

Meeting Outcomes – 1 July 2010

Attendees: Michael Lavarch (Chair), Tony Abbott, Andrew Grech, John Briton, Robert Milliner, Noela L'Estrange, Barbara Bradshaw, Carolyn Bond, Philip Selth, Murray Tobias, Rob Cornall, Joe Catanzariti, Ro Coroneos, Harold Cottee, Steven Penglis

Apologies: Peta Spender, Dudley Stow, Andrew Phelan

Please note: Members of the Consultative Group were speaking on their own behalf and in their personal capacity. This is a general record of discussions only.

1. Michael Lavarch opened the meeting noting that the aim of the day was not to achieve uniform views or consensus about the reforms contained in the draft National Law, but to allow a range of views to be expressed and reflected in the comments to be given to the Taskforce. Mr Lavarch noted that the emphasis of the Group's comments should be on matters of principle or obvious drafting issues/omissions.

UPDATE ON PROGRESS AND CONSULTATION

2. The Secretariat explained that a Taskforce member was not in attendance because there has not been substantive policy development during the consultation period. However, Louise Glanville and Steven Goggs will be available for the 20 July meeting.

Funding Paper

3. The Taskforce is developing a paper concerning funding of the proposed regulatory framework which will include: how the National Bodies are to be funded, how revenue from single trust accounts is to be distributed and implications for practising certificate fees. The Secretariat would be grateful for any assistance that Consultative Group members can provide in encouraging regulatory bodies in their jurisdiction to provide financial information that has been requested by NSW and Victoria in order to develop this paper.

Consultation update

4. The Secretariat noted that the Taskforce roadshows have been completed in each State and Territory. They were very well attended and involved a lot of questions and input from attendees.
5. An independent consultant has been retained on behalf of the Taskforce to conduct an independent consultation process with consumers. Three panel discussions were held in June with individual consumers, consumer representatives and complaints handling staff from around Australia.
6. A consumer survey has been developed and will be available on the internet next week, the Australian Consumers Association (Choice) will provide a link to the survey from its website and the survey will also be available through the Attorney-General's Department website for six weeks. The survey was designed in consultation with Carolyn Bond and other consumer representatives, as well as the legal profession working group. The focus of the survey is the reforms contained in the National Law and National Rules, a clean slate approach has not been adopted, but the survey still provides scope for individual consumers to talk about their own experiences in obtaining legal services.

7. Submissions received to date are available on the AGD website except where the author has not given permission for their submission to be published publically.

Question: Why is Choice involved?

Answer: Choice has become involved in these reforms because there is no legal-specific consumer peak body and so Choice represents a good avenue for promoting the existence of the survey.

Question: How will the Secretariat verify whether the survey has been filled in multiple times?

Answer: It is not possible to track the source of a completed survey, however, nor is it possible to determine whether people who are not the target of the survey have completed it. We will be relying on a significant amount of goodwill to ensure that the survey is being used appropriately.

The survey forms only one of a multi-pronged strategy for consulting consumers and it will be supplemented by the face to face panels, intensive interviews and individual consumer submissions.

Question: Is the timing of the Federal election likely to impact on the timetable for concluding the taskforce's work?

Answer: The Federal election should not impact on the Taskforce's work in considering submissions from the public; however, it may impact on whether another COAG meeting is held this year.

Regardless of the timing of the election, the Taskforce intends to comply with COAG's request that it present its final report by the end of the year. Even if there is not another COAG meeting, the Taskforce is still required to submit its report by that time.

Question: Will there be further consultation on the final Bill once it has been revised following this consultation period?

Answer: It is unlikely that there will be another public consultation period although some targeted consultation is possible, noting agreement at paragraph 31 of this document that the Taskforce should be invited to engage in a dialogue with the Consultative Group after the consultation period closes and before the Taskforce makes further policy considerations.

8. Mr Lavarch noted that the Taskforce will be consulting with SCAG before submitting its final recommendations to COAG by the end of the year (out of session if needed).

