

National Legal Profession Reform Project

Consultation Report
14 May 2010



COAG National Legal Profession Reform Taskforce

Consultation Report April 2010

Foreword

On 5 February 2009, the Council of Australian Governments (COAG) noted that, further to its National Partnership Agreement on a Seamless National Economy, despite recent valuable reform considerable scope remains for further microeconomic reform of legal profession regulation. COAG recognised that disparate State and Territory regulation of the Australian legal profession creates regulatory burdens for law practices and inconsistent consumer protection.

In April 2009, the Commonwealth Attorney-General appointed a Taskforce to prepare draft uniform legislation, for submission to COAG within twelve months, to regulate the legal profession and to make recommendations outlining a proposed national regulatory framework.

The National Legal Profession Reform Taskforce has presented a draft Legal Profession National Law (the National Law) and Legal Profession National Rules (the National Rules) to COAG in accordance with its request, and now seeks public comment on these documents. COAG has agreed to a consultation period of three months, commencing 14 May 2010, to allow for comprehensive consideration of the proposed reforms.

In addition to the benefits of national uniformity, the Taskforce has sought to improve regulation of the legal profession by selecting good practice from around the country, and innovating in appropriate areas.

Key themes underpinning the Taskforce's reform proposals are:

- the creation of a national regulatory framework
- the establishment of an Australian legal profession
- a reduction in the regulatory burden for Australian legal practitioners and law practices
- enhanced consumer protection
- maintenance of the independence of the legal profession.

The Taskforce recognises that, with such important and wide reaching proposals, public consultation is an indispensable part of the reform process. The Taskforce emphasises that all aspects of the proposed reforms are draft only, and welcomes comments on any matter raised in the consultation package. Where the Taskforce would especially appreciate the views of stakeholders on a specific issue, a question that encapsulates the issue is included in boxed text. Submissions that expressly address these questions will assist the Taskforce to refine its proposals for eventual agreement by COAG.

The Taskforce also wishes to acknowledge the important contribution of its supporting Consultative Group, other stakeholders it has consulted, and those who have provided submissions on Taskforce proposals.

Executive Summary

The draft National Law and National Rules developed by the Taskforce are intended not only to unify, but also to simplify and increase the effectiveness of legal profession regulation. The goal of the Taskforce has been complete, substantive and enduring uniformity that eliminates unnecessary regulatory burden and enhances consumer protection.

While many elements of the State and Territory regulatory landscape will be preserved under the Taskforce's proposed arrangements, a number of significant new initiatives are recommended. This report outlines the key proposals under five headings:

- **Creation of a new national regulatory framework**, with new national bodies (a National Legal Services Board and National Legal Services Ombudsman) to oversee regulation of the legal profession (along with State and Territory Supreme Courts), and to develop uniform national rules. The national bodies will operate within a delegated model, with many of the functions of the national bodies to be performed in practice by local representatives.
- **Establishment of an Australian legal profession**, including admission in one jurisdiction resulting in a lawyer becoming an officer of all Supreme Courts, and the creation of an Australian practising certificate and a publicly-accessible Australian Legal Profession Register. Under the new scheme, government lawyers (except those engaging only in legal policy work) and in-house counsel will also be required to hold practising certificates, and continuing professional development rules will be uniform across jurisdictions.
- **Reduction in the regulatory burden** for Australian legal practitioners and law practices. In particular, the profession will benefit from national uniformity of regulatory requirements, and the flexibility engendered by new provisions such as the option of maintaining a single general trust account for multi-jurisdictional law practices.
- **Enhanced consumer protection**, including through the establishment of new powers for the National Legal Services Ombudsman to resolve disputes between lawyers and clients that are exclusively or primarily disputes about service ('consumer matters'). The National Law would also establish a requirement that law practices must charge no more than 'fair and reasonable' legal costs and that claims on State and Territory fidelity funds be determined 'at arms-length' from the profession, to avoid a perceived conflict of interest.
- **Maintenance of the independence of the legal profession**. The National Law adopts a co-regulatory model, retaining direct involvement of the profession in regulation through membership on the National Legal Services Board and its supporting advisory committees, and through professional associations continuing to act as co-regulators where considered appropriate by States and Territories. The profession will also continue to develop practice, conduct, and continuing professional development rules.

While the Taskforce has aimed to achieve complete national uniformity in as many areas of regulation as possible, it has been necessary to reserve some areas for continued regulation at a jurisdictional level. In some cases, it is the aspiration of the Taskforce that further work will be undertaken to nationalise these aspects, once the general regulatory framework has been

implemented. These areas are highlighted in the discussion below under 'Areas of continued jurisdictional regulation'.

National Legal Profession Reform – figures at a glance

Legal profession in Australia

- There are approximately 99 696 people employed in 15 326 legal services businesses
- There are approximately 34 587 practising barristers and solicitors
- Approximately 4016 people were admitted to the legal profession in Australia in 2008/09
- An estimated 65-70 foreign lawyers are presently registered with State and Territory regulatory authorities
- There are approximately 55 bodies with responsibility for regulating the Australian legal profession
- The current cost of regulating the legal profession is approximately \$65.5 million per annum
- Legal services contributed \$10.96 billion to the Australian economy in 2007/08
- The value of pro bono legal services for 2007/08 was estimated to be \$238 million

National Legal Profession Reform project – outcomes

- ACIL Tasman estimates:
 - the net annual benefit of the proposed reforms to Australian regulators and law practices is \$16.9 million in the first year and \$17.7 million per year thereafter
 - the reforms will increase Australian real GDP by around \$23.6 million in the first year of implementation increasing to around \$25.2 million by the fourth year
 - the proposal to allow multi-jurisdictional law firms to have single general trust account in one of the jurisdictions in which they practice will save those practices \$11.6 million per annum
 - law practices will save an additional \$4.425 million per annum in compliance costs as a result of nationally uniform regulation
- An estimated 1700 government lawyers that don't currently hold a practising certificate will be required to have one
- There are 422 Community Legal Services that will be subject to the national regulatory scheme

A national regulatory framework

An enduring system of national regulation requires the creation of a new institutional regulatory framework that promotes consistent regulation for the Australian legal profession as a whole, while harnessing the benefits of jurisdictional flexibility and expertise.

Applied law scheme

The Taskforce is of the view that the optimal means for ensuring a uniform regulatory regime is to implement the new National Law as an ‘applied law’ scheme.

