

Meeting Outcomes – 18 May 2010

Attendees: Michael Lavarch (Chair), John Briton, Carolyn Bond, Barbara Bradshaw, Rob Cornall, Ro Coroneos, Robert Milliner, Andrew Grech, Noela L'Estrange, Martyn Hagan, Steven Penglis, Philip Selth, Peta Spender, Dudley Stow, Murray Tobias, Joe Catanzariti, Ralph Bonig (instead of Tony Abbott) and Steve Stephens (instead of Harold Cottee).

Taskforce members: Roger Wilkins and Laurie Glanfield

Apologies: Tony Abbott, Harold Cottee and Andrew Phelan

Presentation by Taskforce members

1. Roger Wilkins introduced the presentation and informed members that the Taskforce will consider amending its proposals where the feedback is wide, ie views are widely held, or deep, ie relating to a fundamental principle or concept.
2. Laurie Glanfield gave the presentation, which covered the reform drivers, key aims, the proposed national framework, co-regulation and independence of the profession, the key aspects of a single Australian legal profession, reduced regulatory burden, enhanced consumer protection and the next steps in the project.

Questions and comments to Taskforce members

Local representative bodies

Question: Will the intergovernmental agreement provide more specificity or clarity regarding the integration of existing bodies into the new framework?

Answer: The bodies will be specified in the schedules. Their powers and functions are set out in the proposed Law. While the Taskforce originally talked about agents or delegates, it decided to propose a strong legislative delegation, set out in s 1.3.4.

Comment: There is a risk that there will be no change with the 55 existing bodies. This would not result in savings. There needs to be a road map on how to cut down the 55 bodies – specifying which bodies will go.

Response: There are many bodies – they differ between jurisdictions. Many of the 55 are probably not needed. Views are welcome: should we be more directive on which bodies should go? This exercise involves law societies making some decisions too.

Consultation forums

Comment: One stakeholder forum in Queensland will not cover everyone. The message from the Taskforce needs to be thought through.

Response: The meetings in States and Territories are only the beginning. There were also advertisements run in local papers around Australia. If there is a vehicle that takes messages to practitioners, eg a magazine, it should be used to inform people about the project.

Question: What about consumers?

Answer: There is a consumer consultation process. Marjorie Todd outlined the consumer process: it will involve two consumer forums, a complaints-handlers forum, phone interviews and a survey, which will be up online for six weeks.

3. The Chair commented that, if something were to be organised in Townsville or Cairns, a Taskforce member would attend. This was confirmed by the Taskforce members.

Independence and composition of the Board

Comment: Regarding the membership of Board, there needs to be at least three lawyers.

Response: The Taskforce agrees that that would be appropriate.

Comment: The benefit of the way the Board membership provision has been framed is that it focuses on principles rather than people from certain groups.

Comment: The proposal to have SGAG on top will excite the profession and judiciary. SCAG can set the policy for Rules.

Response: SCAG can disallow Rules.

Comment: This started off with the aim of achieving uniformity, which is laudable objective. There was initially no suggestion that independence of profession would cease. There is no problem with ironing out inconsistency, the Board or even the Ombudsman, but there is a problem with s 8.12, which gives SCAG a general supervisory role, allows it to give directions on policy matters and provides that the Board and Ombudsman must comply. Section 8.3.5 talks of the independence of the Ombudsman, but then in s 8.3.7(i)(d), again SCAG has control of Ombudsman. Schedule 1, regarding the membership of the Board, is not acceptable – it doesn't matter whether five members are from the area of practice of the law; appointment is the point. These proposals are like North Korea or Malaysia.

Response: The Taskforce will take that on board. This is something the Taskforce can revisit. Regarding SCAG policy directions, the provision is a standard provision when proposing an independent body – this *is* a special profession, but the provision is standard. If it is a deal-breaker, it can be removed. Regarding the Rules, they would normally go to parliaments for disallowance. There are also interests for governments involved, eg funding issues. There needs to be some way to disallow rules – having to put Rules through all eight parliaments would be too much. Would parliaments be better? Is there a better option?

Comment: At least then it would be public.

Response: We can make the process transparent.

Comment: I acknowledge that disallowance of the rules is required and that it cannot be all parliaments, but that is a small part of the issue.

Question: If the composition of Board may be revisited, is there any way it could be revisited before the end of the 3 month consultation period?

Response: This is a consultation period. Alternatives presented during the period will be considered.

Comment: There is a difference between the Board and advisory groups – the Board needs to have the expertise to make decisions and so the constitution needs to be narrower. As the rules will be very board, covering different issues, maybe a one size fits all approach results in compromise of certain areas.

Comment: Yes, lawyers should be setting conduct rules, but other things are a consumer protection issue – lawyers should not be setting those alone.