DISCUSSION OF CONSULTATIVE GROUP COMMENTS TABLE

Large Law Firm Group comments

9. Mr Milliner advised that the Large Law Firm Group (LLFG) has four major issues with the National Law that it has outlined in its preliminary submission to the Taskforce:
- a) independence of the National Legal Services Board
 - b) the role of the National Legal Services Ombudsman as the regulator over existing State and Territory regulatory bodies (noting that the LLFG feels that there is insufficient information currently available about the number of bodies that will be rationalised under the new system)
 - c) new areas of regulation that are not currently being regulated (regulatory creep), and
 - d) other issues concerning the detail of the regulatory structure and drafting of the National Law, but that detail may well change if the preceding three issues are addressed.
10. The LLFG has a strong preference that the consultation process be a two-way process with the Taskforce responding to Stakeholders who have made submissions about the substance of those submissions.

Australian Bar Association comments

11. Mr Selth reported that the Australian Bar Association's examination of the National Law has focused on the principles underpinning the National Law and implementation issues ("making it work").
12. Mr Selth emphasised that dialogue is needed between the Taskforce and key Stakeholders so that Stakeholders performing regulatory functions are able to explain to the Taskforce the requirements for effective practical implementation of the principles set out in the National Law. This might involve face to face discussions between working group members and officers of regulatory bodies.

Independence of the profession, composition of the Board and structure and role of the Ombudsman

13. The Group noted that:
 - a) the Law Council of Australia (LCA) will shortly write to the Taskforce endorsing a particular model for the National Board which will see the majority of members of the Board drawn from the legal profession and appointed independently of the Executive
 - b) the LCA has also recently determined that it no longer supports a "stand-alone" Ombudsman, preferring that the Ombudsman be incorporated into the infrastructure of the National Legal Services Board. Under the Law Council model, there would be a set of single forms promulgated by the Board and uniform processes required, but there arrangement would be a form of "nationalisation light" under which the National Board would determine which State and Territory body would handle multi jurisdictional complaints, but otherwise would not be involved in day-to-day complaints handling
 - c) similarly, under the LCA model, the National Board would be a standard-setter only with no operational functions performed at the National level. It would be largely a coordinating and oversight body
 - d) the LLFG is concerned to ensure that there is consistency of decision making by State and Territory complaints bodies (which is a key role that the Ombudsman or the Board exercising those powers would fulfil)
 - e) from a consumer point of view, the LCA model might undermine perceptions of the independence of the Ombudsman from the profession, which may be seen as a regressive move within the community. A system which is not based on a clear separation of regulatory functions between a profession-dominated Board and the Ombudsman would give consumers less faith in the integrity of the system. Similarly, any power of the National Board to issue policy directions to the Ombudsman could undermine the independence of complaints handlers and diminish public confidence in the complaints system. Proposals that have the potential to undermine public confidence in the regulation system, such as merging the Board and the Ombudsman, are unlikely to be acceptable at the political level
 - f) some members would prefer that complaints be dealt with by local practitioners under the oversight of relevant State or Territory Commissioners or Boards. Similarly, disciplinary matters should be prosecuted at the local level by volunteer local Lawyers
 - g) admitting authorities maintain concerns about centralisation of the operational responsibility for issuing compliance certificates in relation to admissions
 - h) the majority of members do not support one member of the Government appointees to the Board being aside for representation of Law Deans

- i) it is difficult to comment upon appropriate administrative arrangements for the National Ombudsman in the absence of detailed cost estimates. However, it is strongly desirable that there are national forms and processes for handling complaints
- j) it may be possible that one of the existing State and Territory Legal Services Commissioners or Chairs of the regulatory boards could be appointed to the role of National Legal Services Ombudsman on a rotating basis. Some members, however, expressed concern that a regular turnover in the role could result in delegations and powers being applied differently depending on who sat in the chair. It was also noted that there would be some advantage in having a strong separate National Ombudsman that could call jurisdictions into line from time to time as required, and
- k) some members were concerned that SCAG's powers to disapprove rules of the National Board were open ended and that the Intergovernmental Agreement could cover whatever is required to formalise the subordinate legislation status of the rules under the host legislation.

