

Executive director's report

Philip Selth OAM



Executive Director Philip Selth OAM

National practice reform

For the past few years I have been reporting on progress (or lack of it) with the National Practice Model Laws Project. I began my 2007 – 2008 report on the project thus: 'As at 30 June 2008 all but South Australia has enacted model legal profession legislation to establish similar legislation governing the legal profession across Australia.' Unfortunately, the only change that needs to be made to this sentence is to substitute 30 June 2009 for 30 June 2008. However, the failure of the South Australian Parliament to enact the model legislation was not the only problem facing this project. For a range of reasons it was taking far too long to 'tidy up' the legislation in each state and territory to remove inconsistencies across jurisdictions stemming from local policy and administrative arrangements that remain impediments to national practice. There are also matters that were put to one side for further consideration once the model legislation was in place.

The Bar Association raised with both the New South Wales and federal attorneys-general ways in which the major 'bumps in the road' to a uniform national regime might be removed. The Law Council, too, raised its concerns with the federal attorney-general.

In February 2009 the Council of Australian Governments (COAG), which comprises the prime minister, state premiers, territory chief ministers and the president of the Australian Local Government Association, formally agreed that legal profession regulation would be added to its microeconomic and regulatory reform agenda.

On 30 April 2009 the prime minister and the federal attorney-general announced that COAG had agreed on 'a plan to achieve national regulation of the Australian legal profession'.

COAG has agreed that:

- draft legislation providing uniform laws regulating the legal profession across Australia be prepared for consideration by COAG within 12 months;
- a specialist taskforce be appointed by the attorney-general to make recommendations and prepare the draft legislation; and
- a consultative group be appointed by the attorney-general to advise and assist the taskforce.

The taskforce comprises:

- Roger Wilkins AO - secretary, Commonwealth Attorney-General's Department (chair);
- Bill Grant OAM - secretary-general, Law Council of Australia;
- Laurie Glanfield AM - director-general, NSW Attorney General's Department;
- Mr Steven Goggs, acting chief executive, ACT Department of Justice and Community Safety; and
- Louise Glanville - executive director, Victorian Department of Justice.

The Consultative Group is chaired by the Hon Michael Lavarch, professor of law at Queensland University of Technology, a former federal attorney-general and former secretary-general of the Law

Council of Australia. Members of the Consultative Group include the Hon Justice Murray Tobias AM RFD, Supreme Court of New South Wales and presiding member of the New South Wales Legal Profession Admission Board (and a former president of the NSW Bar Association); Joe Catanzariti, president, Law Society of New South Wales and partner at Clayton Utz; and me.

The mandate for the taskforce undertaking the reform project is very broad. The taskforce is considering all aspects of the existing system of regulation of the legal profession, including education, admission and practice with the goal of harmonising a single national regulatory framework.

The taskforce aims to produce draft legislation and to make recommendations on regulatory structures for the uniform regulation of the legal profession across Australia by 30 April 2010. The intention is to deliver '(a) a national legal profession and a national legal services market through simplified uniform legislation and regulatory standards; (b) clear and accessible consumer protection, so that consumers have the same rights and remedies available to them regardless of where they live; and (c) a system of regulation that is efficient and effective.'

No one can reasonably cavil with the stated intention. The 'bumps in the road' need to be removed - and the road kept in good repair. There must be national standards, for example, for admission, trust accounts, professional indemnity insurance and fee disclosure. There is no justification for different entry standards into either branch of the profession being applied in different jurisdictions. What constitutes professional misconduct or unsatisfactory professional conduct should be uniform across Australia.

However, there are a number of important and complex issues that will need to be addressed before the intention can be met. The important role of the Supreme Courts in the admission of legal practitioners and regulation of the

profession needs to continue. Every person admitted is an officer of the Supreme Court. The legal profession must remain an integral part of whatever regulatory system is to be introduced. A centralised regulatory system, which would inevitably cause delays and increase costs borne by the profession, would benefit neither the profession nor, more importantly, its clients. Nor is there merit in a system of regulation that is administered by people with limited knowledge of the day to day realities of legal practice or who are physically located in another jurisdiction. The enormous contribution being made now by the profession to its administration needs to be acknowledged and preserved. The important role of the bars and law societies in the administration of the profession, their contribution to the work of the courts and to the maintenance of the rule of law, working in a federal system, must be acknowledged.

