



**ATTORNEY-GENERAL
HON ROBERT McCLELLAND MP**

**SPEECH TO THE
LAW SOCIETY OF WESTERN AUSTRALIA
'NATIONAL LEGAL PROFESSION REFORM'**

CHECK AGAINST DELIVERY

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First, may I acknowledge the traditional owners of the land we meet on – and pay my respects to their elders, both past and present.

- The Hon Christian Porter, Western Australian Attorney-General and Minister for Corrective Services;
- The Hon Professor Michael Lavarch, former Commonwealth Attorney-General and Chair of the National Legal Profession Reform Project Consultative Group;
- Mr Tim Bugg, Chair of the International Legal Services Advisory Council.

Thank you for the introduction and thank you to the Law Society of Western Australia for the invitation to speak today.

It's a pleasure to be here to speak about the National Legal Profession Reform Project.

I would like to acknowledge Christian Porter for his ongoing interest and involvement in these issues. I would also like to acknowledge the contribution of Mr Steven Penglis and Dudley Stow, Western Australia's representatives on the National Legal Profession Reform Project Consultative Group. In sharing the unique Western Australian perspective and innovative approach to regulation of the profession, their input has been particularly useful.

Lawyers play a fundamental role in our justice system, facilitating access to justice and equality before the law.

A system of regulation that supports this work and ensures accountability with these high standards is of considerable importance to the Australian community.

But the regulation of the legal profession in Australia remains overly complex and inconsistent, with up to 55 different regulators across the country creating different practices and processes in different jurisdictions.

Increasingly, Australian lawyers and consumers operate in more than just one State or Territory.

Accordingly, we can no longer justify such disparate regulation for such an important profession.

The profession itself has an estimated value of approximately \$11 billion to our national economy – not to mention its value in terms of underpinning the rule of law within our democracy.

Uniform national regulation of the profession will promote a seamless national market for legal services and enhance Australia's international competitiveness.

For over a decade Governments have been working toward facilitating national practice – but despite great commitment there has not been great progress.

In April 2009, the Council of Australian Governments (COAG) took decisive action and agreed on a concrete plan to achieve national regulation of the Australian legal profession. COAG called for the appointment of a specialist Taskforce and Consultative Group that would produce draft uniform legislation within 12 months.

This direction was significant as it meant that Federal, State and Territory leaders all recognised the benefit of a national legal profession.

Since then, with a few notable exceptions, general support has been expressed for the objectives of this reform project.

But as always the devil is often in the detail and it would be fair to say that there has been considerable and robust debate – as there should be – about how a national legal profession may take shape.

Substantive reform, by definition, is never easy – but that certainly doesn't mean it's not worth doing.

It is critical that everyone with an interest in this process not lose sight of the overarching objective by getting bogged down in debates over means rather than ends.

The Imperative of a National Legal Profession

The overall objective of achieving uniform national regulation of the legal profession has been met with strong support. Even critics have recognised the importance of seamless national practice.

As you may be aware, uniformity and national practice have been on the books for many, many years.

While the development of a model law facilitated worthwhile and significant reforms it allowed for variations in a number of areas, largely to garner support or, more accurately, quell opposition. This saw jurisdictions implement the model law differently and then make amendments which have compounded the disparity.

These variations have created a number of inefficiencies.

Firstly, they impose unnecessary regulation and therefore overheads on the many legal practices that operate in more than one jurisdiction. It has been noted that Australia's nine largest national law firms alone waste nearly \$15 million each year duplicating procedures to meet each jurisdiction's requirements.

Duplication also exists in administering the legislation itself. In many jurisdictions there are numerous regulatory authorities administering the legal profession act. Those regulatory authorities are, in turn, often duplicated in other jurisdictions.

The result is having up to eight rule-makers, up to eight bodies approving legal education or training courses or providers, up to eight entities assessing and registering foreign lawyers, and so on.

Even before this reform project commenced the legal profession recognised that duplication in rule-making was neither necessary nor desirable.

It should be noted that the Law Council of Australia and the Australian Bar Association are already working towards national Conduct Rules that would replace those which have previously been developed by professional associations in each jurisdiction – that work is commendable.

Variations between jurisdictions continue to generate impediments to seamless national practice and restrict the competitiveness of Australian lawyers in the international legal services market.

All of these issues are reasons why COAG has characterised uniformity of legal profession regulation as a key issue of microeconomic reform.

The Proposed Model

The legislation that the Taskforce will present to COAG will be uniform national legislation, but it will not be legislation which adopts the lowest common denominator.

In the process of developing its proposals, the Taskforce has been considering legal profession regulation across the country, with a view to adopting best practice. While the detail of the proposals is currently being finalised, the Taskforce has been committed to developing a national system that:

- continues to involve the legal profession in its own regulation through a co regulatory model;
- provides strong consumer protection;
- simplifies regulation to minimise compliance burdens on legal practitioners and law practices;
- promotes uniformity while retaining the significant expertise in existing regulatory bodies;
- is internationally competitive; and

- facilitates pro bono and the work of community legal centres.

