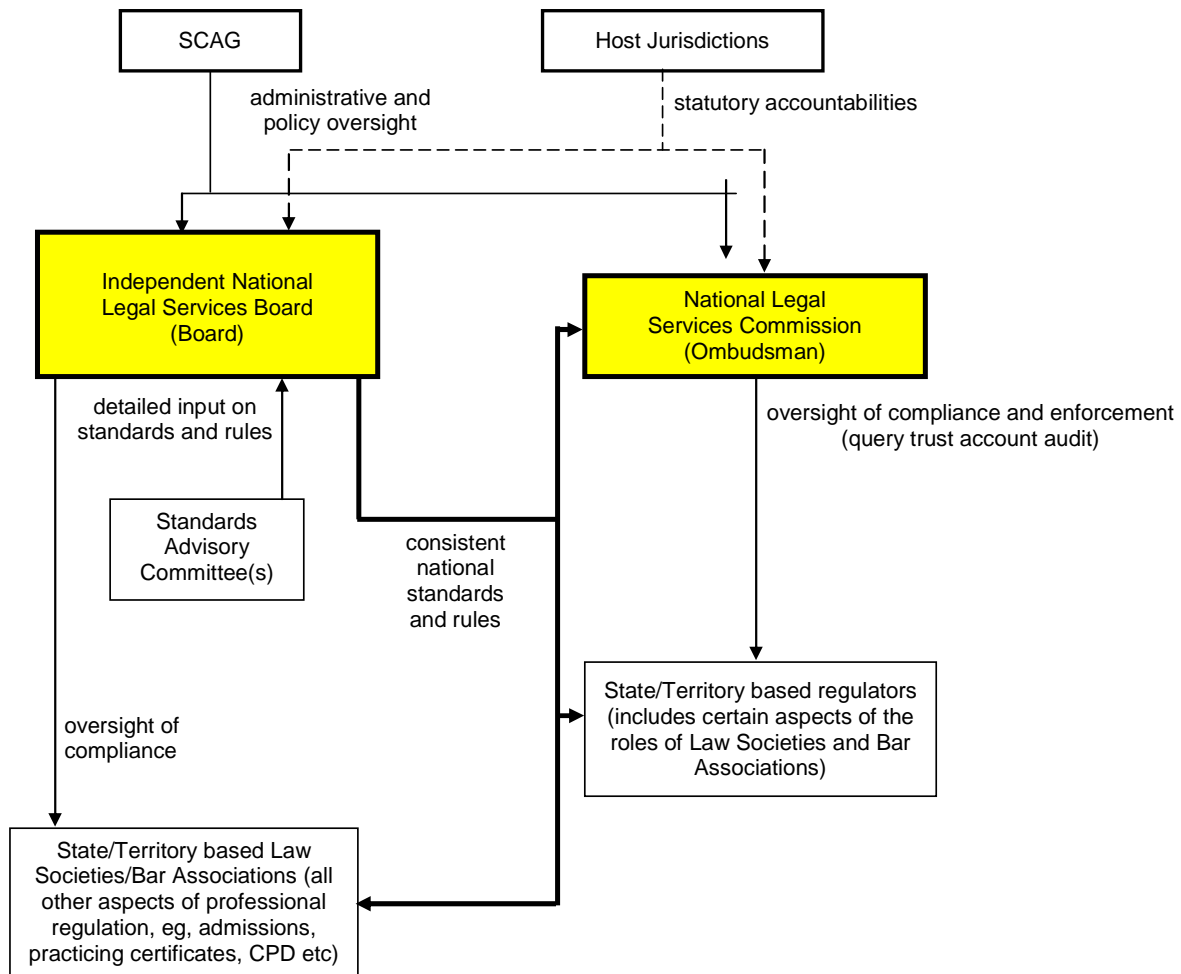
Presidential Member ACT Civil and Administrative Tribunal

1. This paper builds upon comments that have been made in the Consultative Group meetings regarding the role of the National Legal Services Board ('NLSB') and the National Legal Services Ombudsman ('Ombudsman'). There has also been debate in the Consultative Group and recently in the media regarding the composition of the proposed NLSB. In particular, it is asserted that the legal profession should have majority of the members of the new Board.

2. The starting point to this response is the proposed regulatory model referred to as Option 1 on page 2 of the Taskforce's Discussion Paper dated 16 September 2009. This Option is expressed as follows:
 1. National 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

3. In its meeting of 16 December 2009, the Consultative Group diagrammatically distilled the relationship between the proposed Ombudsman and the NLSB as follows:

NLPR Project - Regulatory Framework - Possible Model



4. This response considers an alternative form of regulation which is based on the recent reform of the regulation of health practitioners ('HPs') and argues that the structures adopted in that scheme may be worth considering in the regulation of the legal profession.
5. The argument that has been regularly put in meetings of the Consultative Group is that the Ombudsman is an unnecessary layer of regulation which is costly and may cause confusion about the respective roles of the NLSB and the Ombudsman. There is also concern about the relationship between the proposed Ombudsman and the existing machinery for complaints handling in the states and territories, with the suggestion that a new national Ombudsman will lead to duplication of roles and confusion about the chain of command.

