

Discussion paper

Composition and appointment of the National Legal Services Board

On 14 May 2010, the National Legal Profession Reform Taskforce released for public consultation its draft National Law and National Rules providing for uniform national regulation of the legal profession. The public consultation period concludes on 13 August 2010.

The model for the composition and appointment of the National Legal Services Board (National Board) contained in the draft National Law has attracted very high levels of interest since the public consultation period commenced. In response to this, the Taskforce issues this paper seeking views on a range of models.

The role of the National Legal Services Board

The National Board will be established with the following objectives:

- to ensure the efficient, targeted and effective national regulation of the legal profession and the maintenance of professional standards
- to address the concerns of clients of law practices through the regulatory system and provide for the protection of clients of law practices, and
- to ensure the Australian system is at the forefront of regulation of legal professionals.

Under the current proposal, the National Board will play a fundamental role in setting National Rules governing the regulation of the legal profession. The National Rules will contain uniform regulatory and professional obligations addressing matters that are currently contained in legislation, regulations and statutory rules in most jurisdictions in Australia.

In addition, the National Board will perform a number of specific regulatory functions, including:

- 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)
- granting and renewing Australian registration certificates for foreign lawyers
- approving, where necessary, professional indemnity insurance policies as ‘complying policies’ for the purposes of the National 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, and
- receiving and maintaining information about Australian lawyers and Australian-registered foreign lawyers through the Australian Legal Profession Register.

The Taskforce model

The Taskforce, through the draft National Law, proposes the establishment of a national co-regulatory scheme for the legal profession. Co-regulation has been established in Australian States and Territories for many years and is reflected in legislation regulating the legal profession in those jurisdictions. A co-regulatory scheme draws on the expertise of government, the legal profession, the courts and independent regulators in developing and implementing regulation.

The Taskforce recognises that an effective co-regulatory system needs to incorporate a variety of perspectives, with a view to maintaining the confidence of the legal profession and the community in the regulatory system. The Taskforce included the following model for the composition and appointment of the National Board:

- one member recommended by the Standing Committee of Attorneys-General (SCAG) from a panel of three persons nominated by the Council of Chief Justices
- one member recommended by SCAG from a panel of three persons nominated by the Law Council of Australia, and
- no more than five members recommended by SCAG on the basis of their expertise in one or more of the following areas: the practice of law, the protection of consumers or the regulation of the legal profession.

A member of the National Board is to be appointed Chair on the recommendation of SCAG.

The Taskforce model provides that the members of the National Board are to be appointed so that, as far as practicable, they collectively have experience in large and small jurisdictions and a balance of expertise. Clause 2 of Schedule 1 of the National Law deals with the appointment and composition of the National Board.

Given the National Board's function in developing the National Rules (which have the force of law) the Taskforce considered that membership should reflect an appropriate balance between the legal profession who will be the subject of regulation and those with experience in consumer protection and professional regulation. To achieve this balance, the Taskforce proposed that SCAG nominate the members of the National Board.

Issues raised in consultation to date

As noted above, the Taskforce's model has attracted significant comment over the consultation period to date. The major issues that have been raised include:

1. Who should appoint the members of the National Board?

The Law Council of Australia, several Chief Justices, some legal practitioners and other commentators note that independence of the profession rests, amongst other things, on the principle of the Rule of Law and the need for the legal profession (and the persons appointed to the judiciary, who are largely drawn from the legal profession) to be protected from interference or the risk of interference by government in performing their duties. They have suggested that the independence of the legal profession would be better safeguarded by a model where the majority of National Board appointments are not made by the Executive.

The Taskforce recognises that there may be other views as to which bodies or persons should be responsible for the appointment of National Board members.

2. *What skills, experience and qualifications should be reflected in the National Board's membership?*

Currently, the National Law provides that SCAG's nominees would be appointed on the basis of their expertise in the practice of law, the protection of consumers, or the regulation of the legal profession. The National Law does not otherwise specify whether a member may, or may not, have legal qualifications or be a member of the profession.

Some submissions received by the Taskforce suggest that the majority of the National Board should be members of the legal profession. Others consulted to date have expressed varying views, with some expressing a strong preference for the National Board to consist of a majority of non-lawyers whilst others have proposed a Board consisting of half lawyers and half non-lawyers.

The National Board should account for a range of interests and have sufficient capacity to acquit its functions effectively. It may also be appropriate for other skills sets to be represented on the National Board. For example, some other industry regulation board models make specific provision for consumer representation and financial expertise.

