

Meeting Outcomes – 20 July 2010

Attendees: Michael Lavarch (Chair), Tony Abbott, Andrew Grech, Joe Catanzariti, Carolyn Bond, Bruce Cutler (on behalf of Robert Milliner), Noela L'Estrange, Barbara Bradshaw, Philip Selth, Rob Cornall, Ro Coroneos, Harold Cottee, Martyn Hagan, Peta Spender, Dudley Stow

Apologies: Robert Milliner, Andrew Phelan, John Briton, Steven Penglis, Murray Tobias

Taskforce members: Stephen Goggs, Louise Glanville

Please note: Members of the Consultative Group were speaking on their own behalf and in their personal capacity. This is a general record of discussions only.

UPDATE FROM TASKFORCE MEMBERS

1. Louise Glanville and Stephen Goggs were present at the meeting to give an update on consultation to date and work on funding the new system.

Independence of the legal profession

2. Stephen Goggs reported that:
 - a) that this issue has been subject to much debate by Chief Justices, Attorneys-General, consumers and other individuals
 - b) concerns with this issue include the role that State and Territory courts will play under the new system and the composition of, and appointment to, the proposed National Legal Services Board (the Board)
 - c) concerns have led to the release of a Taskforce discussion paper on the Board to encourage views about the composition of and appointments to the Board [see discussion below], and
 - d) there are concerns with the appropriateness of SCAG's role to issue policy directions to the Board and to the National Legal Services Ombudsman (the Ombudsman) and the Board's authority to disapprove rules.
3. The Consultative Group noted that:
 - a) care must be taken in distinguishing 'independence of the profession' and 'independence from the profession' from a consumer perspective. Therefore, from a consumer perspective, the Board's independence from the profession will be crucial if it is to have any role in overseeing the Ombudsman
 - b) there is a concern that in-house counsel will not be represented on the Board
 - c) the Taskforce does not favour a representative Board, but a skills-based Board. The Law Council of Australia (LCA) model may enable an appropriate balance and mix of skills
 - d) little detail has been released publicly on the interaction between the Board and its advisory committees. While ideally this is a matter for the Board, the interaction would provide opportunity for wider representation of profession and public communities, and

- e) Board members could be appointed by consumer representatives and representatives from the legal profession and that the Chair could be appointed by a panel comprised of lawyers and consumers.

Question: The Taskforce's discussion paper sets out models for the composition and appointment of the Board. However, in determining which model is most appropriate, it is essential that the role and powers of the Board are established clearly. Is the role of the Board to be a national standard setter or should it have an actual role in the day-to-day regulation of the profession?

Answer: The national authorities (both the Board and Ombudsman) have a role in ensuring national consistency through national standard setting and promoting consistent and uniform outcomes. However, the national authorities will have a call-in power to perform functions traditionally delegated to local authorities. This may be invoked where a matter is likely to set a precedent, may promote national uniformity or may result in actual or perceived conflict of interest (draft National Law, section 1.3.7). This call-in power will not extend beyond powers set out in the National Law and will ensure greater consistency around the country, without creating 'heavy-handed' national authorities.

- 4. The Consultative Group expressed reservations with the call-in powers, particularly as the power, as currently drafted in the National Law, does not distinguish between the Board and Ombudsman and may be extended further than envisaged in the National law.

Independence of the Ombudsman

- 5. Stephen Goggs reported:
 - a) some stakeholders have reservations as to whether the Ombudsman would effectively be an instrument of the Executive if it is to be accountable to SCAG
 - b) that the use of the term 'Legal Services Commissioner' may be more appropriate given the Ombudsman's proposed functions, and
 - c) that delegation of functions will not change the status quo or undermine local authorities.

