Framework for a national legal services market

By Bob Gottersen QC, President of the Law Council of Australia

The recent release of the National Legal Profession Model Bill by the Standing Committee of Attorneys-General heralds the beginning of a new era for the Australian legal profession.

The Model Bill paves the way forward for a raft of reforms to the laws, regulations and practices that are necessary to fully implement a truly national legal services market. The Law Council of Australia and its Constituent Bodies have invested an enormous amount of energy and work in championing these reforms over the past decade.

The Law Council applauds the commitment shown by federal, state and territory Attorneys-General in embracing the challenge and producing a reforms platform that positions Australia at the forefront of legal profession regulation internationally.

Why a 'National Legal Profession'?

'National Practice' or a 'National Legal Profession' has been a mantra chanted by politicians and lawyers for some years – but what does it actually mean and why it is important?

National practice is about facilitating legal practice throughout Australia by means of a regulatory system that enhances consumer protection and economic efficiency and maintains the principles of the rule of law.

The increasing influence of the nationalisation and globalisation of legal practice, as well as the internationalisation of the law, have driven the need for growth of the national legal services market. The emerging dissonance between these developments and the separate regulatory regimes in each state and territory (and the differences between these regulatory structures) have hindered the mobility of lawyers within Australia, impeded interstate competitiveness, and inconvenienced clients with interstate or national interests.[1]

As a consequence, national regulation has assumed increasing importance in the last decade with the growing need to remove obstacles to cross-border legal services. This has coincided with the international focus on freeing up trade in goods and services between countries and the development of national business activity within the Australian economy.

These factors drive the need to remove barriers to national legal practice and allow greater competition within the legal services market. The reforms have long been recognised as essential – both for the legal profession and consumers. Reforms which enable integrated delivery of legal services on an Australia-wide basis are vital to the profession meeting existing and future market demand for legal services. Enabling Australian law firms to compete on a national and international basis and market themselves to international companies looking to invest in Australia, is also critical.

The vision for a National Legal Services Market

The fundamental tenet of the Law Council's 1994 Blueprint for a National Legal Services Market (NLSM Blueprint) was that a lawyer admitted to practice in any state or territory should be able to practise law throughout Australia without any further restrictions. This was endorsed by the Standing Committee of Attorneys-General in the mid 1990s and led to the first step in the reform process that saw the National Travelling Practising Certificate Scheme being implemented by most states and territories.

While the scheme represented some advance towards the vision of a national legal services market, it did not remove the barriers (both bureaucratic and financial) to national practice as envisaged under the NLSM Blueprint. Nor did it replace the need for a nationally comprehensive and consistent regulatory regime that governs the way lawyers work throughout Australia.

The National Legal Profession Model Bill

A decade on, the need for comprehensive regulatory reform continues to drive the work comprising the National Legal Profession Model Laws Project. Mostly recently, the Project has seen the translation of the NLSM Blueprint (and the Law Council's model for a national legal profession) into comprehensive model provisions as a basis for consistent laws and rules that apply to lawyers.

The Model Bill is the product of intensive work undertaken over the last two years by the Law Council and its Constituent Bodies and the Standing Committee of Attorneys-General. It represents an advance in the regulation of the legal profession beyond mutual recognition legislation and the National Travelling Practising Certificate Scheme.

The model provisions, as contained in the Model Bill, give expression to the NLSM Blueprint vision by establishing a 'national standards' framework. The provisions lay out the standards that qualify persons to be admitted to practise, the standards regulating the ways in which lawyers practise, and the standards by which quality and service are assured to consumers by the Australian legal profession.

The aim is to streamline state and territory regulation to allow lawyers to practice 'seamlessly' within

Australia. The model provisions do this by harmonising existing standards of regulation and establishing a comprehensive starting point from which state and territory governments can begin implementing a nationally consistent and comprehensive regulatory regime for the practice of law in Australia – paving the foundation for the next steps in the journey towards the reality of national legal practice.

