

## **National regulation of the legal profession: An agenda for reform<sup>1</sup>**

Roger Wilkins AO<sup>2</sup>

The introduction of a national system for regulation of the Legal Profession is one of the most important current initiatives of the Commonwealth Attorney-General, Robert McClelland. The benefits of a national scheme will be enjoyed throughout not only the legal industry, but by business and the community in general.

The Council of Australian Governments (COAG) agreed on 5 February 2009, that further work needs to be done to nationalise regulation of the legal profession in Australia. Although improvements have been made in recent years, regulation of the legal profession remains overly complex and inconsistent with each State and Territory maintaining its own regulatory structure and applying different sets of rules.

At the request of COAG, the Commonwealth Attorney-General, Robert McClelland, established a Taskforce to prepare draft legislation by April next year to uniformly regulate the legal profession across Australia. This work is part of COAG's efforts to deliver a seamless national economy, which is particularly important in the face of the Global Financial Crisis.

A uniform national scheme for the regulation of legal professionals is not, however, an end in itself. We need to begin by understanding the very purpose of the exercise; the key goal has to be improving consumer protection and promoting the interests of the administration of justice.

---

<sup>1</sup> Based on a speech given to the NSW Law Society Managing Partners' Lunch, Sydney, 15 May 2009.

<sup>2</sup> Roger Wilkins AO is Secretary of the Australian Government Attorney-General's Department and is a member of the Taskforce responsible for preparing draft uniform legislation to regulate the legal profession across Australia. The Taskforce will report to the Council of Australian Governments by April 2010.

## **Goals for regulatory reform**

In considering which outcomes to seek, it is helpful to begin from first principles. Why would anyone bother to regulate lawyers? What is it about this sort of activity that requires any sort of regulation at all? Why not just repeal all the regulations?

The most important answer to these questions is that we regulate for the protection of consumers of legal services. Put simply, ordinary consumers are at a disadvantage compared to lawyers because they do not normally understand what sorts of legal services they require or what a reasonable price for those services might be. Further, they do not understand until it is too late whether they are getting good quality legal services. Economists describe this scenario as ‘information asymmetry’ and it is a classic form of market failure.

While this issue must be redressed, I do not think that this is the only reason why we might regulate the legal profession. A further motivation is directly concerned with the importance of the rule of law as an institution. Public confidence in the rule of law is a critical part of our social, economic and political system. People need to be confident that, among other things, the administration of justice will be properly, fairly and impartially applied. Lawyers play the most important role in ensuring this happens. Therefore, we need to ensure that lawyers understand the law and work diligently to ensure that the law is complied with. This goal is not unrelated to the problem of information asymmetry, but it presents a distinct set of challenges. This notion is sometimes encapsulated in the idea that lawyers not only have obligations to their clients, but also to ‘the court’ or ‘the law’.

So these are two reasons why a Government might decide it is necessary to regulate. Historically, Governments have done this in a very piecemeal and ad hoc fashion, as they have more or less relied on, or at least inherited, a powerfully entrenched system of self-regulation. The main regulators have not been, and arguably still are not, Governments. Rather, they are the courts and the legal profession itself.

The history of self-regulation stretches back several centuries to the emergence of an independent legal profession; forged, importantly, in the vicissitudes and unrest of the

English Civil Wars. That independent profession was at the centre of the emergence of parliamentary government and constitutional monarchy. It is a proud heritage and should not lightly be put aside.

There is nothing wrong with a system of self-regulation if it works. However, in at least one very important respect it is presently failing; politicians, the media and the public simply do not believe that it works. There is a common perception that lawyers are, as a profession, unethical, overpaid and motivated primarily by greed.<sup>3</sup> Common complaints relate to overcharging, untruthfulness, unnecessary delay, intimidation, harassment and drawing out matters unnecessarily. Another common criticism is that the profession is self-serving and looks after its own at the expense of clients and the greater public interest. Whether or not this opinion of the system is correct, if the confidence of the public is undermined, the very operation of the system of law and the rule of law is at stake.