In some areas, identified concerns and further opportunities for simplification have led to innovations.

For example one of the identified problems with the current system of consumer complaints handling is that in many jurisdictions there is no stream to treat these matters as consumer rather than disciplinary matters.

Often, this results in complaint-handlers either dismissing the matter or taking disciplinary action against the lawyer, which may be an inappropriate over-reaction to a problem such as poor communication or failure to explain charges.

The Taskforce is therefore proposing a new stream of consumer matters that will endeavour to conciliate clients' complaints against their lawyers quickly, cheaply and effectively.

At the same time, the Taskforce hasn't been reinventing the wheel. Many proposals will look familiar in a number of States and Territories.

For example the proposed two institution model of the National Legal Services Board and the National Legal Services Ombudsman, with the proposed Board acting as the standard setter and the proposed Ombudsman performing compliance and complaints handling functions has, I understand, been considerably influenced by the Western Australian model.

The Taskforce has proposed that the National Legal Services Board would set a single, national set of rules for all lawyers in Australia and any changes to those rules would also apply universally. As mentioned, the profession has conducted significant work in creating new national rules.

The Taskforce has proposed that the National Legal Services Ombudsman will have a role in ensuring that the administration and enforcement of the national law and rules are also consistent across jurisdictions – to the extent that uniformity in application is beneficial.

The proposed National Ombudsman would also be able to undertake other value-add tasks such as collecting information and data on complaints, providing an annual report to the National Legal Services Board on nation-wide statistics and systemic issues, and drawing upon this practice to develop tools to support practitioners across the nation.

The Role of States and Territories

To date, much of the debate in relation to national legal profession reform has centred around the role of the States and Territories in the new national system.

Under current proposals, States and Territories will be very much equal partners in any new system.

Legislation would be enacted at the State and Territory level. States and Territories would jointly establish the national bodies. In turn, those national bodies would be accountable to the States and Territories through the Standing Committee of Attorneys-General (SCAG).

It is proposed that National Rules would be developed by the National Legal Services Board in close consultation with the legal profession before being approved by the States and Territories through SCAG.

The National Board and Ombudsman would promote uniformity, but would delegate many of their functions back to State and Territory entities nominated by Governments in each jurisdiction. As such, local entities would continue to undertake compliance and complaint-handling functions.

There is no doubt that a local presence is of course desirable when dealing with individuals, and equally many complaints and concerns can better be resolved at a local level.

Funding will also remain in State and Territory hands.

I particularly want to address concerns that under the proposals States and Territories may lose revenue from trust account interest which is often used for worthwhile purposes such as legal aid.

This will not be the case.

The Taskforce will propose a model for the distribution of interest from multijurisdictional trust accounts which largely maintains the status quo. Accordingly, under the proposals, interest from statutory deposits in each jurisdiction will continue to go directly to State and Territory public purpose funds.

Similarly, the Taskforce is not proposing to move away from each State and Territory managing its own fidelity fund.

The Taskforce has commissioned ACIL Tasman to undertake an analysis of the regulatory and economic costs and benefits of the Taskforce's proposals. This will assist the States and Territories to assess the details of the Taskforce's proposals on funding structures and to negotiate an Inter Governmental Agreement that each jurisdiction can accept.

Maintaining the Independence of the Profession

Another issue that has been the subject of considerable debate has been the role of the legal profession in their own regulation.

It is my strong personal view that independence within our justice system is fundamental.

Lawyers must be free to take up the causes of all citizens without fear or favour, even when these causes are not palatable to Governments or evoke the scorn and ridicule of the popular press. This principle is fundamental to access to justice and to the rule of law.

The profession over many years has made important and for the most part voluntary contributions to maintaining a strong professional code and system of accountability that ensures lawyers meet the high ethical standards required of them.

Increasingly, however, it is being appreciated that an appropriate level of consumer representation would be beneficial. Such representation will enrich deliberations and show that the national leadership of the profession is genuinely mindful and respectful of the interests of those whom the legal profession serves.

What has been proposed, therefore, is a system of co-regulation with a central, but not exclusive, role for the profession and its representative associations.

I am pleased that the Taskforce has revisited the important issue of the composition of the National Legal Services Board.

The Taskforce has developed a proposal that the National Legal Services Board would constitute up to seven members appointed by SCAG with the Law Council of Australia and the Council of Chief Justices each having a nominee appointed.

There would also be Board members with consumer protection and regulatory experience.

It is anticipated that the Board will, collectively, hold a range of stakeholder expertise, with members fulfilling the functions of the Board, rather than representing any one interest or constituent.