An applied law scheme may take one of several different forms, but in general will operate in the following way: each State and Territory *applies* – as a law of that State or Territory – the laws or standards enacted in a ‘lead’ or ‘host’ jurisdiction. The process for amending the legislation is provided for in an inter-governmental agreement.

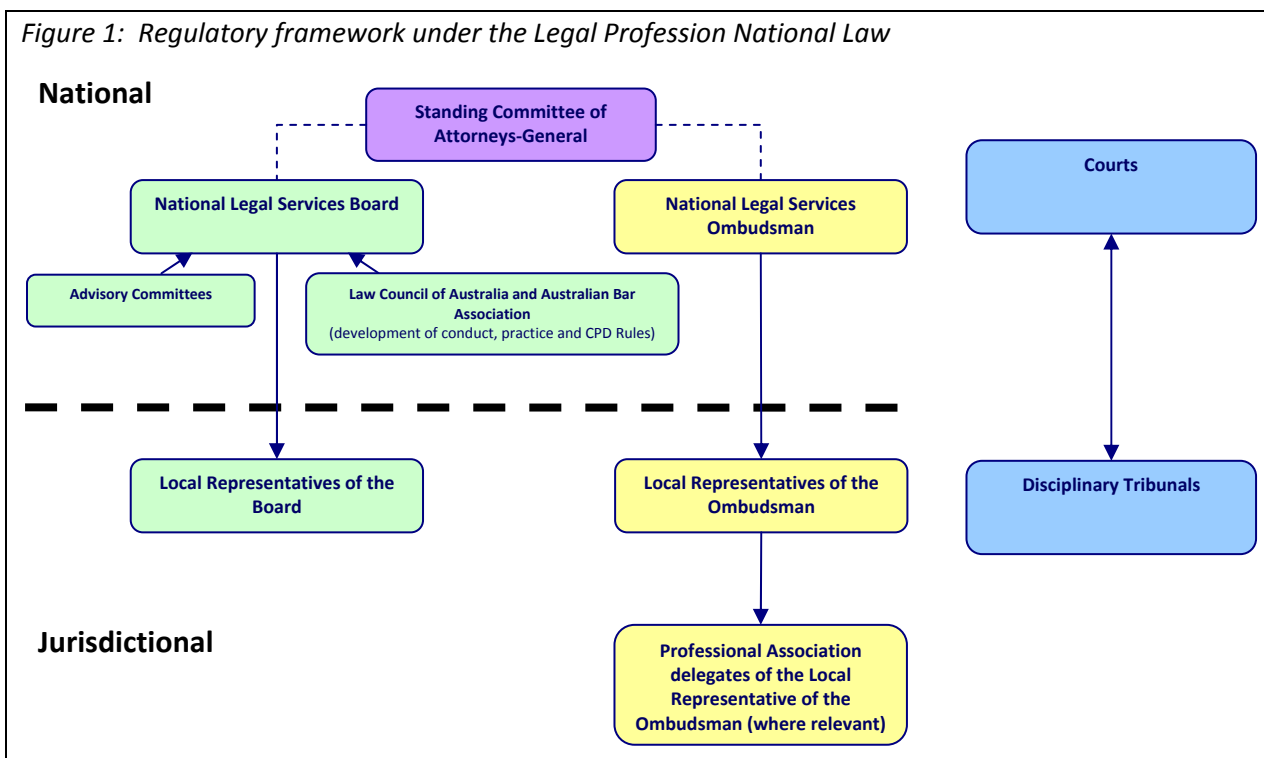
There has been no decision as to which jurisdiction will act as ‘host’ for the Legal Profession National Law. The Taskforce welcomes any views on this issue.

Regulatory bodies

Key bodies under the proposed new regulatory framework are:

- the courts and relevant disciplinary tribunals
- the National Legal Services Board, and its local representatives
- the National Legal Services Ombudsman, and its local representatives.

Figure 1: Regulatory framework under the Legal Profession National Law



Courts and tribunals

Under the national regulatory framework, the Supreme Courts in the States and Territories will continue to be the admitting authorities, with the National Legal Services Board recommending to the Supreme Court in the applicant’s nominated jurisdiction whether or not

an individual meets the eligibility and suitability prerequisites for admission. The Supreme Court will retain the discretion to refuse an applicant's admission. Admissions will be relayed to the Board and reflected on a National Register. Admission as an officer of one Supreme Court will make a lawyer an officer of Supreme Courts around the country.

The Courts will retain their inherent jurisdiction in disciplinary matters. Disciplinary actions (for example, cancellation or suspension of practising certificates, or the imposition of conditions on practice) will also be reflected on the Australian Legal Profession Register.

State and Territory courts and tribunals will also play a key role in administering the disciplinary regime under the National Law. Courts and tribunals will be able to make orders in relation to unsatisfactory professional conduct and professional misconduct, including recommending the removal of a lawyer from a Supreme Court roll. Courts and tribunals will also be able direct the National Legal Services Board to suspend, vary or cancel an Australian practising certificate, and will hear appeals or reviews concerning the Board's decisions with respect to practising certificates and against certain decisions of the National Ombudsman.

National Legal Services Board

The National Law establishes a new National Legal Services Board (the Board). The Board will be a small body of between five and seven members, generally appointed on the basis of range of skills and experience, and will include representation from the legal profession (the process for appointing Board members is outlined below under 'Co-regulation and preserving the independence of the legal profession').

The Board is the principal regulatory body under the new scheme, and is vested with a number of critical functions.

National Rules

One of the Board's main functions will be to make National Rules under the National Law. A draft set of National Rules, dealing with the following areas, accompanies the National Law for consultation:

- unqualified legal practice
- admission
- Australian practising certificates
- foreign lawyers
- business structures (incorporated legal practices and unincorporated legal practices)
- trust money and trust accounts
- legal costs
- professional indemnity insurance
- fidelity cover
- continuing professional development
- external intervention
- the Australian Legal Profession Register

- professional conduct (see discussion under ‘Independence of the Profession’, below)

The Board’s powers to make rules are interspersed throughout the National Law (see, for example, section 4.2.42 regarding trust money and trust accounts).

The Board’s making of rules will be informed by specialised advisory committees, comprising representatives from the relevant stakeholder groups, including (as appropriate) the legal profession, the Courts, professional indemnity insurance providers, education institutions, consumers and State and Territory governments. According to section 9.1.3 of the National Law, the Law Council of Australia and Australian Bar Association may develop Legal Practice Rules, Legal Profession Conduct Rules, and Continuing Professional Development Rules.

