



**ATTORNEY-GENERAL
HON ROBERT McCLELLAND MP**

**ADDRESS TO THE
JOHN CURTIN INSTITUTE FOR PUBLIC POLICY
'NATIONAL LEGAL PROFESSION REFORM'**

CHECK AGAINST DELIVERY

PERTH

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

- Professor Jeanette Hacket, Vice Chancellor, Curtin University of Technology;
- Professor John Phillimore, Executive Director, The John Curtin Institute of Public Policy;
- Distinguished guests

Thank you for your welcome this morning.

Congratulations to the John Curtin Institute of Public Policy which has, in just five short years since its founding, encouraged broad dialogue and promoted excellent public sector research, teaching and debate.

I am very happy to contribute to the open discussion that characterises the important work of the Institute.

Given that it is Law Week here in Western Australia, I think it is fitting to raise a number of issues about the regulation of the Australian legal profession and the reform project that is being pursued by the Rudd Government.

Let me begin by setting the scene as to why change is overdue and what steps we're taking to achieve this reform.

The Australian Legal Profession

I should think that those working in law would be loathe to describe themselves as part of an 'industry', yet the fact is that the 'law' is very much a wealth creator and significant economic contributor in its own right.

In 2007-2008, for instance, legal services contributed an estimated \$11 billion to the Australian economy and employed some 100,000 people.

It is a well established view that the legal profession has been quite successful in evolving its activities and business to keep pace with the modern economy.

The same, however, cannot be said for the regulation and governance structures that underpin the profession.

In an integrated national economy, these structures have comprehensively failed to adapt to modern demands and expectations.

Apart from the mere economic imperative, Governments have a special interest in addressing this situation. This is because of the unique role the legal profession plays in maintaining our democratic institutions. The practice of law is central to upholding the law and facilitating access to justice.

It is therefore critical that we ensure the legal profession is set up to continue to deliver on this goal. At the same time, it is crucial that consumers of legal services and the community in general can have confidence in the profession.

With the judiciary, legal practitioners are the custodians of our legal system.

Current Regulatory Framework

Currently, States and Territories are responsible for regulating the legal profession.

They look after issues such as requirements for entry into the profession, practising entitlements and conditions, the form and manner in which practise is conducted, complaints handling and discipline.

This disparate approach has led to some 55 different regulators each overseeing the practice of law within Australia. Legislation regulating the legal profession in each jurisdiction ranges anywhere from 130 pages to almost 900 pages.

Overall, consumers, lawyers and firms have to deal with nearly 5,000 pages of regulation. On top of this there are a range of other regulations which national firms have to comply with. I

have not met one lawyer that has read, let alone digested, this massive amount of material that regulates their practice.

Recent reports indicate that Australia's nine largest national law firms waste nearly \$15 million each year just duplicating procedures for each jurisdiction's requirements.

That's hardly an intelligent or sustainable outcome for any profession.

This unnecessary complexity and lack of uniformity does not bring better regulation – just more, often overlapping, regulation.

What it does bring, however, is more cost and red-tape for the profession, which inevitably gets passed on to the consumer.

Importantly, it also damages our international competitiveness by impeding international firms from entering the Australian legal services market – a necessary pre-condition to our lawyers building links and entering the international market.

Goals of Reform

There is increasing evidence to suggest that ordinary Australians find their dealings with the profession to be confusing, complex and, at times, intimidating.ⁱ

This is a key issue that we need to tackle in the reform process.

Many consumers do not have a clear, or even basic, picture of their rights and responsibilities when engaging a lawyer, nor are many aware of how to go about lodging a complaint should something go wrong.

The June 2009 Roy Morgan survey of the *Most Ethical and Honest Professions* placed lawyers 14th on a list of 30 professions, with a rather dismal 30 per cent level of public confidence. ⁱⁱ

Clearly, public opinion and experience is not helped in any way by the inherent inconsistencies in areas such as complaints-handling and discipline.

In February, at the request of the Commonwealth, the Council of Australian Governments (COAG) extended its commitment to regulatory reform across a wide range of Australian industries to include the legal profession.

Following COAG's April meeting, the Government established a specialist Taskforce and Consultative Group to prepare uniform laws for the regulation of the legal profession for COAG consideration within 12 months.

So, what do we hope to achieve from this process?

The point I want to emphasise is the need for not only uniform regulation, but better regulation.

We need to ensure arrangements are flexible and robust in order for them to be enduring and to complement the work that can be done by the profession itself. Effective regulation means that ultimately the Government can step back and further involve the profession in the regulation of its own industry.

Through this project we are looking for three other principal outcomes.

First, a system that promotes an effective and accessible system of justice. We need to ensure, for example, that lawyers maintain appropriate ethical and professional standards.

Secondly, we need an efficient and effective system of regulation that operates on a national basis. It is essential that the regulatory framework under which lawyers operate continues to evolve in ways that support and foster a truly national legal services market.

Finally, consumer protection should be enhanced.

It is an unfortunate reality that there is often an information asymmetry between lawyers and their clients. Because of this, it can be difficult for clients to determine the cost implications of their decisions and to know whether their lawyer is acting in their best interests.

This is why Government involvement is so important in this area – to achieve a comprehensible, workable and effective regulatory framework.

Consumer protection could be enhanced, for example, through greater transparency in billing standards. It is generally recognised that pro-forma computer generated disclosure statements are all but meaningless and give little indication of actual costs that are likely to be incurred.