3. *Which body or person should have the power to nominate the Chair of the Board?*

Suggestions to date have included the Council of Chief Justices and SCAG. Alternatively, the National Board could appoint the Chair from its own membership or recruit its own Chair.

Other issues for consideration

The Taskforce recognises that any model for the National Board's composition and appointment must take into consideration the broader legislative framework in which the Board will operate. In addition to direct participation on the National Board, it may be possible to accommodate the varied interests of the legal profession and other stakeholders by adopting other structures, requirements or checks and balances that ensure appropriate representation, consultation and exercise of regulatory power. For example, the National Law provides that the National Board must establish at least one advisory committee to provide advice to the Board in the exercise of its functions and outlines the relevant expertise and experience the committee members should hold (Clause 25, Schedule 1). Alternatively, independent advisory committees could be established to directly represent the interests of different stakeholders.

Models for consultation

The Law Council of Australia proposes an alternative model for the National Board which reflects its view of the issues outlined above. The Law Council model is summarised in **Attachment A**. The Taskforce has also set out in **Attachment A** other models, including its own, as options for the composition of the National Board. These models are put forward for the purpose of consultation.

The Taskforce welcomes submissions on these models and the issues raised above.

Attachment A — Models for the National Board

Model	Board composition	Comments
A	<ul style="list-style-type: none"> • One member appointed on the recommendation of the Standing Committee of Attorneys-General (SCAG) from a panel of three persons nominated by the Council of Chief Justices; and • One member appointed on the recommendation of SCAG from a panel of three persons nominated by the Law Council of Australia; and • No more than five members on the recommendation of SCAG on the basis of their expertise in one or more of the following areas: the practice of law; the protection of consumers; or the regulation of the legal profession. <p>*A member appointed Chair on the recommendation of SCAG.</p>	<p>This is the model currently contained in the draft National Law.</p> <p><i>Possible variation:</i> require SCAG to consult the Council of Chief Justices on all appointments (including those nominated by the profession) and obtain concurrence to the appointment of the Chair (who must have legal qualifications, but need not be nominated by the profession). This is loosely based on the English model.</p>
B	<ul style="list-style-type: none"> • Two members nominated by the Law Council of Australia • One member nominated by the Australian Bar Association • One member nominated by the Council of Chief Justices*, and • Three members nominated by the SCAG. <p>*Nominee of the Council of Chief Justices would be the Chair.</p>	<p>Model proposed by the Law Council of Australia.</p> <p><i>Possible variation:</i> Chair elected by members of the Board.</p>
C	<ul style="list-style-type: none"> • One member nominated by the Council of Chief Justices • One member nominated by the Law Council of Australia • One member nominated by the Australian Bar Association • Two legal practitioners nominated by SCAG, and • Two lay persons nominated by SCAG. <p>*Chair appointed by SCAG.</p>	<p>Requiring SCAG to nominate two legal practitioners would ensure that the majority of members are legal practitioners, but would promote an appropriate mix of skills on the Board.</p> <p><i>Possible variation:</i> Chair elected by members of the Board.</p>
D	<p>A nine member Board comprising:</p> <ul style="list-style-type: none"> • Two members nominated by the Law Council of Australia • One member nominated by the Australian Bar Association • One member who is a judge or ex judge, nominated by the Council of Chief Justices • One member who is a dean of a law school, and • Four members nominated by SCAG. <p>*Board elects the Chair from among its members.</p>	<p>The majority of members would have legal qualifications, but this composition would reflect a broad range of legal stakeholders.</p>
E	<ul style="list-style-type: none"> • Three members nominated by SCAG • Two members nominated by the Law Council of Australia • One member nominated by the Australian Bar Association, and • Chair recruited and appointed on the recommendation of the Board. 	<p>Based upon the Financial Services Ombudsman.</p>
F	<p>A selection panel appointed by SCAG in consultation with the Council of Chief Justices, the Law Council of Australia and the Australian Bar Association appoints seven members of the Board who, in the opinion of the selection panel, have the skills and experience required by the National Law.</p>	
<p>Note 1: Under each model, members nominated by SCAG would be nominated on the basis of their expertise in one or more of the following areas: (i) the practice of law; (ii) the protection of consumers; or (iii) the regulation of the legal profession.</p> <p>Note 2: It is proposed that it remain a requirement that members are to be appointed so that, as far as practicable, they collectively have experience in large and small jurisdictions and a balance of expertise.</p> <p>Note 3: It is expected that an odd number of members will sit on the Board regardless of the model for appointment or its composition.</p>		