A centralised regulatory system, which would inevitably cause delays and increase costs borne by the profession, would benefit neither the profession nor, more importantly, its clients.

There have been suggestions by some that the COAG project is justification for the present federated model of the Law Council being replaced by a national model with the state and territory bars becoming some form of 'chapter' of the Law Council. While such a national model for the profession's peak representative body may evolve over time, the forced imposition of such a model would inevitably see the demise of the Law Council.

As at 30 June 2009 the Consultative Group had yet to meet. The various possible models to form the basis of the proposed legislation being developed by the taskforce have yet to be published.

National Barristers' Rules

As I noted in the 2007- 2008 annual report, the Australian Bar Association, of which each state and territory bar is a constituent body, has as a major project the development of a uniform set of Rules for all bars. The benefits of an identical set of Rules that apply across Australia are obvious. The development of these Rules is properly the role of the profession, not one to be picked up by default by some government agency.

At the end of 2008 the president of the Australian Bar Association, Tom Bathurst QC, the Bar Association's senior vice president, appointed a Working Party comprising Michael Colbran QC of the Victorian Bar, Jennifer Pearce, the Bar Association's then director, legal (and now director, professional conduct) and myself to work with each bar to come up with a draft set of national Rules. Each bar strongly supported the preparation of

the proposed new Rules and was quick to agree to common wording for most of the Rules. The few 'policy' differences were identified and discussed at meetings of the Australian Bar Association's Council.

There were two reasons why this project has been so successful to date – and that there is no apparent reason why it will not be successfully concluded in the near future. First, the amendments to the various Rules are for the most part of an editorial nature only. The few 'policy differences' that were identified in the early stages of this project, when carefully considered by the ABA Council, have generally proved to be either differences that should not have existed, or differences which can be accommodated.

The second reason was the extraordinary amount of co-operation and good will the Working Party encountered as it worked its way around each bar discussing how best a national uniform set of Rules could be achieved.

At the time of writing, it is very likely that before the end of the 2009 calendar year the ABA's proposed new set of uniform Rules will be formally submitted to the state and territory bars for consideration. Each bar will then consult its members. After that, the intention is that each bar will adopt as its Rules the new uniform Rules, albeit with a few minor differences required by, say, state legislation. This project is an excellent example of how different organs of the legal profession can work together to achieve a national purpose.

Section 55D of the Judiciary Act 1903

In my report for 2005 – 2006, I noted that there was a serious flaw in the national practising certificate regime. This is s 55D of the *Judiciary Act 1903*, enacted when there was no ACT (and Norfolk Island) law dealing with legal practice. The effect of this provision is that it is at least arguable that a person whose name is on a supreme court's or the High Court's roll of lawyers is entitled to practise in a federal court (including the High Court of Australia) without holding a practising certificate.

This problem, which unfortunately is not simply a hypothetical problem, has been raised by the Bar Association with both the former and current federal governments. There was general agreement that the Act needed to be brought up to date, but doing so was not a legislative priority.

On 3 December 2008 the *Law and Justice Legislation Amendment (Identity Crimes and Other Measures) Bill 2008* was introduced into the House of Representatives. As the Parliamentary Library noted in *Bills Digest no. 89 2008 – 09*, one of the Bill's key amendments was to repeal s 55D of the

Executive director's report

Judiciary Act. At the time of writing this report, the Bill had passed the House of Representatives and is awaiting debate by the Senate.

The Australian Taxation Office's secrecy provision

As I noted in last year's report, since November 2000 the Bar Association has been endeavouring to persuade the Australian Taxation Office and relevant Commonwealth ministers to seek parliamentary approval to an amendment to section 16 of the *Income Tax Assessment Act 1936*. The aim is to allow the ATO to provide the association with *publicly available information* (for example, court records) about action it has taken against those few barristers who have abused the taxation laws to the detriment of both the community and the profession. Unless the association is given the information, the first we often know is when the details appear on the front pages of the newspapers. We know from bitter experience that the damage that sort of publicity causes, to both the reputation of the barrister concerned and the bar as a whole is, incalculable.