There should also be a clear, accessible and affordable complaints resolution mechanism that provides everyone with the same level of protection, no matter where they live in Australia.

Such measures will play a critical role in our efforts to improve access to justice by helping consumers make informed decisions about how to progress their legal affairs.

Areas of Reform

This leads me to one of the difficult issues that the Taskforce is going to have address – the role of the profession in complaints-handling.

The legal profession has a long history of involvement in its own regulation.

Self-regulation in this context can provide tangible benefits. Professional bodies bring technical expertise to regulation, they can encourage high-levels of compliance and can often be cost effective and relevant in the provision of services.

There is, however, widespread recognition that self-regulation can be a problem because of the dual role professional associations play as regulator and advocate.

For example, in the Northern Territory and the Australian Capital Territory consumer complaints are heard by professional associations – whereas other States have established separate Legal Service Commissions to handle complaints.

I am of the view that being able to draw on the expertise of professional bodies when determining standards would be highly beneficial, but when it comes to complaints, for

example, the ability for decisions to be made at arm's length from the profession is very important.

If the profession thinks it through they will appreciate that the concept of Caesar judging Caesar is anathema to the Australian sense of fair play.

Another issue that the Taskforce will need to address is that of fidelity or guarantee funds.

The purpose of such a fund is to compensate clients where a law practice has defaulted with trust money or property held on behalf of the client.

Although trust account fraud is rare in Australia, when it occurs, it undermines trust in the profession as a whole and is one of the regulatory issues that is most frequently raised with me.

From a consumer perspective, the rules aren't clear and they aren't consistent.

Indeed, regulations in some jurisdictions require consumers to jump through a number of hoops when they have been the victims.

Clearly there is a need to emphasise that the initial and primary focus should be on attempting to recoup from the defrauder. But this expectation should not be unrealistically applied. To do so can compel the victim to suffer additional trauma in pursuing a fruitless goal.

In short, in framing new national regulations, we need to keep in mind the experience the average punter has with the system and we need to consider how we can make that better.

A good test is to ask whether lawyers would be willing consumers of legal services.

Currently, I don't think many would.

Options for Reform

The mandate for change set out by COAG is clear – the status quo is not satisfactory.

Today, I am pleased to announce the release of initial proposals by the National Legal Profession Reform Taskforce in their regulatory framework paper.

To achieve uniformity, the Taskforce has proposed the establishment of a National Legal Services Board.

Rather than rely on a constitutionally difficult referral of powers, it is proposed that the Board be a joint State and Territory entity. In my view, this represents a sensible way forward that allows for real reform to happen immediately. It also avoids parochial turf wars stifling the reform process.

Essentially, the Board would be a single standard-setter for all lawyers in Australia and would maintain a national register.

It would be a small body made up of key experts from differing backgrounds including legal practice, consumer protection and the regulation of professions.

I agree strongly with Vic Marles, Victoria's outgoing Legal Services Commissioner, that we need consumer participation in this process. It is entirely appropriate that consumers have a say in setting standards for the profession.

There would also be capacity for the Board to establish advisory committees to assist it in developing national rules.

The Taskforce has also proposed that the Board have an operational, decision-making role for making recommendations to the Courts about eligibility for admission and for granting practising certificates. These powers could conveniently be delegated to relevant State and Territory bodies, including to professional associations – again, preserving their ongoing relevance.

You may have also seen recent discussion in relation to a National Legal Services Ombudsman.

I think this is a significant proposal worthy of further consideration.

A national Ombudsman could have the power to consider complaints and decide whether they are consumer disputes or disciplinary matters. Where they are consumer disputes, the Ombudsman needs flexible powers to resolve issues quickly and without formality.

As part of the Government's broader access to justice agenda, I want to ensure an effective and accessible system of justice where people are able to resolve their disputes quickly, efficiently and fairly.

The legal profession should be setting an example in this area, not falling behind the consumer protection mechanisms that currently exist in other industries.

The bottom line is that transparency builds confidence, confidence brings in work – and the justice system operates more effectively.

The proposals of the Taskforce warrant full public consideration, not only from the Consultative Group but the public at large.

I look forward to hearing a range of views about the proposals from the profession, regulators, consumer groups, courts, academia and importantly, the community.

Conclusion

Australia now operates within a vastly different legal and economic landscape to that under which the present system of legal profession regulation developed.

Australian lawyers and consumers no longer operate in just one State or Territory.

To deliver a seamless national economy we can no longer justify such disparate regulation for just one profession.

If other professions in Australia can be regulated through a simple, unified, national structure there is no reason why the Australian legal profession should be an exception.

A better approach is required if we are to remain successful in the long-term – and given the wide variety of interests involved, we must think creatively about operating together in a Federation.

In this regard, our goals are not insignificant tasks. They are complex and require real application and insight to effectively create a shift in the way the legal profession operates.

Given the undeniable economic imperative, the collective political will of COAG and good will from all stakeholders, I am sure we will be able to achieve an outcome that will deliver significant tangible benefits to not only the profession, but the Australian community in general.

Thank you.

ⁱ WA Law Reform Commission, *Review of the Criminal and Civil Justice System – Submissions Survey*, 1997. See <http://www.lrc.justice.wa.gov.au/2publications/reports/P92-CJS/finalreport/foreword.pdf>

ⁱⁱ Sighted on 31.08.09 at <http://www.roymorgan.com/news/polls/2009/4387/>