Questions

Should the National Law make provision for advisory committees, or should the composition and functions of such committees be left to the Board to determine? In which subject areas may they be required and what relationship should they have with the Board?

The formal rule-making process is set out at Part 9.1 of the National Law. In summary, the Board will develop a National Rule (the process differs for practice, conduct and continuing professional development Rules, which are to be developed by the Law Council of Australia and the Australian Bar Association) and:

- consult on the Rule as it considers appropriate with its advisory committees or more broadly
- release the Rule for public consultation, and take into account any submissions received
- submit the Rule to the Standing Committee of Attorneys-General (SCAG).

SCAG has a power to veto the Rule by majority. If it does not do so within 30 days, or advises its approval of the Rule, the Board may make the Rule, which will come into operation on gazettal in the host jurisdiction. A more streamlined process for minor and urgent matters is allowed under section 9.1.5 and 9.1.6 of the National Law.

Other functions of the Board

Other functions of the Board include:

- administering admissions to the profession, including assessing applications for admission and issuing compliance certificates (recommending to Supreme Courts that a person be admitted), and approving academic and practical legal training courses
- granting and renewing Australian practising certificates (in practice, to be performed by local representatives, as discussed below under ‘A delegated model’)
- granting and renewing Australian registration certificates for foreign lawyers
- approving, where necessary, professional indemnity insurance policies as ‘complying policies’ for the purposes of the Law
- receiving various notices relating to legal practice, including notification of an intention to commence or cease practice as an incorporated legal practice or unincorporated legal practice

- receiving and maintaining necessary information about lawyers and Australian-registered foreign lawyers through the Australian Legal Profession Register.

Questions

The Taskforce seeks views on its proposal to centralise the assessment of applications for admissions, and the registration of foreign lawyers, with the National Legal Services Board. Are there operational issues that could emerge as a result of this?

National Legal Services Ombudsman

The second new body proposed under the National Law is the National Legal Services Ombudsman (the Ombudsman).

The principal role of the Ombudsman will be to receive, and deal with, complaints against legal practitioners and law practices. This would include making determinations in relation to complaints and, where appropriate, prosecuting matters involving unsatisfactory professional conduct or professional misconduct in the appropriate disciplinary tribunal.

In addition, the Ombudsman will have a number of important regulatory functions, including compliance, auditing and investigations functions (for example, the Ombudsman will be empowered to appoint an external investigator for the purposes of determining whether a law practice is complying with the trust accounting provisions under Part 4.2). Chapter 7 of the National Law prescribes the powers that the Ombudsman may exercise with respect to trust records examinations and investigations, compliance audits, and complaint investigations.

The Ombudsman will also have the power to issue management system directions, and will administer the interventions regime under Chapter 6 and the penalties regime under Part 9.6.

In practice, most of the functions of the Ombudsman will be performed by local representatives of the Ombudsman. Importantly, the Ombudsman will be an independent entity, per section 8.3.5 of the National Law.

Questions

The Taskforce has received submissions querying the use of the term ‘Ombudsman’ for the new national body, on the basis that the Law vests regulatory powers other than complaints-handling in the body. What is the view of other stakeholders on the use of the term ‘Ombudsman’? What would be an appropriate alternative?

Local representatives

In order to leverage the benefits of existing institutional infrastructure and expertise, many of the functions of the Board and Ombudsman will in practice be performed by local regulatory authorities that are nominated by the States and Territories.

The National Law prescribes ‘special functions’ of the Board and Ombudsman (Part 1.3), expressly providing that these functions will be performed by local representatives that are listed in Schedules 3 and 4 to the National Law. Each local representative is empowered, by virtue of section 1.3.10, to further delegate these functions to a member of its staff, or a local professional association. In order to ensure ongoing national consistency, the Board and the Ombudsman will retain powers to monitor the performance of special functions, and to take

over, or 'call in', the exercise of a special function in relation to a particular matter under certain specified circumstances (for example, where the matter is likely to set a precedent).

As noted above, under the National Law, most functions of the Ombudsman will be performed by local representatives. Special functions of the Ombudsman are all functions associated with:

- trust money and trust accounts
- business management and control (including compliance audits and management system directions)
- complaints handling
- external intervention.

The Ombudsman's powers to oversee the system, and to take over the exercise of a special function by a local representative (section 1.3.7) cannot be performed by local representatives or delegated.

Unlike the Ombudsman, most functions of the Board will not be performed by local representatives. As outlined above, the National Board will perform functions relating to:

- the making of National Rules
- applications for admission to the profession and issuing compliance certificates
- the registration of foreign lawyers
- functions in relation to professional indemnity insurance
- receiving various notices relating to legal practice
- maintaining the Australian Legal Profession Register.

The following are 'special functions' of the Board that will be exercised by local representatives:

- the grant, renewal, variation, suspension and/or variation of Australian practising certificates
- applying for an order (under part 2.3 of the National Law) establishing that a person is 'disqualified' for the purposes of the Law
- approving a 'lay associate' who is disqualified or has been convicted of a serious offence.

As with the Ombudsman, the Board's power to take over the exercise of these functions cannot be performed by local representatives or delegated.

Importantly, local representatives will be empowered to 'sub-delegate' the exercise of functions to professional associations under section 1.3.10 of the National Law. Thus, the delegations framework established by the National Law will provide for substantial flexibility in how jurisdictions may assign regulatory functions.

Independence

The Taskforce's preference is that the Ombudsman's complaint-handling functions are managed independently of the profession, and therefore that professional associations are

not nominated as local representatives of the Ombudsman. However, because some jurisdictions do not currently have existing independent bodies that would be able to carry out complaints handling functions, the National Law does not preclude professional associations from being local representatives of the Ombudsman or from being delegated these functions.

The Taskforce notes that professional associations are likely to be nominated as the Board's local representative in most jurisdictions.

Questions

Local representatives of the Board and Ombudsman will be listed in Schedules 3 and 4 to the National Law. The Taskforce seeks views on which entity or entities, in each jurisdiction, would be appropriate to act in the role of local representative for the Board and Ombudsman in relation to the special functions. Note that a local representative need not be an existing body.

Suggestions for other arrangements that could facilitate the devolved structure of the legislative regime would also be welcome.

Standing Committee of Attorneys-General (SCAG)

As the peak body comprising ministers responsible for jurisdictional legal profession regulation, SCAG will play a key role in overseeing the implementation and ongoing development of the new Law and Rules. In the establishment phase and over time, SCAG will make major policy decisions concerning the form and implementation of the national scheme, and will have a general supervisory role in relation to the Board and the Ombudsman.