14. The Consultative Group confirmed, by majority, that the majority of the Board should be appointed by bodies other than the Executive, and that the Board should be constituted as follows:

- **One appointee of the Council of Chief Justices**
- **Two appointees of the Law Council of Australia**
- **One appointee of the Australian Bar Association, and**
- **Three appointees of SCAG.**

15. The Consultative Group affirmed, by clear majority, its previous agreement that SCAG should not have the power to issue policy directions to the National Board.

16. The Consultative Group agreed, by majority, that if the National Board is to be dominated by appointees of the Legal Profession, the Ombudsman should remain independent of the National Board.

17. The Consultative Group agreed unanimously that the National Legal Services Ombudsman should be re-named the National Legal Services Commissioner.

Funding the New System

18. The Consultative Group noted:

- a) concerns that the Regulatory Impact Statement should not seek to claim that the currently proposed system will be cost neutral
- b) that under the recently established United Kingdom regulatory system, budgets have increased significantly over time. Some Consultative Group members query whether the proposed centralisation of functions under the National Law might be more expensive to administer than originally anticipated by the Taskforce
- c) an additional regulatory layer at the national level would not necessarily lead to higher cost if there was appropriate rationalisation of duplicated State and Territory regulatory functions and bodies (however, it is difficult to make such an assessment at the present time as it is not known which bodies or functions will be rationalised)
- d) some members believe that the intergovernmental agreement should cover rationalisation of complaints and regulatory bodies across Australia and contain an agreement that States and Territories will aim towards saving costs in the overall regulatory system over time

- e) it may be appropriate for the IGA to include a mechanism for moving towards further national integration in the future. In particular, the LLFG would prefer a mechanism that allows the National Board and Ombudsman to take on the full regulatory role at the national level in the future
- f) smaller jurisdictions would prefer to maintain local structures that are determined by State and Territory Governments at the local level, and
- g) it is very difficult to comment on the practicalities of the proposed system in the absence of detailed information about potential costs and cost savings that might accrue. The Consultative Group would like to see the Taskforce's funding paper.

19. The Consultative Group agreed that it would like the Taskforce to report to it on anticipated costs and savings arising from the establishment of the proposed National Regulatory scheme.

Auditing and Compliance and Management Directions

20. The Consultative Group noted:

- a) allowing law firms to incorporate broke the nexus with personal liability and that in circumstances where personal liability is limited, increased regulatory intervention is justified
- b) tax issues preventing Large Law Firms from incorporating remain
- c) in those firms that remain partnerships, the partners are personally liable and the LLFG believes that auditing and management direction powers therefore constitute an extraordinary intervention into their business affairs. Under the existing arrangements, partnerships are already subject to financial audits, trust account inspections and the normal disciplinary regimes. Large law firms also retain consultants for advice on management issues
- d) under the National Law, the compliance auditing and management powers are not subject to a requirement of reasonable cause and there is no definition of what would constitute an appropriate management system direction. As law firms each take different approaches to issues such as training and that it would be inappropriate to attempt to standardise firms' approaches to these issues through management systems directions
- e) to date there have been about 1600 compliance audits undertaken of ILPs in NSW and Queensland. Of these, only 12 had been audited otherwise than by self-assessment. There is data which shows that auditing of ILPs has reduced complaints by two-thirds as a result of changes implemented following self assessments. ILPs that are ISO9001 compliance are already exempt from audits.
- f) the power to make management system directions may be better framed as a power to make recommendations on management system issues
- g) Mr Grech's experience of ILP self assessment has been positive. Having undertaken the self assessment process, he feels that it is an appropriate additional burden for choosing to avail oneself of the incorporation option. However, given that the risk of non-compliance is generally higher in smaller firms than large firms, it may be appropriate to carve out law firms earning more than \$25 million in revenue per year (about 55 in Australia)
- h) as currently drafted, the auditing provisions would seem to catch Barristers
- i) management systems directions could be phrased in terms of a requirement that certain compliance issues within the firm be addressed not that a particular system be implemented
- j) a number of members are concerned that it is difficult to justify additional regulatory intervention through compliance auditing of non-incorporated law firms if tax, stamp duty and limited liability partnership issues are not addressed so as to give law practices real choice about business structure