The Taskforce is still considering the appropriate composition of the Board and further views will be specifically sought on this issue during further consultation.

As well as substantial representation on the Board the profession will also continue to have a central role in the development of conduct rules and other professional regulation through their participation in advisory committees to the Board. In addition, the Taskforce has noted that it may be appropriate to delegate some powers of the Board and the Ombudsman to the profession.

It is also pleasing to note that the Taskforce intends to propose that the National Conduct Rules for barristers and solicitors recently developed by the profession be largely picked up as the National Rules on conduct.

Courts will, of course, maintain their inherent jurisdiction to admit and discipline practitioners.

Other Areas of Reform

The elimination of unnecessary duplication and the simplification of regulation has been one of the main goals of the project.

Currently, regulation of the legal profession totals over 4,700 pages of legislation, regulations and rules across the country and the legal profession acts which adopt this regulation currently range between about 400 and 600 pages.

This complexity often creates prescriptive and onerous overregulation. It also confuses the consumers of legal services, for example in relation to costs.

Although it is still being refined, it is anticipated that the National Legal Profession Bill will be less than 200 pages.

Underpinning this efficiency is a focus on outcomes based legislation – that is, focusing on the outcomes to be achieved, rather than prescribing the means by which they should be achieved.

This approach will cut through the considerable complexity and red tape that exists in the current systems of regulation.

An example which I have noted before is the pro-forma approach to costs agreements. These statements give little indication to clients about the actual costs involved in a matter. In some jurisdictions they run up to 15 pages and not even lawyers are able to explain them simply.

This provides a good example of the outcomes-based approach and I am pleased that this is an issue that the Taskforce has taken on.

Rather than specifying pro-formas, lawyers would be required to disclose to clients the options available to them and the likely costs involved in pursuing these. They would be required to ensure that clients give informed consent to the course taken and the costs that will be incurred. This may involve different levels of disclosure for different clients, and lawyers would need to exercise their professional discretion to determine what is required to meet this obligation.

The proposed national system will also eliminate significant duplication.

For example, the national practising certificates proposed by the Taskforce would do away with eight different systems of practising certificate types, eight different systems for practising certificate renewal and the need for law practices to manage multiple compliance requirements for practising certificates.

Some have queried whether the proposed reforms will benefit only large law practices or those that practise in more than one jurisdiction.

The reforms will of course bring considerable benefits to multi-jurisdictional firms in the form of streamlined compliance requirements, however, all practitioners will undoubtedly benefit from the many proposed improvements to the regulatory system, including from simplification and deregulation generally and the adoption of best practice and other innovations.

I believe that creating a truly seamless national legal profession will provide greater opportunities for law firms from smaller states who, in the main, carry lower overheads, to compete on a more or less level playing field.

As a significant consumer of legal services, the Commonwealth looks at competence, but also efficiency and cost effectiveness. Accordingly, smaller firms and the Bar, including practitioners from smaller States, should not assume this reform is not about their interests.

The Way Forward

As always, due respect must always go to those who have paved the way. It is the lessons of previous attempts at reform that have guided the currently proposed model.

The proposed applied law will operate differently from the model law as it would institute uniformity initially and then establish a process for future amendments to be made by all jurisdictions working together to enact the same legislative changes.

The Taskforce has been advised that such a proposal would indeed be constitutional.

I am pleased to report that the reform project is on track and a Bill will be ready for consideration by COAG at its meeting in April.

I am also pleased to announce that the Taskforce will not only produce a draft Bill for COAG consideration, but also proposed National Rules for the profession – a significantly larger undertaking than was initially proposed.

The proposed National Rules would be subordinate to the National Law and will include details of the proposals which are currently found in regulations.

This is a positive development as I understand there has been feedback from some stakeholders that Rules were necessary in order to assess the detail of the scheme.

I am also aware that there has been a degree of anxiety in relation to the project's time frame. Understandably, people want time to be able to consider the proposals, provide feedback and offer ideas for further refinement.

To that end, it is my intention to ask Leaders in April to agree in general terms to the legislative package of the Bill and the National Rules, subject to consultation, and to agree to the package being put out for a further consultation period.

This timetable will allow more time for detailed examination and debate of the recommendations by the Consultative Group and the general public.

This additional feedback is important as we need to be mindful that it is the legal profession as well as the consumers of legal services that will need to adapt to these new laws.

I will also ask Leaders to agree to me reporting back to them at the end of this consultation period with a finalised legislative package as well as an Inter-Governmental Agreement for signature.

Conclusion

Uniform, simpler and more effective national legal profession regulation is long overdue.

I look forward to the debate that the proposals in the draft Bill will inevitably generate.

This process of research, consultation and public debate is vital to the development of a robust, sustainable system which will serve both the profession and the broader community for decades to come.

Thank you.