Under the National Law, as highlighted above, SCAG will have a formal role in approving or vetoing proposed National Rules; in addition, it will recommend appointments to the Board, receive annual reports from the Board and Ombudsman, and be empowered to give directions on policy matters that are relevant to the Board and the Ombudsman (section 8.1.2). The role of SCAG is largely prescribed by Chapter 8 and Schedules 1 and 2 of the National Law.

An Australian legal profession

One of the Taskforce's key aspirations in creating a national system of regulation of the legal profession is to establish and promote a seamless, unified Australian legal profession.

Admission

As noted above, State and Territory Supreme Courts will continue to act as the principal admitting authorities in each jurisdiction. The National Law also includes a provision that an 'Australian lawyer' (defined as a person who has been admitted to the Australian legal profession) is an officer of the Supreme Court of each jurisdiction. This effectively provides for simultaneous admission of Australian lawyers to each Supreme Court around the country.

A single Australian practising certificate

A single Australian practising certificate (see Part 3.3 of the National Law), with uniform categories of conditions, will automatically entitle a practitioner to practice in any jurisdiction in Australia. This practising certificate will also automatically entitle a practitioner to provide volunteer legal services at community legal services.

At present, each jurisdiction has a different practising certificate regime with varying categories and conditions. Mutual recognition of practising certificates has gone some way

toward facilitating inter-jurisdictional legal practice. However, the Taskforce is of the view that removing jurisdictional differences will reduce compliance burdens on practitioners and create uniformity and consistency.

Barristers

An Australian practising certificate may be issued with the condition that the holder is authorised to practice as a barrister only. The Taskforce has attempted to take account of the current distinction between ‘fused’ jurisdictions (where all legal practitioners are entitled to practice as barristers and solicitors) and ‘non-fused’ jurisdictions (where additional requirements must be met before a practitioner is authorised to practice as a barrister).

All Australian legal practitioners must notify the Board when they intend to move their ‘home jurisdiction’. Where a barrister moves from a fused jurisdiction to a non-fused jurisdiction, that notification will not be effective until the Board is satisfied that the barrister meets the requirements for practice as a barrister in their new jurisdiction. These requirements are set by the relevant Bar Association in each jurisdiction.

Questions

Are the proposed conditions for practising certificates appropriate to best discern the different types of legal practitioners? Are any additional types of statutory or discretionary conditions necessary?

Do the provisions dealing with barristers under the proposed practising certificate regime adequately deal with the distinction between ‘fused’ and ‘non-fused’ jurisdictions?

Practising certificates for government lawyers and in-house counsel

Government lawyers have long played a key role in the provision of legal services in Australia and form an integral part of the Australian legal profession. In recognition of this, all lawyers providing legal advice and services (but not legal policy advice) to government agencies and related statutory authorities will be required to hold a practising certificate.

This requirement will facilitate greater mobility for lawyers moving between government and private practice; create consistent continuing professional development requirements; encourage greater involvement of government lawyers in pro bono work for community legal services; and remove the perception that government lawyers are detached from mainstream professional obligations and accountabilities that attach to non-government legal practitioners.

Lawyers employed as in-house counsel for businesses (‘corporate lawyers’) will also be required to hold practising certificates. As with government lawyers, it is envisaged that practising certificates for ‘corporate lawyers’ would come at a reduced cost, in recognition that they will not be required to pay Fidelity Fund contributions or take out professional indemnity insurance.

Questions

Does the definition of ‘government lawyer’ in the National Law appropriately capture those practitioners working for government authorities who should be required to hold a practising certificate?

Practising certificates for lawyers volunteering in community legal services

The National Law will facilitate volunteerism within the legal profession by establishing a new free or low-cost volunteer Australian practising certificate aimed at lawyers who are not otherwise required to hold a practising certificate, for example, those undertaking legal policy work, retired practitioners, or those who have been admitted to the legal profession but work in another field.

The volunteer Australian practising certificate is designed to encourage volunteer work at community legal services by lawyers who may be discouraged from obtaining a full-priced practising certificate for the sole purpose of undertaking casual volunteer work. Community legal services are defined broadly to capture and allow pro bono work at a large range of not-for-profit organisations providing legal services to the community.

Uniform continuing professional development (CPD) requirements

Professional development and education of legal practitioners is a critical aspect of healthy legal practice and has wider benefits for the community. CPD ensures that legal practitioners remain up-to-date with critical developments in their areas of practice and obliges legal practitioners to regularly consider common ethical issues arising from their work, appropriate risk management, and effective business practice.

Under the National Law, all Australian legal practitioners will be subject to uniform CPD obligations.

Question

Will the CPD requirements instituted under the National Law and the National Rules adequately address the needs of Australian legal practitioners in all jurisdictions?

Foreign Lawyers

The National Law will facilitate the continued internationalisation of Australia's legal services market, by providing for a centralised process for the admission and registration of foreign lawyers.

Foreign lawyers seeking admission in Australia (ie seeking to practise Australian law) will be able to apply directly to the Board for a compliance certificate verifying to a Supreme Court their eligibility for admission. The Board may exempt a person from having to meet the usual requirements for academic qualifications and practical legal training (section 2.2.3(2)) if it is satisfied that the person has sufficient qualifications, skills or experience so as to render the person suitable for admission. These qualifications, skills or experience may be obtained wholly or partly overseas, providing an avenue to admission for foreign lawyers who may otherwise have to undertake significant additional study or training in Australia in order to qualify for admission.

Foreign lawyers will also have an option of 'conditional admission', which will allow a Court to admit them to the Australian legal profession, subject to conditions that define how they may practise in Australia (for example, a foreign specialist criminal advocate could have a restriction placed on their admission that allows them only to act as a criminal advocate in Australia). Conditional admission will ease the restrictions on qualified foreign lawyers seeking to work in Australia for a particular purpose or matter, and is therefore likely to

increase the quality legal services available to the Australian public from the international market.

The Board will also be the only point of contact for foreign lawyers seeking registration in Australia (ie seeking to practise foreign law in Australia). Unlike current arrangements, where each jurisdiction registers foreign lawyers to practise foreign law, this approach will eliminate forum-shopping and potential duplication.

An Australian Legal Profession Register

One of the great benefits of the nationalisation of the legal profession is the reduction in information barriers between bodies performing regulatory functions and the ability to centralise key data to enable a more responsive regulatory framework.