Why a 'national standards' approach?

In developing the Model Bill however, the challenge for the legal profession and Australian governments has been to match the regulation of legal practice with the reality that most lawyers and their clients are individuals and small businesses operating in local communities and markets, while a significant portion of legal work by monetary value is done at an interstate or national level. While this need not, and should not, mean the state based legal professions are lost, it does mean that the standards applying to the practice of law should be nationally consistent where this benefits legal consumers and their lawyers.

At a general level, legal practice is also subject to a co-regulatory model of professional associations requiring their members to meet standards of conduct and performance, and of governmental bodies oversighting or conducting regulation of aspects of legal practice. The balance between government structures and professional associations performing regulatory duties varies from jurisdiction to jurisdiction and reflects local conditions and issues experienced over time. In particular, the Supreme Courts in each jurisdiction have an important role derived from their respective inherent jurisdiction, although some powers have been given specific statutory recognition. Equally, how regulation is funded also varies.

These challenges have shaped the direction adopted by government in pursuing a 'national standards' approach to the proposed regulatory reforms. The consequence is that:

* The regulation of legal practice will remain the responsibility of state and territory governments and courts.
* The focus of the work is not on achieving 'one size fits all' regulatory structures, but rather that different regulatory structures operating at the state and territory level will apply national consistent standards of regulation.

The approach is consistent with that contemplated by the Law Council's NLSM Blueprint – with the effect that the Model Bill reforms are not aimed at 'nationalising' regulation of the legal profession in a way that the national companies' scheme saw the enactment of the Corporations Act and the creation of the national regulatory bodies which accompany the scheme.

In other words, the Model Bill will not alter the existing basic structural features or the funding of legal regulation at the individual state and territory level (although several states have instigated changes to regulatory structures via separate and state based review processes). Instead, the Model Bill reform process will see the changes to the regulatory standards being incorporated within the separate regulatory regimes of each state and territory - including, in some cases, the adoption of nationally uniform legislation by each state and territory to implement the national standards.[2] Importantly, self regulation also remains an essential element of the overall regulatory mix.

The structure of the Model Bill

The structure of the Model Bill has been influenced by the work of the National Legal Profession Model Laws Project. Since its establishment in early 2002, the Project has involved the Law Council and its Constituent Bodies[3] working closely in consultation with the Standing Committee of Attorneys-General on detailed policy development and the drafting of the recently released Model Bill in relation to 12 principal areas or 'streams' of regulation. These include:

* Reservation of legal work and legal titles;
* Admission to practice;
* Practising certificate requirements;
* Trust accounts;
* Fidelity fund cover;
* Costs and costs disclosure;
* Complaints and discipline;
* External intervention;
* Lawyers' business structures, (namely incorporated legal practices and multi-disciplinary practices);
* Legal profession rules; and
* Foreign lawyers practising foreign law in Australia.

The structure of the Model Bill reflects these principal 'streams' of regulation with additional parts for matters to support the operation of Model Bill regime (such as for instance definitional, inter-jurisdictional, investigation and miscellaneous provisions).

The structure accommodates varying degrees of difference between the highly prescriptive approach taken in some parts of the Model Bill and in others where a framework approach has been used. These differences are supported by the categorisation of the model provisions into those which are core and require textual uniformity in local adoption, those which are core but do not require textual uniformity, and non-core provisions.

By way of general description, readers will find a less prescriptive approach has been adopted for those parts of the Model Bill dealing with admission, practice, complaints and discipline, and legal profession rules. This is to be contrasted with, for instance, the more prescriptive approach adopted in other parts of the Model Bill for trust account regulation, external intervention and incorporated legal practices and multi-disciplinary partnerships.

These signposts are intended to guide the way the model provisions

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will be incorporated by governments into the state and territory regulatory regimes. They simply reflect the degree to which model provisions are thought necessary to overcome the 'road blocks' experienced in the operation of the national legal services market. Accordingly, varying degrees of local variation can be expected as the Model Bill translates into state and territory based legislative reforms on matters other than those designated as core and requiring textual uniformity.

