

Law Council of Australia Speech - National Legal Profession Reform

INTRODUCTION

- Between 1867 and 1895, in the American 'Old West', the notorious gunfighter and outlaw, John Wesley Hardin, dispatched between 27 and 45 people.¹
- One of the most notable of these brutal killings occurred one evening when, along with several fellow cow herders, Hardin had put up for the night at the "American House Hotel". Being unable to sleep because of snoring coming from an adjacent room, Hardin resorted to what some of us may consider an extreme measure – he started shooting through the wall and ceiling to stop the disturbance.
- Following such behaviour, there was perhaps only one real option for Hardin to both enhance his notoriety and satiate his natural competitive streak – he began to study law.
- Hardin was released from prison on 17 February 1894 and was pardoned on 16 March. Four months later, Hardin passed the Texas state's bar examination and obtained his licence to practice law.
- It is sometimes said that ask three lawyers for their views on any particular matter, and you will receive 6 different opinions. In reflecting on these events, however, I think that we can all agree on two propositions. The first is that the regulation of the legal profession has enjoyed some moderate improvements since the late 19th century, and the second is that, despite general views of those in the eastern states, at least Western Australia is not quite as 'wild' as the American Old West was.

Overview of the Legal Profession:

- To come to the matter at hand, today I will be briefly discussing the issue of legal profession reform. Before discussing specifics, though, it will be beneficial to set the scene. The Australian Bureau of Statistics performed a survey of the legal sector in June 2008 and we can draw some of the following observations.
- From the Western Australian perspective, at the end of June 2008 there were approximately 906 legal services operating; employing around 6,500 people. Of this 6,500 approximately 2,611 were practicing barristers and solicitors.
- In Australia generally, the approximate 15,326 legal services employ around 99,696 persons.
- Of course, the legal profession is not solely confined to the private sector. In addition to the paid employees 4,474 volunteers contributed nationally to community legal centres and Aboriginal legal services.
- In a time when we naturally regard the mining and agricultural as the primary drivers of the national economy, it is not insignificant that Australian legal services contributed almost \$11 billion, and generated \$18 billion in income in 2007/08.
- The regulation of the legal profession in Australia remains complex and variable, with up to 55 different regulators across the country.
- As a result, different practices apply in different jurisdictions, including, for example, costs disclosure and billing, admissions and practicing certificates and complaints handling and professional discipline.

¹ http://en.wikipedia.org/wiki/John_Wesley_Hardin

- Australian lawyers and consumers no longer operate in just one State or Territory. The resources boom is also resulting in increasing numbers of Australian lawyers being called upon to operate overseas.
- National regulation of the legal profession is intended to benefit consumers, lawyers and firms alike by providing a seamless framework of national regulatory practices.

National Legal Profession Model Laws Project

- The development of a national model for the regulation of legal services has been ongoing now for almost 20 years.
- Current efforts to develop a national legal profession build upon the work laid down by earlier projects such as the National Legal Profession Model Laws project.
- Lead by the then Standing Council of Attorney's General (SCAG), the Model Laws project sought to develop a model bill which could provide for mutual recognition of legal qualifications across states.
- The Model Laws also included uniform provisions that allowed for alternative business structures for legal practice, such as incorporated legal practices and multi-disciplinary partners.
- The Model Laws responded to the globalisation of legal practice through uniform provisions to enable foreign lawyers to practise foreign law in Australia, either on their own account, or in partnerships with Australian legal practitioners.
- The Model Laws project also attempted to address consumer needs for greater information about the way their legal needs would be addressed, the costs involved and the recourses available if disputes and complaints arise.
- The resulting draft Bill was adopted by all seven State jurisdictions, including Western Australia, where it forms the foundation of the current *Legal Profession Act 2008 (WA)*.
- While the Model Bill has lead to greater harmonisation between states, it was never intended to provide for uniformity. In developing the Model Bill, SCAG did not commit to enacting textually identical laws and in practice, significant variation still exists between the legal profession laws and regulatory structures of each State and Territory.