Funding the new system

- 6. Louise Glanville reported that:
 - a) The Taskforce is collecting data on the breakdown of costs from jurisdictions to determine how current systems are funded. The proposed cost model is a delegated structure, in which most functions are performed by States and Territories. The aim of the reforms is to streamline national bodies, which will focus on consistency and uniformity of the system, rather than the day-to-day running. The reforms will not seek to create large bureaucracies or material duplication of existing models between States and Territories or the Commonwealth.
 - b) The Taskforce will meet over the coming weeks to further consider funding. The three key areas that will be addressed include:
 - 1. cost of infrastructure
 - 2. price of practising certificate and admission fees, and
 - 3. a funding formula for redistributing interest from single national trust accounts.

- c) It is expected that the final cost for the national bodies will not depart from the estimate in the ACIL Tasman Report and that it may actually end up being lower. However, it is also expected that it will take time to realise the full extent of savings and efficiencies created by the reforms.

7. The Consultative Group noted:

- a) a strong desire for further details on funding as comments on proposed formulas or models will be made against a backdrop of understanding costs and how the system is to be funded, and
- b) that the ACIL Tasman Report was provided early in the piece.

Question: The Taskforce has sought information from jurisdictions about costs of current regulatory frameworks and information about the creation of a single national trust account. After the Taskforce has assessed this information, will they seek a further review from ACIL?

Answer: The Taskforce is discussing both the substance and the process involved in funding the regulatory system. No decisions have been made about seeking further reviews.

Question: Has the Taskforce consulted with multi-jurisdictional practices in considering uniform practising certificate fees or the allocation of interest from single national trust accounts?

Answer: The Taskforce has reviewed the existing structure of practising fees in Australia, which differs considerably across the jurisdictions. From this review, the core components of practising certificate fees will be determined, which will enable the development of a funding formula. The Taskforce has done an assessment on the number of multi-jurisdictional firms practising in Australia to get a sense of how many firms are likely to take up the option of a single national trust account. This information is assisting in determining funding formulas.

Question: In developing an estimate of costs, is the Taskforce taking into account the different and varying regulatory functions across the jurisdictions?

Answer: Yes. For example, the Taskforce considering staffing issues, modelling and other evidence to determine what might be required in giving effect to the national system.

Question: If functions are more expensive than expected, will the Taskforce make changes to the proposed regulatory system?

Answer: The Taskforce anticipates the new regulatory system will fit within existing funding.

Question: Do initial estimates take into account the time and nominal value of volunteer work?

Answer: The Taskforce is aware of this issue and will be considering this matter more closely.

Admissions

8. The Consultative Group noted:

- a) that the role of Supreme Courts should be properly preserved
- b) potential membership of an admissions sub-committee of the Board and the capacity for local input to the admissions process
- c) queries as to how admission ceremonies and the Australian Legal Profession Register will work in practice, and
- d) that there could be practical problems with a centralised system of admission such that it may not be viable.

Legal Costs

9. Stephen Goggs reported on whether the requirement to charge no more than fair and reasonable costs is appropriate and whether such a requirement would increase the regulatory burden on lawyers.
10. The Consultative Group noted:
 - a) that managing legal costs is challenging and questioned whether lawyers who overcharge clients (ie more than fair and reasonable) should automatically be subject to discipline
 - b) a view that the current test of “grossly excessive” should apply to determine whether the lawyer has charged costs that are more than fair and reasonable, as supported by the Large Law Firm Group’s principles for the regulation of legal costs, and
 - c) further information on costs will be contained in the final Regulatory Impact Statement.

Representation of small jurisdictions on the Board

11. Stephen Goggs noted the need to ensure an appropriate mix of representation on the Board, including from small jurisdictions, which was raised in the consultation process.

Consumer engagement

12. Stephen Goggs reported that:
 - a) the intensive consumer consultation process continues, although some consumers would have preferred more time to consider the proposals, and
 - b) there has been a relatively high number of responses to the consumer survey.

Consultation

13. Stephen Goggs reported that the Taskforce has ruled out a second public consultation period. However, targeted consultation with stakeholders on particular issues may be undertaken.
14. The Consultative Group noted that they would like to review the National Law and Rules after the incorporation of comments made during the consultation period.