Admission

Question: If admissions are centralised, who will be appearing before the Court when required?

Comment: The requirements for academic qualifications and practical legal training are currently mostly uniform. Where the issue arises is in considering whether a person is fit and proper – that is what the Supreme Court is concerned with. There are strict disclosure requirements: about 50 disclosures recently, 20-25 required close consideration. Currently, the NSW Admissions Board comprises three judges, two representatives from the Bar, two representatives from the Law Society, a Government representative and academics. If centralised, there will be an issue with inherent jurisdiction and potential double-handling.

Response: We decided to have an admissions committee and we have kept the disclosure regime. Views are welcome on whether we need more detail about that committee. The question would be if committees in every jurisdiction would be needed or just one.

Comment: It would be too burdensome for two or three judges to do all work and some Supreme Courts may have different views on what is fit and proper.

Response: That is the problem – consistency.

Comment: Inconsistency across jurisdictions is relevant to universities.

Question: Is there any data on how many applicants self-select?

4. Tobias J undertook to provide figures on the numbers of disclosures.

Ensuring consistency and National Ombudsman's powers

Comment: Ombudsman must delegate everything → very little power to do anything if there's no consistency.

Response: We have put triggers in there to say when the Ombudsman can call in a matter. Look at those triggers and let us know if they are not adequate. At present, someone would complain to the Minister about such an issue. Under the proposals, it would make it to the Ombudsman, and then the Board, which could potentially make a rule to address the issue.

The concern is that if too much is done, the Ombudsman would be too intrusive. There is also a regular reporting requirement.

Comments: The Ombudsman should be proactive action rather than waiting until something happens. The bodies would talk amongst themselves to ensure consistency – the triggers are there. There would also be national training and guidelines.

Compliance audits

Comments: Compliance audits are unnecessarily intrusive.

Response: Should they never occur?

Comment: If there is something wrong, investigate.

Response: The proposal is seen as an alternative to investigations.

ACIL Report

Comment: The ACIL Report lacks rigour and is based on assumptions – we do not know where they got their figures from.

Response: The figures came from governments.

Comment: There were some figures that we supplied ACIL, but there are costs arising from new regulation that have not been factored in: commercial clients should not be able to access costs assessments and, regarding the Ombudsman's compliance role, now people are jointly and severally liable for doing what the Ombudsman tells them to do.

Other matters

Comment: The objective is to allow law practices to use any business structure, but we need to address tax relief – it is the greatest inhibitor. We have come so far, it would be a shame not to grasp this opportunity. Similarly, regarding advertising, this is an opportunity to address advertising regulation – there is no need for the phrase 'or otherwise prohibited by law' in the relevant provision.

Comment: It will be important to be clear about the interaction with State and Territory law, eg being subject to the State Ombudsman. Consider covering this in the intergovernmental agreement.

5. The Taskforce members agreed to take those comments on board.

Comment: There is a concern that the Ombudsman has a discretionary power of internal review. There is also a concern about the power to make unsatisfactory professional conduct determinations. It would be useful to have a road map of the functions.

Response: The principle is based on allowing an assessment of the severity of the conduct.

Comment: Get rid of the name Ombudsman. (Many agreed with this comment.)

Comments: There is no lower limit for costs agreements. There needs to be something in place at the lower level to avoid litigation. It would be more robust at the lower level.

Comment: The Ombudsman needs the power to take proactive leadership role – needs a mandate to get in and test and change.

Comment: The costs requirements will be costly.

6. The Taskforce members agreed to take those comments on board.

Consultative Group discussion outcomes

7. The Chair asked for each member to identify the top three major issues for them.

Major issues identified

1. Independence of the profession, including all SCAG involvement and especially Board composition and appointment, including conditional appointment (Schedule 1, subs 2(5)).
2. Maintaining uniformity over time.
3. Consistency in implementation – somehow ensuring consistency of State systems, a ‘truly national commissioner’ rather than local representatives and call-in powers are not enough.
4. Business structures, including tax barriers to using different business structures.
5. Advertising barriers.
6. Delegations – what will be delegated to which State bodies?
7. Funding/costing of the whole system, including costs of national bodies and costs to practitioners (any increase in practising certificate fees).
8. Additional costs for single jurisdiction practices.
9. Powers and functions of the Ombudsman.
10. Commercial and government clients – should be excluded from costs assessments regime.
11. Areas of substantive change ‘where change not necessary’.
12. Admission – whether centralisation would work.
13. Legal costs – ‘fair and reasonable’, informed consent isn’t taken into account in costs assessment, penalty for breaching costs provisions (UPC/PM) and new costs regime creates ‘greater regulatory burden’ which is unaccounted for.
14. Fidelity funds – eg does it apply to clients only or anyone who puts money in trusts accounts and fact that Court would consider it fund of last resort.
15. Foreign lawyers – application of Rules to them.
16. Continuing Professional Development – 10 hours and approval of providers.