The Legal Profession National Law:

- The national Model Laws institute worthwhile and significant reforms, which have come closer to creating a national legal services market than ever before. However, variations in the implementation of the Model Bill have resulted in:
 - impediments to seamless national practise;
 - unnecessary compliance costs and burdens; and
 - varying levels of consumer protection.
- The Council of Australian Governments (COAG) saw that scope remained for further micro-economic reform of legal profession regulation to address disparate State and Territory regulation, creating regulatory burdens for law practices and inconsistent consumer protection.
- In February 2009 COAG decided to initiate this project as an addition to its National Partnership Agreement for a Seamless National Economy.
- The new work is intended to deliver:
 - the establishment of an Australian legal profession;

- a reduced regulatory burden for Australian legal practitioners and law practices;
 - consistent and transparent consumer protection so that consumers have the same rights and remedies available to them regardless of where they live in Australia; and
 - a system of regulation that is more efficient and effective.
- Between May and December 2010, the draft Legal Profession National Law underwent a detailed review in response to submissions received in response to the Consultation Report, culminating in the taskforce lodging its final report and draft legislation with COAG in December 2010.
- Unlike the national legal profession model law project, the Legal Profession National Law does not require states to pass their own versions of a model bill.
- A key step in constructing the national framework would be for the proposed draft National Law to be enacted by the Parliament of a host jurisdiction. It would then be adopted in identical terms in each of the other States and Territories.
- The draft National Law has been deliberately designed to be principles-based, with as much of the “regulatory detail” as possible moved to National Rules to be administered by new national structure.
- The proposed new structure for regulation includes the creation of two new bodies – a National Legal Services Board and a National Legal Services Commissioner (who would also be Chief Executive Officer of the Board). While most regulatory powers would reside in these national bodies, many of the powers of the Board, and most of the powers of the Commissioner would actually be exercised locally by State and Territory regulators.
- Each participating jurisdiction would need to consider how regulatory functions would be delivered at the local level, and by which regulatory bodies. Amendments in the revised legislation, and the report issued alongside it, make it clear that the National Commissioner’s compliance functions can be exercised by professional associations.
- Where professional associations already have these functions, they will continue to do so.
- At its meeting in February 2011, COAG “agreed in principle to settle reforms to legal profession regulation by May 2011 (with the exception of Western Australia and South Australia)”. By the end of May 2011, COAG had received a revised legal profession reform package but it was not made publicly available.
- Following cancellation of its 15 July meeting, COAG was expected to finalise the reforms at its meeting on 19 August. This did not eventuate and it was reported that Tasmania and the Australian Capital Territory also had reservations about the scheme.
- On 9 September 2011, the Commonwealth Attorney-General released the revised draft National Law following discussions between the Attorneys-General of the Commonwealth, New South Wales, Victoria, Queensland and the Northern Territory.
- On 19 October 2011, the Commonwealth Attorney-General announced that the new National Legal Services Board and National Legal Services Commissioner will be established in New South Wales. The Attorney-General also announced that Victoria will introduce the legislation to implement the reforms that will be replicated across participating jurisdictions.
- It was expected that the legislation would be first introduced into the Parliament of Victoria, followed by the necessary adopting legislation in New South Wales, Queensland and the Northern Territory to enable the national scheme to begin in July 2013. Between New South Wales, Victoria and Queensland it was estimated that approximately 85% of Australian lawyers would be covered under the new scheme.