TASKFORCE’S PAPER ON THE COMPOSITION AND APPOINTMENT OF THE NATIONAL BOARD

15. The Consultative Group noted:
 - a) That in response to comments on the independence of the Board, the Taskforce has issued a discussion paper which considers the role of the Board and the issue of appointment of members. This paper details six models, which differ in three key areas:
 1. who appoints the members to the Board
 2. the number of members on the Board (raised by small jurisdictions, who question whether seven Board members is the right number, noting that nine would allow more equitable representation), and
 3. the process of appointing members – for example, through the use of a selection panel.
 - b) how the variation across the models largely concerned the size of the Board and appointment of the Chair, and

- c) that some members believe that the Taskforce model, which proposes the appointment of one member who is selected from a panel of three nominees, is still worth considering.

16. The Consultative Group affirmed, by majority, its support for the LCA model, as discussed at the previous Consultative Group meeting on 1 July 2010.

DISCUSSION OF THE LARGE LAW FIRM GROUP'S COSTS PRINCIPLES PAPER

17. Michael Lavarch reported that the Large Law Firm Group (LLFG) has developed a summary of principles for the regulation of legal costs. The document builds on discussions at the last Consultative Group meeting on 1 July 2010 and is to be treated as a submission from the LLFG.

18. The Consultative Group noted that:

- a) the LLFG states that the legal profession should be treated no differently from other professions or service providers, except to the extent that different treatment is compelled by the special duties of lawyers
- b) in financial services, telephone companies and energy companies, there are enforceable obligations for obtaining informed consent from clients and the industry ombudsman are able to make binding determinations of up to \$250 000. Additionally, fairness and reasonableness of costs is not an unusual requirement in other industries. Some members of the Consultative Group believe that if the regulation of service providers is to be consistent, these principles should apply to the legal profession as well
- c) the draft National Law provides that the profession should take all *reasonable* steps to satisfy itself that clients understand the information provided by their lawyers
- d) when developing the legal cost principles, consumer protection provisions should be considered
- e) some members believe that the profession should obtain retail clients' informed consent when providing a service, but that sophisticated clients should be exempt from all legal costs requirements, including costs assessment regimes, and
- f) while the draft Law makes some attempt to separate consumer and disciplinary outcomes, it may not go far enough. Although not all matters lead to disciplinary action, it may automatically be required in certain cases, such as with repeated unprofessional conduct.

19. The Consultative Group supported, by majority, the outline of principles in the LLFG's paper.

20. A minority of the Consultative Group expressed concern that the paper does not adequately bring lawyers into line with a range of other service industries.

OTHER BUSINESS

Minutes from 1 July and 18 May meetings

21. The Consultative Group agreed that members will submit any written comments or changes to the minutes of the 1 July and 18 May meetings to Marjorie Todd over the next week. If required, major issues raised will be discussed at our next meeting.

Forward timeframe for the project

22. The Consultative Group queried how implementation of the reforms would be tested and whether forthcoming elections (CTH, NSW, VIC) might impact upon anticipated timeframes.
23. There is no firm date on when the draft National Law will commence and be implemented. However, the Taskforce is on track to report back to COAG at the end of this year.

Auditing and compliance power

24. At the 1 July meeting, Noela L'Estrange, John Briton and Harold Cottee agreed to collaborate on a paper proposing appropriate rewording of the auditing provisions. This paper will be sent to Marjorie Todd for distribution in the next week or so and will be dealt with out of session.

Publication of the Consultative Group key issues table

- 25. The Consultative Group agreed to review the consolidated key issues table with a view that the table will be published on the Attorney-General's Department Consultative Group website.**

NEXT MEETING

26. The Consultative Group will meet again after the Taskforce's discussion on funding and possibly the Taskforce paper on Board composition and appointment. The dates of both meetings are yet to be determined.