The perceived problem, I think, is this: right or wrong, the profession and the courts are seen as making rules that serve the profession, not the public; rules that buttress the monopoly of the legal profession and only in the most egregious circumstances do they lead to real disciplinary measures against its members. Lawyers, more than any other professional group, should understand the root of this problem. Justice must not only be done, it must be seen to be done. Regulation must not only work, it must be seen and believed to work.

To this end, Governments have intervened by attempting to develop the national legal profession legislation. However the system we have ended up with is not ‘national’ because the States and Territories have all adopted the law in slightly different ways, and some not at all. Even the final model is far too complex, with over 700 pages of detail. The model adopted is, regrettably, prescriptive, rather than principles-based. This is a result of the twin pressures of the profession wanting every obligation to be specified in minute detail so they knew exactly what was required of them (and with a range of caveats where what was required seemed too onerous), and consumers

---

<sup>3</sup> Law Reform Commission (WA), “Review of the Criminal and Civil Justice System—Submissions Survey”, 1997.

wanting every obligation in minute detail so that the profession could not wriggle out of them.

### **A new regulatory framework**

Returning to our objectives; what does a system of regulation designed to meet these goals need to look like?

It seems to me that our system of regulation needs to do three things. The first thing the system needs to do is to ensure that members of the legal profession are competent to deliver legal services and that they maintain high ethical standards. The second thing a system of regulation needs to do is to assure people that where mistakes are made there is an efficient and effective way of getting redress or compensation. The third thing the system must do is empower consumers to make informed choices about the courses of actions they pursue and the costs involved.

So how do we achieve these goals? There are a variety of ways you could go about tackling this task. In Australia, that has been part of the problem that now confronts us. Different Governments and different professional bodies have approached regulation in different ways, but with sufficient differences to create barriers to trade and barriers to entry across different jurisdictions. The differences, it seems to me, are not significant, but the protagonists are very reluctant to give ground. At least, they have been to date.

In my view, there needs to be a national system of regulation that gives life to the concept of an 'Australian Legal Practitioner'. The right to practise law needs to be based on a licence that works anywhere in Australia. There needs to be a national standard-setter that decides what sort of legal training and standards are required to enter the profession and to remain a member of the profession.

As far as complaints about the quality and price of legal services are concerned, the present situation must be re-thought. Essentially this is about consumer protection, in an environment where there is normally unequal bargaining power and where there

may be little capacity on the part of the consumer to figure out whether their lawyer has acted reasonably. It is also an environment where, very often, the transaction is very significant for the consumer. It might involve a house, an injury, a marriage etc.

In my view, the profession has to embrace and fund an independent national complaints handler such as an industry Ombudsman. People simply do not accept the idea of ‘Caesar judging Caesar,’ no matter how defensible that idea of self-regulation might be in theory. Other industries and professions are moving to this model. The virtues of the Ombudsman model are that it is cheap, flexible and it has an inquisitorial method of inquiry.

What are the standards the Ombudsman should apply? There is a narrow issue: ‘did the lawyer fulfil the contract for services?’ But there is also a wider issue: ‘was the contract or arrangement itself reasonable? Did the lawyer act reasonably in this wider sense?’ If we go down the track of looking at this wider issue (as I think we must) the question is who decides and how do we decide what is reasonable here? Here is my attempt to set out some principles:

- The lawyer has to make sure that the client fully understands the cost implications and the practical consequences of a course of action.
- The lawyer has to make sure that the client fully understands what alternative courses of action are open to him or her.
- The lawyer has to act in such a way to optimise value for money for the client.
- It is not necessarily enough that the lawyer gets a client to agree in writing to an arrangement.
- There is a presumption that the arrangement should be one where the total costs of doing the work are disclosed at the outset, not one where there is a simple disclosure of charging rates.

I think these general principles, together with the institution of an Ombudsman, who will apply them, are sufficient to afford robust consumer protection.

There are a number of institutional models that could be used to achieve national reform. I will consider three. The first model is what I call the 'National Model'. Under this system there is a single Registration Board with a national standard-setting function, and a single consumer complaints handler, but day to day regulation could be carried out by specific bodies in the different jurisdictions. The States and Territories would need to pass legislation that underpins this system. Most importantly, the legislation must be uniform throughout Australia.