The National Law will establish a new single national register of Australian lawyers, Australian legal practitioners and Australian-registered foreign lawyers that will act as a central repository of information relating to admission (including any conditions on admission), discretionary conditions on practising certificates, disciplinary findings and any adverse findings resulting in a removal from the roll.

The Australian Legal Profession Register will act as an important regulatory risk management tool for regulators by enhancing information sharing and removing the ability of rogue practitioners to exploit gaps in regulatory information between jurisdictions.

Some components of the Register will be publicly accessible, including in online format. This will make it a useful tool for consumers wishing to make informed decisions when seeking legal services.

Questions

What information should form part of the publicly-available Australian Legal Profession Register? How should information sharing between state-based regulators, professional associations, courts and tribunals and other organisations operate to ensure the success of the Register and effective coordination of regulatory activities?

Reducing the regulatory burden

A key driver for the commencement of the reforms under the auspices of COAG was the recognition that, following a period of microeconomic reform in the mid-2000s, further efforts could be made to ease the regulatory burden on Australian law practices and legal practitioners. Additional reforms are required to improve productivity and competitiveness, and reduce the cost of legal services for consumers. The National Law represents a significant improvement over existing regimes, in particular by achieving national standardisation of rules and processes, and facilitating the concept of national legal practice.

In addition to the information below, interested readers should refer to the consultation Regulation Impact Statement, which includes a Cost-Benefit Analysis prepared by ACIL Tasman, for more on the expected reduction in regulatory burden. A key finding of the ACIL Tasman report is that the implementation of the proposed national arrangements would lead to an increase in Australian Gross Domestic Product of around \$24 million per year.

National standardisation

Arguably, the principal benefit of the new National Law will be that it will institute one set of rules and standards for regulation of the legal profession. It is estimated that overlapping requirements for different jurisdictions presently lead to duplication of work costing large law firms alone around \$15 million annually.

The National Law and National Rules will establish one set of requirements, applicable wherever legal practice is conducted in Australia. It will also create an institutional architecture that will facilitate a reduction in the number of bodies that presently regulate the profession, meaning that there will be fewer regulatory contact points.

In complex areas of compliance that are presently subject to significant inter-jurisdictional variation (for example, trust accounting), this will lead to significant savings in time and resources for Australian law practices. ACIL Tasman has projected that these savings will total approximately \$16.05 million per year (including savings from trust account compliance changes, discussed below).

The creation of this national legislative framework will also facilitate national practice (as discussed under 'An Australian legal profession', above). While mutual recognition arrangements have gone some way to improving the mobility of Australian legal practitioners and reducing the burden on inter-jurisdictional law firms, the National Law will remove almost all the remaining impediments.

Simpler, shorter legislation

The Taskforce has simplified the existing regulatory requirements established under the existing State and Territory legislative regimes. Instead of highly detailed and prescriptive requirements in areas like legal costs, the National Law sets out the high-level principles, which are essentially the outcomes and behaviours that the National Law seeks to foster. Where more detail is required, this has been reserved for the National Rules. The National Rules and National Law combined, however, are substantially shorter and clearer than existing laws and regulations.

The Board and the Ombudsman may also choose to make non-binding guidelines on specific areas of the National Law or National Rules, in order to assist in achieving regulatory compliance.

Specific elements

The National Law contains a number of specific provisions that will reduce the regulatory burden on Australian law practices, including:

- single national trust accounts – under section 4.2.10 of the National Law, law practices that engage in practice in more than one jurisdiction may choose to maintain a general trust account in just one of those jurisdictions (a 'single national trust account').

ACIL Tasman estimates that this will produce compliance cost savings of approximately \$11.6 million per year.

- business structures – the National Law will allow for law practices to adopt any business structure that suits their purposes (section 3.2.1), subject to particular requirements of the National Law or National Rules (including, in some cases, approval

of the Board). This will remove a significant barrier to practices that wish to employ alternative business structures for the purposes of providing legal services.

- professional indemnity insurance exemptions – presently, law practices that operate in more than one jurisdiction can obtain professional indemnity insurance in just one jurisdiction to cover the whole practice, but are required to seek an exemption from each other jurisdiction. The National Law will remove this requirement, reducing the overall administrative burden on inter-jurisdictional practices.

Community legal services

Previous attempts at achieving uniform regulation of the legal profession have avoided extending coverage to community legal services (sometimes called ‘community legal centres’). Consequently, community legal services have historically been regulated on a jurisdiction-by-jurisdiction basis.

The National Law specifically regulates community legal services (see Part 3.8 of the National Law). Importantly, the definition of ‘law practice’ in the National Law includes community legal services, meaning that, in general, community legal services will be subject to the same regulatory requirements as other types of law practice.

Question

The Taskforce is keen to ensure that the important work of community legal services is not impeded by unnecessary regulatory burdens. The Taskforce also recognises that there is significant variation in the nature and structure of community legal services around the country, and that uniform regulation of these services is a new concept. It therefore seeks views from those directly involved in the sector on whether there are likely to be any onerous or unforeseen impacts that arise from the regulation of community legal services in the National Law.

Penalties

The National Law provides that any conduct consisting of a contravention of the National Law or National Rules is capable of being unsatisfactory professional conduct or professional misconduct that could be subject to a disciplinary finding (section 5.4.4). A broad range of disciplinary measures can be taken if a practitioner is found to have engaged in unsatisfactory professional conduct or professional misconduct (see section 5.4.9).

In addition, the National Law prescribes penalties for contraventions of particular provisions. More serious contraventions are prescribed as criminal offences, and a maximum pecuniary penalty or term of imprisonment may be imposed – see, for example, section 2.1.3(1), prohibiting legal practice by unqualified entities. For less serious contraventions, civil pecuniary penalties that do not constitute a criminal offence may be imposed – see, for example, section 3.7.4(2), requiring law practices to notify particulars of each person who is or ceases to be a supervising legal practitioner. For both types of penalties, where the contravening entity may be a body corporate or a natural person, the National Law sets different maximum penalties, reflecting the different characteristics of these respondents, and the different penalty levels required to achieve a deterrent effect.

Matters relevant to the penalty regime, including factors that must be considered by the relevant tribunal when ordering pecuniary penalties for civil penalty contraventions, are set out at Part 9.6 of the National Law.