17. Conduct Rules – whether they reflect the actually Law Council of Australia and Australian Bar Association versions.
 18. Complaints.
 19. Compliance auditing – unnecessary intrusion.
 20. Trust accounting.
 21. Section 3.2.7 (privilege) – no acknowledgement of in-house lawyers.
 22. Representatives from in-house lawyers on the Board.
 23. Support staff and operations of the Board.
 24. Practising certificates for government and in-house lawyers.
 25. Inconsistencies exist between admissions boards now regarding practical legal training – need more on practical legal training.
 26. Professional indemnity insurance.
8. It was agreed that the following issues would be discussed:
1. Board composition/independence
 2. Funding of the system
 3. Legal costs

Board composition/independence

9. The majority of Consultative Group members were of the view that the Board is not sufficiently independent. This relates to the Board appointment process, the concept of conditional appointment, the criteria for Board membership and SCAG policy directions.

Board composition

10. A proposal regarding s 8.12 of the Bill was presented:
- appointment (not nomination) by Law Council of Australia and Chief Justices
 - one member from bar associations
 - s 2(i)(c)(i) should include government and in-house practice
 - delete subsection (4)
 - subsection (5) not necessary and open-ended (conditions)
 - concern about ‘unsatisfactory performance’ as ground for termination
11. The large majority of Consultative Group members agreed that the majority of Board members should be appointed by the profession, not SCAG. However, this view was not unanimous.
12. A majority of members agreed that the Chair of the Board should be appointed by the Council of Chief Justices. However, there was a little less support for this proposition than the previous one.

13. A small majority of members agreed that two members of the Board should be nominated by the Law Council of Australia — not through nomination of a panel.
14. A majority of members agreed that three members of the Board should be appointed by SCAG.
15. Two Consultative Group members supported the Taskforce proposal as it is. However, all members but one agreed that SCAG probably should not appoint all Board members.
16. It was noted that the advisory committees would be more representative of all stakeholders.

Role of SCAG

17. The Group agreed that s 8.1.2(1) is OK.
18. The Group agreed that reporting to SCAG and tabling in Parliaments is OK. The Group generally agreed that the Ombudsman should be reporting to the Board, but should not be answerable to the Board.
19. The Group agreed that some level of oversight by SCAG is appropriate as it provides transparency and accountability to the public.
20. The Group agreed that SCAG should not have open-ended power to set the direction of policy. The majority of members agreed that SCAG should not be giving the Board and Ombudsman policy directions. However, if policy directions were to be included for limited purposes, any direction from SCAG should be published.

Funding

21. The Consultative Group reiterated its interest in the costs and funding. It noted that the ACIL Report looks at the overall benefit, but there is a need for more information on how much the new regulatory system will cost and who will bear that cost.
22. The Group agreed that the system should not cost more — it should be cost neutral.
23. The Group noted that New South Wales and Victoria are undertaking further work on the costs and funding and stated that it would like to see the results of that work and would like a progress update on the work at its next meeting.

Legal costs

24. A number of views were expressed, but the discussion was not completed.
25. One view was that:
 - sophisticated clients need not have cost assessments available to them;
 - ‘sophisticated clients’ or ‘commercial and government’ clients should include highly networked individuals; and
 - the way in which the concept of ‘fair and reasonable’ is proposed is too complicated.

26. The view that 'fair and reasonable' is too complicated was supported by some other members.
27. One member expressed support for the concepts of 'fair and reasonable' and 'informed consent' for consumers, but agreed that large companies do not require the same level of protection.
28. Concern was raised regarding the consequences of a breach of the requirement to charge no more than fair and reasonable costs — wherever a costs assessor determines that the bill should be even one dollar less, that would mean that the costs are not fair and reasonable and therefore potentially trigger disciplinary action.
29. One view was that the concept of 'fair and reasonable' arises in all legal dealings and, while the proposed interaction with discipline may be rough, if the profession is going to have independence then it needs to take professional responsibility for its dealings with clients.
30. Another view was that, if a lawyer has disclosed information appropriately and has entered into a cost agreement in good faith, on the understanding that the client has understood, the lawyer should not be faced with the double reprimand of a reduced bill and a conduct finding.

Next meeting

31. It was agreed that the Group would next meet on 1 July and then 20 July 2010 at the Bar Association of NSW.
32. The Group anticipates a progress update on the cost/funding work at its next meeting.
33. The Group agreed to provide Marjorie Todd with preliminary submissions, in the form of a template to be provided by Marjorie, which the Working Group would collate to facilitate discussions at the next meeting.