6. Others have suggested that it is unwise to allow the Ombudsman to make findings of unsatisfactory professional conduct or professional misconduct.

Aspects of the reform of the regulation of health practitioners

7. The regulation of the health professionals is currently underway and it is worth examining some of the institutional structures that are being put in place by the reforms. This is an ambitious project which will cover, inter alia, the following professions:

- (a) chiropractic;
- (b) dental (including the profession of a dentist, dental therapist, dental hygienist or dental prosthetist);
- (c) medical;
- (d) nursing and midwifery;
- (e) optometry;
- (f) osteopathy;
- (g) pharmacy;
- (h) physiotherapy;
- (i) podiatry;
- (j) psychology.

8. The regulation is being implemented in stages through COAG, based on state and territory legislation providing for the adoption of a national law to establish a national registration and accreditation scheme for HPs. For example, the current the Queensland acts are:

Health Practitioner Regulation (Administrative Arrangements) National Law Act 2008 ('2008 Act')

at

<http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/H/HealthPracRAA08.pdf>

Health Practitioner Regulation National Law Act 2009 ('2009 Act')

<http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/H/HealthPracRNA09.pdf>

though parts of the latter Act have not commenced at or before the reprint date.

9. The scheme creates National Boards (under the HP scheme there are multiple boards because of the multiple professions brought under the scheme). At least half, but not more than two-thirds, of the members of a National Board must be persons appointed as practitioner members and at least 2 of the members of a National Board must be persons appointed as community members (s 38 2008 Act).
10. The National Board can also establish a committee for a Board to exercise its powers in a State or Territory jurisdiction, called a State or Territory Board, 'that provides an effective and timely local response to health practitioners and others in the jurisdiction' (s 36 2009 Act). Members of the State or Territory Board are appointed by the responsible minister for the participating jurisdiction (s 36(3) 2009 Act). Importantly, the scheme allows for co-regulatory jurisdictions i.e. jurisdictions which have not implemented the full machinery under the Act, to create a co-regulatory authority who can take action which corresponds to the action taken by the National Board. This might be an appealing option in the legal profession for smaller states and territories where the creation of a State and Territory Board would be costly.
11. The National Board is responsible for standard setting e.g. registration of HPs, accreditation of programs, overseeing the qualifications of overseas HPs. The National Boards are responsible for the development and approval of codes and guidelines that provide guidance to HPs registered in the profession.
12. However, unlike the proposed NLSB, the National Boards also perform investigatory and complaint handling functions. The latter functions are set out in s 35 of the 2009 Act as follows:

... (g) to oversee the receipt, assessment and investigation of notifications about persons who—

(i) are or were registered as health practitioners in the health profession under this Law or a corresponding prior Act; or

(ii) are students in the health profession;

(h) to establish panels to conduct hearings about—

(i) health and performance and professional standards matters in relation to persons who are or were registered in the health profession under this Law or a corresponding prior Act; and

(ii) health matters in relation to students registered by the Board;

(i) to refer matters about health practitioners who are or were registered under this Law or a corresponding prior Act to responsible tribunals for participating jurisdictions.

13. The National Boards can use agency staff (see below) or contractors to conduct investigations.

14. The National Boards are supported by a national agency i.e. a body corporate which provides administrative assistance to the National Boards and the committees of the Boards. The agency receives and deals with notifications (i.e. complaints) about HPs and students.

Application to the Legal Profession

15. In summary, this scheme indicates that it is not necessary to isolate the standard setting role of the NLSB from the complaint handling role of the Ombudsman and that the Ombudsman's role may be otiose if the NLSB is given sufficiently wide powers.

16. The HP regulatory scheme has created a national agency to support the National Boards. That may or may not be necessary for the legal profession

given that it is much smaller than the collective HP professions, though the proposed NLSB would clearly need administrative support.

17. The HP National Boards can delegate their functions to State and Territory Boards or other co-regulatory authorities and this may be worth considering in the legal profession.
18. The HP complaints handling is streamlined and provides feedback to the National Boards regarding systemic problems about compliance. This model would allow the proposed NLSB to better fulfil its long term regulatory functions.
19. By analogy with the HP scheme, there is a case for majority representation on the NLSB by the profession and the NLSB itself would be the standard setter rather than an outside body like the Law Council. This, of course, raises the further question as to whether certain standards nevertheless need to be entrenched in legislation.