A second option is what I call the 'Commonwealth Model', as opposed to the 'National Model'. This would be a system where there is a single Registration Board run by the Commonwealth and a single consumer complaints handler, administered by the Commonwealth. The States and Territories could continue to have a role through a consultative Ministerial Council that makes policy or a deliberative council that must agree on changes to the system. This system could be underpinned by a referral of power to the Commonwealth or by complementary legislation.

The third model is what I call a 'Devolved Model'. This would be a system with a single uniform piece of legislation, but not single national institutions. Rather, each jurisdiction would enact the legislation and set up a Registration Board and a consumer complaints handler in its own jurisdiction. A strict system of mutual recognition would need to be instituted so that decisions are given currency throughout Australia. There would also need to be cooperative machinery so that legislation could be changed from time to time and so that interpretation and administration across jurisdictions is uniform.

While both the Commonwealth Model and the National Model have strengths, I prefer the National Model as it better utilises the expertise and accessibility of regulators at the State and Territory level. Further, I think that the Devolved Model is inferior to both. It would require very high maintenance to ensure a truly uniform approach to regulation of legal services. It would also be difficult to address issues such as insurance. Moreover, it would be a rather expensive, duplicative and inefficient way to deliver uniformity in regulation of the legal profession.

## **The work ahead**

My views are the result of considering these issues for many years, as Chair of COAG's Regulatory Reform Committee, as one of the architects of mutual recognition and having written a report on legal profession regulation in 1994. I also think my views reflect those of a great number of people who have thought about this issue over the years.

Nevertheless, the process of reform needs to be a consultative one. This process must come up with a workable solution. The ideas I profess may not be best or even right. However, I have always found that in making policy it is best to start with something other than a 'blank piece of paper' and test it and modify it or even supplant it with something else.

The Commonwealth Attorney-General has established a Consultative Group chaired by Professor the Hon Michael Lavarch, Executive Dean at Queensland University of Technology and former Attorney-General, to advise and assist the Taskforce in its work. The Consultative Group includes members from every State and Territory and represents expertise from regulators, the courts, consumers, the legal profession and legal educators. Throughout this process, the Taskforce will also be seeking input from affected and interested parties, to ensure that the model reached reflects the best outcome for both the legal industry and consumers of legal services.

## **Conclusion**

It is generally agreed that a national profession will benefit both the industry, through a reduced regulatory burden and the consumer, through greater transparency and power in the selection of legal services. By taking into account the views of all industry participants, from lawyers and legal societies to governments to consumers, we should be able to construct a regulatory model for the legal profession that is mutually beneficial to all.

## **Biography - Roger Wilkins**

Mr Roger Wilkins AO is Secretary of the Attorney-General's Department, a position he has held since September 2008.

Prior to his appointment as Secretary of the Department, he was Head of Government and Public Sector Group Australia and New Zealand with Citi and was Citi's global public sector leader on climate change from 2006-2008.

From 1992-2006, Mr Wilkins was the Director-General of The Cabinet Office in New South Wales where he played a leading role in areas of reform in administration and law, corporatisation and micro-economic reform. These areas included Commonwealth-State relations, negotiation of agreements on competition policy, international treaties, mutual recognition, electricity, the environment, and health reform.

Mr Wilkins has chaired a number of national taskforces and committees dealing with public sector reform, including the Council of Australian Government Committee on Regulatory Reform, the National Health Taskforce on Mental Health and the National Emissions Trading Taskforce. He was New South Wales' representative on the Senior Officials Committee for the Council of Australian Governments.

Mr Wilkins was responsible for the Greenhouse Office, the introduction of an emissions trading scheme in New South Wales and design of a national emissions trading scheme for Australia as chair of a national taskforce. He has recently led the strategic review of climate change programs for the Commonwealth Government.

He is a member of the Board of the International Forum of Federations and advises different federal systems especially on fiscal issues.

Mr Wilkins was the Director-General of the Ministry of Arts from 2001-2006. He was appointed an Officer of the Order of Australia in 2007 for service to public administration in New South Wales, particularly as a contributor to a range of policy initiatives, and to arts administration.