The availability of civil penalties for less serious contraventions of the National Law will provide a more flexible penalty regime, as civil penalties are subject to civil processes that are less stringent than criminal processes, including a lower standard of proof. Retaining criminal penalties only for the most serious contraventions, and for conduct involving a level of moral culpability or criminal character, will ensure that the threat of criminal sanction continues to act as an effective deterrent where required.

The maximum pecuniary penalties for each penalty provision have been determined by reference to existing penalty provisions in State and Territory regulation. When the National Law is in force, the financial value of penalty units in the host jurisdiction will apply.

Questions

Are the proposed penalty levels appropriate? In particular, are the proposed penalty levels adequate to deter contraventions of the National Law, and proportionate to the sanctioned conduct?

Are there other enforcement or compliance mechanisms that should be considered?

Enhanced consumer protection

The desired effect of any regulatory system is the preservation and protection of the interests of consumers and the wider community. While the Taskforce is keen to ensure that regulatory measures are targeted and proportionate to address particular risks and regulatory failures, enhancing the protection of consumers of legal services has been a significant aim of the national reforms.

The Taskforce recognises that many of the existing legal profession complaint-handling regimes do not align with other complaint-handling regimes that consumers may be familiar with. In particular, legal profession complaints-handling is geared to dealing with serious disciplinary breaches. Although such breaches are comparatively rare, existing complaints-handling regimes focus on discipline at the expense of the majority of complaints that tend to relate to poor service, disputes about legal costs or minor conduct breaches.

National Legal Services Ombudsman

The National Law provides for a National Legal Services Ombudsman that will administer a framework that places greater emphasis on the expeditious and effective handling of disputes between clients and lawyers where disciplinary action is not appropriate. 'Consumer matters' (disputes or issues between clients and lawyers arising out of the provision of legal services) will be managed quickly, with minimal formality and with an emphasis on dispute resolution and negotiated outcomes.

There will also be a greater range of orders available where necessary and appropriate, including a power for the Ombudsman to make a binding determination in relation to a consumer matter where dispute resolution is ineffective.

Consumer matters

The Ombudsman will be able to identify consumer matters as well as disciplinary matters arising from a single complaint, and to deal with these separately if appropriate. Consumer matters are defined as any dispute or issue between a person and their lawyer relating to the provision of legal services to the person. Consumer matters are defined to include costs

disputes not exceeding \$100,000. The conduct of a lawyer or law practice from which a consumer matter arises can also be (or be capable of constituting) a disciplinary matter.

The Ombudsman will be required to attempt to resolve consumer matters by agreement as soon as practicable (section 5.3.2). The Ombudsman will also have a power to order parties to attend mediation in good faith. Where agreement is reached, the Ombudsman must make a record of the agreement, which would become enforceable when a party files it in Court.

Where a matter is also a disciplinary matter, the resolution of the consumer matter will not preclude disciplinary action from being taken separately. A disciplinary tribunal may also make a compensation order where it makes a disciplinary finding against a lawyer (section 5.4.9(1)(k)).

This distinction between consumer and disciplinary matters will provide for more efficient, better-targeted resolution of disputes, to the benefit of both clients and practitioners.

Greater access to assistance

Under the Taskforce proposals, consumers with a complaint against a lawyer will have the opportunity to call a single phone number from anywhere in Australia that will automatically divert to their local Ombudsman representative. The Ombudsman will have an important educative role and will be responsible for developing fact sheets, brochures and guidelines to help both consumers and practitioners understand their rights and obligations. Potentially, a single, accessible and interactive website could enable consumers to lodge questions and complaints online for action by their local representative.

Greater uniformity

Currently, consumers in different jurisdictions are subject to different complaint-handling authorities each with their own powers and processes. The Taskforce is of the view that a complaint about the same alleged conduct should be treated consistently, regardless of the jurisdiction the consumer resides in.

The national presence of the Ombudsman is designed to guarantee uniformity by overseeing the performance of its functions by State and Territory local representatives. All local representatives of the Ombudsman will be applying the same legislation, rules and guidelines in the exercise of functions – as will any of their delegates. Furthermore, if the Ombudsman is of the view that a local representative is failing to manage a matter in accordance with the uniform regime, or believes the matter is more appropriately dealt with by the national Ombudsman, he or she will have the power to ‘call in’ such a matter and handle it itself.

Questions

How can enduring consistency and uniformity in delegates’ decision-making and exercise of Ombudsman functions be best achieved? Can the legislation facilitate greater uniformity and what practical and operational measures, including information-sharing arrangements, could assist in maintaining consistency?

A greater range of remedies

The primary focus of the Ombudsman will be to resolve consumer matters as efficiently and as effectively as possible. The Taskforce envisages that such resolution will primarily be achieved through informal means, mainly over the telephone, with both parties coming to an agreed resolution to the dispute that is then formalised by the Ombudsman.

Where this is not possible or appropriate, the Ombudsman will be empowered to exercise determinative powers to finalise disputes and make a range of orders.

Binding determinations in consumer matters would be made on the basis of what the Ombudsman considers to be 'fair and reasonable' in the circumstances; and could include orders to redo any relevant work, complete work at a reduced fee, apologise to the complainant, or to undertake further education or training. The Ombudsman may also order compensation of up to \$25,000. Compensation orders made by the Ombudsman for more than \$10,000 may be appealed to the court or tribunal responsible for disciplinary matters (section 5.6.3).

The Ombudsman will be able to dispense with minor disciplinary conduct breaches by making a disciplinary determination that results in a finding of unsatisfactory professional conduct, and making any of a range of orders (see section 5.4.5) – this range of orders is more limited than those available if the determination were made by an appropriate tribunal. Such findings would be appealable to the relevant court or tribunal.

Questions

Are the proposed orders that the Ombudsman may make appropriate to address the needs of aggrieved consumers? Should matters that may give rise to a claim on a fidelity fund be precluded from being handled by the Ombudsman as consumer matters?

Are there any particular concerns that arise from the Ombudsman's power to make findings of unsatisfactory professional conduct?

Appropriate review mechanisms

The Taskforce believes that allowing for appropriate discretionary internal review of the Ombudsman's decisions is an important aspect in ensuring the integrity and accountability of the complaints-handling process.

It is envisaged that the Ombudsman would exercise its discretion to conduct an internal review in limited circumstances where, for example, it becomes apparent that an error may have occurred in the investigation or handling of a complaint that requires correction.

Questions

Is internal review necessary to ensure fairness in the complaints-handling process? In what circumstances would internal review be useful? Are there other areas of the Ombudsman's functions where internal review may be necessary?