- k) a system based on self assessment may not require coercive powers, however, sometimes coercive powers are required in legislation to set a framework for compliance even if they are not regularly used in practice
- l) legal practice is a business which carries business risk and governments cannot legislate to completely remove risk. The auditing provisions contained in the National Law are not complaints-driven, so they take existing regulatory provisions much further
- m) accountants are subject to auditing, as are hospitals, and ASIC has auditing powers that apply to businesses generally. The fact that a business has not had a complaint against it does not mean that it is doing the right thing
- n) it may be appropriate to carve out Large Law Firm Group clients as their clients have enough clout and influence to resolve disputes between themselves and the law firm
- o) the auditing compliance power is arguably less coercive than treating a complaint about management issues within a firm as a disciplinary matter which requires formal investigation under the disciplinary provisions. For example, failure to put in place arrangements to supervise of staff could be treated as a disciplinary matter or approached in a softer way through an audit
- p) it may be preferable to base the system upon voluntary participation, but if there is cause to do so, there should be a power to intervene and issue directions as appropriate, and
- q) existing practicing companies in some jurisdictions (e.g. Northern Territory) would need to be further grandfathered under transitional arrangements.

21. The Consultative Group agreed that, in light of the broad range of views expressed, John Briton and Harold Cottee will collaborate on a paper proposing appropriate rewording of the auditing provisions.

22. The Consultative Group also agreed that the auditing provisions should not apply to Barristers, noting that they are not covered under existing arrangements.

Legal Costs

23. The Consultative Group noted:

- a) that under the current provisions charging anything more than fair and reasonable legal costs could potentially result in a disciplinary complaint being initiated. Under existing arrangements, only excessive overcharging is a disciplinary matter
- b) under the provisions of the National Law, charging costs that are not fair and reasonable is only capable of constituting unsatisfactory professional conduct or professional misconduct and that such behaviour is not deemed to be an automatic breach of the disciplinary provisions
- c) at issue is whether the Ombudsman should be relied upon to exercise his or her discretion, or whether the legislation should set out more clearly the circumstances in which charging more than fair and reasonable costs will be a disciplinary matter
- d) if the matter is not qualified in the legislation, the requirement for costs assessors to refer matters to the Ombudsman could result in hundreds of referrals, and
- e) costs assessment is not an exact science and case law recognises that a matter sounds in discipline only where overcharging is excessive.

24. There may be an inconsistency between the definition of 'cost dispute' (which refers to a dispute about legal costs not exceeding \$100,000) and other parts of Chapter 5 which refer to the amount of costs in dispute being less than \$100,000 (e.g. section 5.3.6(2)).

25. **The Consultative Group agreed by majority that only the excessive overcharging should trigger disciplinary action, not any instance in which costs are found not to be fair and reasonable.**
26. **The Consultative Group agreed that a paper be prepared by officers experienced in costing matters for the benefit of the Taskforce. The paper should include discussion about the requirements for legal bills. Mr Milliner will co-ordinate, Carolyn Bond will contribute and Philip Selth will ask his legal costing officers to contribute.**

Liability of Principals

27. The Consultative Group noted
 - a) the LLFG's concern that nominating a partner responsible for compliance is not practical in large law firms, and
 - b) Mr Penglis' indicated an objection to section 4.3.18 (2).
28. **The Taskforce agreed that the vicarious liability of principals should be modelled along the lines of section 8.1.2 of the SCAG model bill and that these provisions should be carried over to the National Law.**

Future consultation

29. **The Consultative Group agreed that the Taskforce should consider further targeted consultation in relation to the next version of the Model Law, including Law Council of Australia as well as regulators. This will allow key stakeholders to advise the Taskforce or whether the revised provisions will work from an operational perspective.**
30. **The Consultative Group agreed that the Taskforce should be invited to engage in dialogue with the Consultative Group after the 13 August Public Consultation period closes and before the Taskforce makes further policy decisions.**

NEXT MEETING

31. The consultative Group agreed to convene again on 20 July 2010, but would leave the question of whether this should take place by teleconference or a face to face meeting until closer to the date.
32. Robert Milliner, John Briton and Steven Penglis noted that they will not be available to attend the meeting on 20 July.