National Legal Profession Reform

By Michael Lavarch

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Lawyers understand that developments in the law often occur in cycles. This is certainly the pattern with civil liability, which has experienced periods of expansion and contraction in the ability of those suffering injury to recover their loss. Politics also works in cycles and, when the legal and political cycles intersect, there is often a burst of intense change in the law.

The political and legal cycles have once again coincided, not in a specific field of law, but in how lawyers operate as a profession. For the last 15 years, there has been intermittent progress towards Australia creating a truly national legal services market. While there has been worthwhile reform, the project has stalled somewhat, prompting the Council of Australian Governments (COAG) to intervene and establish a new process and an ambitious 12-month timeline to get the job done. COAG's decision recognises that legal practice is a critical component defining how well a civil society functions and how well the economy operates.

Firstly, a little background. The movement towards a national legal services market flows from the micro government reform agenda of the early 1990s. The adoption of national competition policy meant that the discipline of the *Trade Practices Act* went beyond trading companies and extended into the professions. The legal profession's response to this new public policy environment was embodied in the Law Council of Australia's 'Blueprint for the Structure of the Legal Profession: A National Market for Legal Services' (July 1994). The Blueprint set out a reform agenda that has been influential in the last 15 years, including:

- national practice achieved by removing constraints on interstate practice;
- mutual recognition of practising certificates, based on common pre-admission standards; and
- national uniformity in areas such as professional conduct and ethics, regulation of foreign lawyers, trust accounting rules and the management of fidelity funds.

Since 2001, the Standing Committee of Attorneys-General (SCAG) has been responsible for the national practice project. The centrepiece of SCAG's work has been the so-called Model Laws Project, which has focused on the harmonisation of the laws applying to legal practice. Important as this work has been, the SCAG process has examined only one leg of a tripod of elements involved in a regulatory regime. The other two legs – namely, the regulatory structures applying the laws and how this is all funded – have not been included in the SCAG reforms.

The theory behind this approach was that, if the laws were essentially uniform, at least in respect of those provisions that impacted on the ability of lawyers and their clients to operate nationally, then jurisdictional differences in how regulatory and quasi-regulatory bodies work should not be vital to achieving a national marketplace. With some 55 different legal regulatory bodies across the states and territories, each having some responsibility on how lawyers operate, it was always somewhat optimistic to think that this approach might succeed.

To be fair, there have been worthwhile and, in some cases, innovative reforms. For instance, the facilitation of the incorporation of legal practice has been influential at an international level, with the United Kingdom now following the Australian approach. Equally, the model laws approach to trust account regulation recognises the role of the legal practice as a whole, rather than the individual lawyer, and has aligned regulation with modern operational realities.

However, in a number of other respects the project has been deeply unsatisfactory. The national model that has been developed consists of over 700 pages of legislation, which draws distinctions between core (necessary for national practice) and non-core provisions. In some respects, the length and complexity of the legislation reflects the consensus model used in its development and the need to accommodate a variety of interests across the jurisdictions.

In February 2009, COAG removed the national practice project from SCAG and in its place outlined a plan to draft legislation to achieve uniform national laws regulating the

legal profession and to propose a regulatory framework to administer the law. To undertake this ambitious task, COAG has created a two-tier process consisting of a taskforce comprising senior officials from the Commonwealth and state attorney-general departments and a broader consultative group consisting of key stakeholders drawn from the legal profession and consumers of legal services. The specialist taskforce will produce the model legislation and propose 'nationalising' regulatory structures. It will also have to examine the funding of legal regulation. The consultative group will provide feedback to the taskforce on its proposals, as well as providing ideas to help shape the regulatory regime.

While the form and content of legal practice legislation has been heavily debated over recent years, the best model for a regulatory structure or structures to apply the legislative standards is relatively untested ground. There are numerous options that could be developed on a continuum – from doing nothing and allowing the current bodies to continue at one end, to replacing all existing bodies, stripping professional associations of any ongoing regulatory role and placing such responsibilities in one single national entity at the other. It is unlikely that either end of this continuum will ultimately be adopted. Further, any change must reflect that Australia is a federation and that the state supreme courts will retain an oversight role for the legal profession.

Without pre-empting any outcomes, one option might feature a model based on a national body responsible for the various steps leading to the recommendation of admission of lawyers, and then subsequent practising certificate renewal functions. This body would be accompanied by a national legal ombudsman-type office, incorporating the functions currently performed by the Legal Service Commissioners in the eastern seaboard and the Western Australian Legal Practice Board. There could be state branches of the national bodies. Equally, the professional associations should continue to have an important role in maintaining high standards of conduct, ethics and professionalism among lawyers, but not retain any role in consumer complaint processes.

National uniform legislation, accompanied by a national standards and accrediting body, combined with reformed state and territory-based regulatory bodies, might be another option. The national standards body might set rules for matters including:

- the framework for an undergraduate law degree;
- professional legal training;
- admission requirements;
- recognition of foreign lawyers;
- continuing professional development;
- professional indemnity insurance;
- fidelity funds; and
- conduct rules and complaints and discipline procedures.

The national body would formulate standards and also accredit the process applied by the state and territory regulators to ensure uniformity of regulatory approach. Such a model could accommodate a continuing quasi-regulatory role for the professional associations.

The funding of legal practice regulation has not been comprehensively examined at a national level. At present, funding mechanisms vary between jurisdictions, but commonly comprise a mixture of sources including interest earned on clients' funds held on trust, fees from annual practising certificate renewals and, in some instances, a contribution from consolidated revenue. In those jurisdictions where a professional association continues to perform recognised regulatory functions, there is generally in place a formula or some other agreement between the association and the state government to apportion the association's costs between membership functions and regulatory responsibilities. The professional association is then reimbursed by the state for the cost of its regulatory role. A hallmark of all of the regimes is the large number of unpaid hours committed by members of the profession at various points of the system associated with the maintenance of professional standards.

Clearly, any reform to the system of regulation, particularly the regulatory structures, will have to be accompanied by an appropriate funding mechanism. In this respect, some regard might be had to the way in which various industry ombudsman schemes operate in fields such as financial services and telecommunications. Again, there is no right or wrong model; just different choices extending from levies that apply across the industry as a whole, to particular fee-for-service charges relating to complaint resolution processes.

The decision of COAG to incorporate legal practice regulation into its business regulation and competition reform stream is a significant milestone in achieving a national legal services market. It demonstrates that the political cycle has moved the reform agenda beyond the domain of attorneys-general and the profession's representative bodies and given it new impetus. This is both an acknowledgement of the critical role of the legal profession and the provision of legal services to Australian wellbeing and a reflection that progress to date has not been satisfactory.

The Chief Justice of the High Court, Justice Robert French, noted on the 75th Anniversary of the Law Council of Australia on 19 September 2008:

> 'Today Australia's population comprises 21 million people. This is the population of New York State. It seems ridiculous to think of anything less than a national profession and a national judiciary, albeit within the framework of a working federation which retains a useful pluralism.'

Now is the time to make a national legal profession a reality. ■

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