A clearer approach to legal costs

The costs charged to a client by a legal practitioner forms an important aspect of the solicitor-client relationship and can be a significant source of disputes and complaints against lawyers.

Effective communication is a critical factor in reducing confusion and misunderstandings regarding legal costs. Therefore, the Taskforce is proposing adopting the principle of 'informed consent' in place of prescriptive and onerous disclosure obligations. Rather than having to provide voluminous disclosure documents, a law practice will be required to satisfy itself that the client has understood and consented to the proposed course of action and costs involved after being given all relevant information. It is envisaged this greater focus on

communication between law practices and their clients will serve to minimise disputes and complaints about costs.

Note that there will also be an option for ‘commercial or government clients’ to contract out of the provisions in the National Law relating to legal costs (with the exception of provisions relating to contingency fees and costs assessment – section 4.3.2(1)). ‘Commercial or government clients’, sometimes referred to in other contexts as ‘sophisticated clients’, include such bodies as public companies and government authorities (see section 4.3.2(2)) that are in a better position to negotiate legal costs.

‘Fair and reasonable’ legal costs

In a further effort to reduce costs disputes between legal practitioners and consumers, the National Law will impose a clear obligation on legal practitioners to charge clients no more than fair and reasonable costs. The Taskforce acknowledges that the majority of legal practitioners already seek reasonable remuneration for their services. However, information asymmetry can leave consumers vulnerable to overcharging by unscrupulous practitioners.

What will constitute ‘fair and reasonable’ costs will require consideration of a variety of factors (see section 4.3.4), such as the proportionality of the legal costs to the nature, importance and value of the matter, the skill and expertise of the lawyers concerned, and whether the costs were reasonably incurred.

This obligation will complement existing regulatory provisions that allow a law practice to recover only fair and reasonable costs in the event of costs assessment.

Question

Do the Taskforce’s proposals in relation to the disclosure and charging of legal costs raise any particular concerns?

Disputes about legal costs

Where a dispute about legal costs does arise, the Ombudsman will have jurisdiction to assist in the resolution of costs disputes involving legal costs up to \$100,000. Where dispute resolution is unsuccessful and the Ombudsman considers it appropriate, it will be empowered to make a binding determination in relation to disputed costs less than \$10,000.

Questions

Should the Ombudsman have the power to deal with costs disputes over \$100,000?

Should parties with a costs dispute of less than \$100,000 be required to seek the assistance of the Ombudsman, or should direct access to costs assessment be permitted? Should costs determinations by the Ombudsman be appellable to a costs assessor?

The Ombudsman has discretion to make a binding determination for matters under \$10,000. Should it be mandatory for the Ombudsman to make such a determination?

Greater transparency in fidelity fund determinations

The Taskforce recognises that some consumers have particularly strong views in relation to the reform of fidelity fund arrangements. However, comprehensive national reform of Fidelity Fund arrangements in Australia is not feasible in the timeframe allocated to the Taskforce’s national reforms (discussed further below under ‘Areas of continued jurisdictional regulation’).

The existing fidelity fund arrangements will be largely maintained, with jurisdictions continuing to administer and manage their own fidelity funds. However, the fidelity fund in each jurisdiction will be required to conform with the provisions of the National Law.

To alleviate a perceived conflict of interest in professional associations making decisions on fidelity fund claims against their members, the National Law requires that decisions on fidelity fund claims be made ‘at arms length from the profession’.

This could be facilitated by the nominated authority establishing an independent committee to perform decision-making functions, for example.

The Taskforce would support the establishment of one national fidelity fund in the future.

Questions

Is the proposal to include a requirement that fidelity fund determinations be made at ‘arms length from the profession’ appropriate? In particular, are there any practical impediments to imposing this requirement, especially in smaller jurisdictions?

Business management and control

Under the National Law (see Part 4.6), the Ombudsman will have the power to conduct ‘compliance audits’, which are general audits of the compliance of law practices with the National Law and National Rules and applicable professional obligations, including the management of the provision of legal services. The Ombudsman will also be empowered to issue ‘management system directions’, which are directions to law practices or classes of law practice to implement management systems that enable the provision of legal services in accordance with regulatory obligations. Law practices that are subject to a management system direction must provide periodic reports to the Ombudsman on the systems and their compliance with the systems.

Under existing regulatory regimes, these powers generally only extend to incorporated legal practices. The extension of these powers to all law practices under the National Law will further enhance consumer protection and confidence in the regulatory system.

Enhanced consumer representation and participation in the regulatory framework

Consumers provide a unique and necessary perspective on the regulatory framework. Consumer involvement encourages consumer confidence in the regulation of the legal profession and entrenches a system that better reflects the needs and interests of consumers.

Consumers and consumer advocates will play a role on the National Legal Services Board, on relevant advisory committees to the Board and by commenting and engaging with proposed amendments to National Rules and the National Law.

Question

Are there additional means by which the role of consumers and consumer advocates in the national regulatory framework could be strengthened?

Co-regulation and preserving the independence of the legal profession

The Taskforce recognises the unique and important role that the legal profession plays within a healthy, democratic society. As legal practitioners are often required to protect the rule of

law and challenge executive power, it is essential that the legal profession remain independent from executive direction or control.

The Taskforce supports a co-operative, co-regulatory approach to regulation, which involves the Courts, government, and the legal profession. This partnership secures the independence of the profession and draws on the profession's essential legal expertise with government involvement ensuring transparency and accountability. This transparency and accountability is essential to consumer confidence in a regulatory system.

Composition of the National Legal Services Board

The appointment process for the members of the proposed National Legal Services Board has attracted significant attention from the legal profession, commentators and consumers.

The National Law provides that members of the Board (of between five and seven members) would be appointed by the Attorney-General of the host jurisdiction on the recommendation of SCAG.

The Law Council of Australia and the Council of Chief Justices would each nominate a panel of three, and one Board member would be selected from each panel. The remaining Board members would be appointed to represent a balance of skills in the practice of law, the protection of consumers and the regulation of the legal profession. The Board members will collectively represent experience and skills in a variety of relevant areas and carry experience of working within both larger and smaller jurisdictions. Board members would not represent particular interests or jurisdictions.

Questions

The Taskforce recognises that the issue of appointments to the Board attracts significantly varied views and particularly welcomes submissions on this issue.

How can the co-regulatory model be best reflected in appointments to the National Legal Services Board? Are there more desirable alternative appointment processes?