- On 3 October 2012 the new Queensland Attorney-General announced that Queensland would not be signing up to the national legal profession reforms. The reason for this withdrawal was said to be concerns about the impact of the scheme on sole practitioners as well as uncertainties relating to the costs of establishing and operating the national Legal Services Board and office of the National Legal Services Commissioner.
- In this regard it should be noted that other points of contention with regard to the national laws have been raised by the Judicial Council of Australia (JCA), the Legal Practice Board of WA and the Law Admissions Consultative Committee (LACC). These relate to the manner in which appointments to national bodies are made pursuant to the legislation, the handling of admissions, the costs to individual practitioners (particularly with regard to admissions) and the cost to establish and administer the new national bodies the scheme requires.
- The JCA in particular holds grave concerns regarding the composition and centralisation of the admission functions in the National Board. The JCA were particularly concerned that since appointments to the Board were to be overseen by SCAG (now the Standing Council on Law and Justice) this could potentially imperil the independence of the legal profession.
- It is unclear what effect implementation of the model legislation in other jurisdictions may have on the mutual recognition arrangements currently applying to legal practitioners in WA. The Law Society of WA has expressed concerns that failure to adopt the national laws may result in WA lawyers not being recognised as 'Australian lawyers' under the model legislation.
- It is important to note that at the October 2012 meeting of the Standing Council on Law and Justice which brings together the Attorneys General from the Commonwealth and all states and territories, only New South Wales and Victoria have agreed to participate in the implementation of model legislation.

Western Australian Position:

- Western Australia has decided not to participate in the model law by adopting the template legislation, and at this stage I feel it will be worthwhile to reiterate why WA adopted the position it has.
- This is because the template legislation, as drafted effectively picks up 'by reference' substantive legislation enacted in another jurisdiction. Under the template legislation alteration of the law in the host jurisdiction would mean that the law in Western Australia will also be altered, possibly without being considered by the Western Australian Parliament and arguably against Western Australian wishes.
- The basic position of the WA Government is that any legislation, if it can be, should be State, and not Commonwealth, legislation. That is, any attempt by the Commonwealth Government and Parliament to use its powers, such as the corporations power, as had been intimated from time to time by the Commonwealth Attorney-General, to unilaterally impose Commonwealth legal profession legislation on the States will be vigorously opposed. This philosophical opposition extends to this State not referring any power to the Commonwealth Parliament which would be necessary to enable such legislation to comprehensively cover the field.
- From the outset, the Western Australian position was that, instead of Commonwealth legislation or a State template scheme, each State should have enacted the substantive reforms agreed to by the jurisdictions.
- Given the immediate opposition to this position from the Commonwealth, WA could not participate any further in the reform process and I here note that WA has now been joined in its withdrawal from the centralising process by South Australia and Queensland. The remaining participants in the 'national reform project' are New South Wales and Victoria.

- From today's perspective, the extent to which the Western Australian legislation utilises provisions in the model Bill and which areas or subject matter in which that will occur has yet to be decided.
- This will depend not only on the final form of the Model Bill introduced in Victoria, and the extent to which it is picked up by other jurisdictions, but also on the particular needs and conditions relating to the Western Australian legal profession.
- To that end the former Attorney General requested that the Solicitor General convene a working group to develop substantive legal practitioner's legislation for Western Australia. While largely left to the Solicitor General's discretion, this Working Group comprised members from both the WA Law Society and Bar Association.
- While the Working Group will consider its own reform options, it will remain open to consideration as to whether any aspects or provisions of the COAG model Bill would be of benefit to the profession in WA to utilise or replicate.

Conclusion

- To conclude, and draw together some of the themes I have discussed this morning, it is clear that the development of a uniform model for national legal profession regulation remains a long way from completion. There are pressing issues requiring resolution before a truly acceptable national model can be agreed to by all jurisdictions.
- Given the unquestionable benefits that will result from more uniform regulation of the legal profession, both for the legal profession itself and for the consumer, it is desirable that this remain a priority.
- Ultimately the best model for uniform national legislation is one which strikes an appropriate balance between the responsibilities of the State Government and the wishes of the Commonwealth.
- As I said at the beginning of my comments today, if you ask three lawyers for a position, you will receive 6 different opinions. And I would not be so bold as to suggest that there are positions that we all can agree upon on reflecting of the developments I have outlined earlier. However, I would hope that we can all at least recognise that perhaps an adaptive way forward for our federation is to try and reach for a more cooperative norm, whereby the views of the States are genuinely sought and considered before the tired and anachronistic arguments for centralisation, absolute harmonisation, and referral of legislative power become parodies of their original goals.
- Thank you very much.