Major features of the Model Bill regulatory model

Consistent with the national standards approach, the regulatory model (as amplified in the Model Bill) is based on local regulation of local or intra-state lawyers practising within the confines of their state and territory. Upon this basic architecture is built the regulation of lawyers visiting the jurisdiction and providing legal services, and the position of law firms operating from offices in multiple jurisdictions.

In large measure, the Model Bill regulatory model is that contemplated by the Law Council's NLSM Blueprint. By way of brief summary, the major features are:

* There will be uniform standards for law degrees and practical legal training, and Australia-wide recognition of these qualifications.[4]
* Lawyers will be able to practise anywhere in Australia with the one practising certificate.[5] On this matter, lawyers are required to seek their practising certificate from the 'home jurisdiction' as defined in the Model Bill. The practising certificate is fully transportable and recognisable throughout each jurisdiction and responsibility for regulation of the lawyer is that of the 'home jurisdiction' issuing the practising certificate.[6]
* A practising certificate is required to undertake work in areas that are reserved to lawyers. The use of legal titles will be set out in legislation in uniform terms.[7]
* Lawyers will be able to practise in a variety of business structures, including incorporated legal practices and/or multi-disciplinary practices. The regulation of incorporated legal practices and/or multi-disciplinary practices will be by way of uniform provisions adopted by each state and territory.
* There will be uniform rules dealing with trust accounts and fidelity funds. The regulation of trust accounts will be in accordance with legislative provisions that are uniform in each state and territory. The model provisions also provide for uniform outcomes on the circumstances in which the state and territory fidelity funds will be liable for a defalcation, and a nationally consistent approach to matters dealing with scope of cover, caps, claims and appeals.
* The practice of foreign law in Australia by foreign lawyers will be allowed on an open and consistent basis in all states and territories.
* There will also be nationally consistent requirements for the disclosure of information on legal costs to clients.
* Regulatory bodies will be able to share information and cooperate in investigations, including in matters relating to complaints and discipline.

Also supporting the multi-jurisdictional regulatory regime is the concept of compliance at the entity level, namely the 'law practice'. This represents a significant advance in the thinking on the regulation of the practice of law throughout Australia and is likely to attract great interest as experience with the operational regime unfolds.

Where to now?

The March 2004 Standing Committee of Attorneys-General meeting saw Ministers reaffirm their commitment to the national legal profession reforms and progressing implementation of the Model Bill as soon as practicable. Queensland has already commenced its process with the introduction of new legislation in early May 2004. Other jurisdictions are also expected to follow shortly.[8]

Establishing a national legal services market in Australia is still a work in progress however.

For instance, professional indemnity insurance is an additional 'stream' of the Project work but model provisions for this stream are yet to be drafted and incorporated into the Model Bill.

Significant work is continuing on this stream with the aim of establishing a nationally consistent regulatory framework for the provision of compulsory cover within Australia. This is to be based on nationally consistent standards of insurance. The aim is to simplify the compliance and administrative requirements for interstate firms and lawyers who provide legal services across inter-state borders. It is a particularly complex area however, and there are unique challenges to delivering these outcomes whilst achieving a meaningful balance between the provision of adequate consumer protection against the negligence of lawyers and ensuring stable and affordable coverage for lawyers in the current insurance market climate.

Smoothing the way forward for the implementation of the Model Bill by state and territory governments throughout Australia is also now vital if the benefits of the reforms for consumers and lawyers are to be realised. This work contemplates the continuing refinement of the Model Bill as operational experience matures, and the development of supporting model regulations as a matter of priority over coming months. There is also the establishment by SCAG of the Law Council/SCAG Officers' Joint Working Group to monitor the implementation of the Model Bill to ensure that inter-jurisdictional consistency is maintained.