Professional conduct rules

The legal profession itself has always strived to ensure high ethical standards of professional conduct to protect the reputation and standing of legal practitioners within the community. The profession has long been involved in developing and enforcing appropriate standards of behaviour for its members and the Taskforce recognises the importance of professional involvement in the setting of such standards.

Significant work has been done by both the Law Council of Australia and the Australian Bar Association in taking a national, uniform approach to conduct rules. The Taskforce is seeking views on the draft solicitors and barristers conduct rules, with the Law Council of Australia and Australian Bar Association, in order to determine their suitability for integration within the national reforms.

The National Law also preserves the ongoing role of the legal profession in the development of National Rules on legal practice, legal profession conduct and continuing professional development. Rules would be prepared by the profession in consultation with the National Legal Services Board, released for public consultation, and submitted to the Board for approval, with the Board subsequently to forward the Rules to SCAG for consideration (section 9.1.3).

Regulatory functions

An important aspect of the co-regulatory system is the performance of regulatory functions by professional associations. The regulatory functions carried out by the profession rather than by government currently differ from jurisdiction to jurisdiction. As noted above, the Taskforce's proposals allow the balance between government and professional regulation to continue to be determined at a State and Territory level, by allowing professional associations to act as local representatives of the Board or Ombudsman, or as delegates of local representatives.

The Taskforce expects that professional associations will be the local representatives of the Board in most jurisdictions, and continue to carry out functions including the granting of practising certificates. The Taskforce would prefer that government bodies be nominated as local representatives of the Ombudsman, to allow complaints functions to be handled independently of the profession. This would allow other functions of the Ombudsman to be delegated to professional associations.

Areas of continued jurisdictional regulation

The Taskforce considers that a number of regulatory areas require ongoing management at the jurisdictional level. Often, this is as a result of the connection of these areas to State and Territory finances. The Taskforce is committed to ensuring that States and Territories will continue to maintain control over important funding programs that are connected with legal profession regulation.

Professional indemnity insurance

The National Law maintains the existing requirement for all Australian legal practitioners to have an adequate minimum level of professional indemnity insurance (PII) cover (Part 4.4). The National Law and National Rules also specify the criteria for establishing a 'complying policy' of PII, and requirements for when and how insurance is to be obtained. The National Rules adopt the national minimum standards developed by the SCAG Joint Working Party on PII.

However, the National Law also makes specific provision (see section 4.4.3) for jurisdictions to continue to legislate to establish PII arrangements within their own jurisdictions.

Question

The Taskforce has aimed to ensure that existing jurisdictional professional indemnity insurance schemes are not interrupted by the introduction of the National Law, and that the existing requirements under those schemes are unchanged. Do the provisions in Part 4.4 achieve those aims?

Fidelity cover

Fidelity cover is a source of compensation for clients who suffer loss as a result of a default by their law practice. Part 4.5 of the National Law sets out requirements for fidelity cover in each jurisdiction, including how claims are to be made, and the process for determining claims.

In addition to nominating a fund that will serve as the 'fidelity fund' in its jurisdiction, the National Law provides that each jurisdiction will nominate an authority (a 'nominated authority') to administer the fidelity fund (see Division 2 of Part 4.5). These nominations are to be made within the Legal Profession National Law Act of each jurisdiction.

This arrangement will allow existing fidelity funds to remain in place, and jurisdictions ongoing flexibility in how the Funds are established and administered. The Taskforce is of the view that, over time, it would be preferable if fidelity cover arrangements could be completely nationalised.

Costs assessment

The process of costs assessment is currently administered by Courts within States and Territories, as a mechanism for resolving disputes between clients and lawyers about costs charged for legal services. The process of costs assessment is separate to the function of costs dispute resolution proposed for the National Legal Services Ombudsman, discussed above.

While the National Law sets out factors that are to be considered in a costs assessment and a range of other matters, it also provides that costs assessment is also to be conducted in accordance with any applicable jurisdictional legislation.

Next steps

Financial and organisational planning

A number of implementation issues remain to be considered by the Taskforce before detailed advice can be given to COAG later in the year. In particular, these relate to:

- funding under the new national system. Some of the Taskforce proposals, specifically those relating to practising certificates and trust accounts, will affect existing regulatory revenue streams. The Taskforce is committed to ensuring that revenue flows to States and Territories, including to State and Territory Public Purpose Funds, will not be affected by the transition to the proposed new national system. The Taskforce will be working over the consultation period to settle financial arrangements that will achieve this aim.

In addition, the Taskforce will further consider arrangements for funding of the new national bodies. Regulatory budget savings generated by the implementation of the new system may contribute toward these new costs.

- organisational restructuring within jurisdictions. One of the key aspirations of the Taskforce has been to facilitate a reduction in the number of bodies involved in regulation of the legal profession. It is expected that, once established, the national bodies can absorb some of the workload of the existing State and Territory regulators, leading to the possibility of rationalising these existing regulators. The Taskforce will give further consideration to how jurisdictions can internally restructure their institutions to best accommodate the national scheme, and to optimise reductions in the regulatory burden and budgetary costs.

Decisions of the Taskforce in these areas will be reflected in the inter-governmental agreement that will be included with the reform proposal when it is resubmitted to COAG in late 2010 for agreement.

Consultation – Regulation Impact Statement

In addition to this Report, the Taskforce has also produced a consultation Regulation Impact Statement (RIS) to assist with understanding the reforms. A final RIS will also be required by COAG.

The consultation RIS follows the format required by COAG when any change to regulatory arrangements is proposed. This format requires identification of the problem to be resolved, an outline of objectives and discussion of possible options in key areas of regulatory change. The Taskforce's proposals have been identified as the preferred options in the conclusion and recommendations section.

A consultation RIS is prepared to obtain views before a final RIS is produced. The Taskforce would be particularly grateful for submissions as to whether stakeholders agree with the Taskforce's proposed options as it is required to provide detail on this feedback in the final RIS. A list of questions for stakeholders is at p 45 of the consultation RIS.

The consultation RIS also attaches an independent report commissioned from ACIL Tasman to analyse the costs and benefits of the proposed reforms. This report projects that there will be substantial benefits arising from the Taskforce's proposals.

Consultation – how to make a submission

Submissions may be addressed to the National Legal Profession Reform Taskforce. Please indicate at the time of making your submission whether you would like it to be published on the National Legal Profession Reform website. Submissions may be sent:

By mail to: Attorney-General's Department
3-5 National Circuit
BARTON ACT 2603

By email to: legalprofession@ag.gov.au

By fax to: 02 6141 2583