This important work will continue to be at the top of the Law Council's agenda over the coming year. The end result though will be a legal profession which will serve the Australian community well in the future. It will ensure that lawyers may practise law across Australia without impediments. It will ensure that in that process they will do so in vigorous competition with each other, but still maintain the principles of the rule of law and preserve that vital objective of service to the Australian community and quality of service to their clients.

Endnotes

[1] Law Council of Australia, A response to Access to Justice – An Action Plan, Access to Justice Advisory Committee, August 1994

[2] It should be appreciated however that uniformity of regulation has not been the goal in itself through out the process – but rather a consequence in a number of regulatory 'streams' where it is necessary to overcome regulation that is dysfunctional in terms of national practice.

[3] Members include the Law Society of New South Wales, ACT Bar Association, Bar Association of Queensland; Law Institute of Victoria, Law Society of the ACT, Law Society of the Northern Territory, Law Society of South Australia, Law Society of Tasmania, Law Society of Western Australia, New South Wales Bar Association, Northern Territory Bar Association, Queensland Law Society, the Victorian Bar, and Western Australian Bar Association.

[4] On this matter, the model provisions anticipate that a person becomes qualified for admission as a lawyer as a result of undertaking academic study and practical legal training in accordance with standards developed by the Law Admissions Consultative Committee (LACC). Admission takes place at a state and territory level in accordance with the Uniform Admission Rules developed by LACC. The structures and processes however by which the rules are applied are matters for each state and territory, and national practice is facilitated by means of the mutual recognition by each state and territory of the admission of a lawyer by any of the state or territories.

[5] Generally, a lawyer may practise on a visiting basis in any jurisdiction without meeting additional requirements. As a general rule, a lawyer will be brought into the regulatory orbit of the second jurisdiction upon the opening of an office in a second jurisdiction (see for instance, trust account regulation and fidelity fund cover), or the lodgement of a complaint against a lawyer in a second jurisdiction.

[6] National practice is facilitated by means of consistent regulatory requirements for the purposes of interstate practice, mutual recognition of the licence to practice, as well as of any restrictions or conditions placed on the practising certificate by the home jurisdiction and any disciplinary orders issued by the relevant authorities in each Australia jurisdiction (where relevant). There are also uniform definitions of 'unsatisfactory professional conduct' and 'professional misconduct' to support this approach.

[7] The Model Bill adopts a common law approach to identifying the areas of work reserved to lawyers (cf the Law Council model which promotes a list approach)

[8] Western Australia introduced its legal profession regulatory reforms in late 2003. These reforms anticipated the Model Bill standards. Further amendments will be necessary to bring that legislation in line with core provisions of the Model Bill that require textual uniformity.①

New chairman for National Pro Bono Centre

Tony Fitzgerald QC has been appointed as the new chairman of the National Pro Bono Centre, which is based at the University of New South Wales.

Mr Fitzgerald has held the positions of President of the Queensland Court of Appeal (1991-1998) and was a member of the NSW Court of Appeal (1998-2001). He retains chambers in Sydney and now works as a consultant undertaking commercial mediations and arbitrations.

Former chair Andrea Durbach will stay on as a director.

The Board has also announced the appointment of three new directors: Peter Stapleton (consultant, Blake Dawson Waldron); Michelle Hannon (Pro Bono Co-ordinator for Gilbert & Tobin); and Shirley Southgate (director of the Human Rights WA Community Legal Centre).

"The new directors bring unique expertise and experience to the Board which will be of great benefit to the Centre in supporting and promoting pro bono legal services throughout Australia", said John Corker, the Director of the Centre.

The Centre was established in 2002 by the Federal Government as a key recommendation of its National Pro Bono Taskforce and is supported by the Commonwealth Attorney-General's Department and the UNSW Law Faculty.

The Centre works with the legal profession to increase the provision of high quality pro bono legal services and with the community sector to match services with the clients and groups most in need of assistance.①