In August 2006 the Treasury commenced a review of the secrecy and disclosure provisions in the taxation legislation, about which the association made a submission.

In March 2009 the then assistant treasurer released for public comment an exposure draft *Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009* proposed to implement a single and consolidated framework to govern the protection and disclosure of taxpayer information received by the Australian Taxation Office in the course of administering the taxation laws. It is now proposed that 'information that is lawfully available to the public can be disclosed regardless of the source of the information'. The Explanatory Material that accompanied the draft Bill gave the following example of how the new secrecy provision would operate in this area.

The New South Wales Bar Association has a statutory responsibility under the *Legal Profession Act 2004 (NSW)* to satisfy itself that a barrister is a fit and proper person to hold a practising certificate. It is not an offence for a taxation officer to disclose to the New South Wales Bar Association that a NSW barrister has been convicted in an open court. However, the ATO would not be able to supplement that information with, say, a copy of the barrister's tax return, which was not available to the public.

This is exactly what the Bar Association has been seeking since November 2000.

In August 2009 the assistant treasurer issued a media release advising that the Australian Government intended to introduce legislation to standardise the tax secrecy laws into a single, standard piece of legislation in the spring sitting of parliament, that is, before the end of 2009.

The Law Council of Australia

The Bar Association is a constituent body of the Law Council of Australia. The president is a director of the Law Council.

In last year's report I expressed optimism about the Law Council's future. My optimism may have been a little premature.

In previous reports I have indicated that the role and future of the Law Council has at various times in recent years been unsettled. In last year's report I expressed optimism about the Law Council's future. My optimism may have been a little premature. The Law Council has commissioned yet another external review of its governance arrangements. The Executive of the Law Council was recently increased from five members to six. The three new directors elected during 2008-2009 were solicitors. There is only one barrister member of the Executive.

The Law Council and the Australian Bar Association are discussing how matters of particular concern to the bars might be better addressed by the Law Council (the agenda for Law Council meetings is often dominated by matters primarily of interest to the solicitors' branch of the profession), how the LCA might better draw upon the 'intellectual resources' of the bars and how barrister directors might be more able to contribute to the senior leadership of the Law Council, given the restraints of their being sole practitioners and the considerable demands on their time as members of the Law Council's Executive.

Procurement of federal government legal work

I noted in last year's report that the association had raised, with both the previous federal government and the current government, ways in which costs of providing some legal services to the Commonwealth could be reduced by recognising the cost competitiveness of the efficient barrister, particularly in the area of advisory work and in the conduct of legal proceedings. Ministers in both

governments have acknowledged the merit in these proposals.

In March 2009 the attorney-general announced a broad review into the procurement of legal services following the significant increase in legal expenditure by Commonwealth agencies in the 2007 – 2008 financial year. The review is being conducted by former

senior Commonwealth public servant Mr Tony Blunn AO and former Clayton Utz partner Ms Sibylle Krieger. The reviewers have been charged with examining the existing arrangements for the procurement of legal services and to provide advice on how the Commonwealth can most efficiently purchase legal services to deliver value for money for taxpayers.

The Bar Association has made a submission to the review.

Bar Association's Constitution

The Bar Association's present Constitution came into effect on 1 January 2000. In October 2008 comments were sought from members about a number of amendments to the Constitution proposed by the Bar Council. The purpose of these amendments was to:

- update references to the *Corporations Act 2001* and make a number of amendments in line with requirements of that Act;
- delete provisions relating to the *Registered Clubs Act 1976*;
- simplify the procedure for removal of a member's name from the register upon resignation of the member (clause 7.1.2);
- delete provisions relating to honorary members (there are no honorary members of the Bar Association);
- reduce the number of members required to form a quorum at a general meeting from 25 to 5 (clause 9.1.2), and in consequence delete clause 9.1.4; and
- make a number of minor changes of a mechanical nature.

The proposed amendments, other than relating to the quorum, which would bring this provision more into line with the Corporations Act, attracted little comment.

The Bar Council, having considered all the comments received, in April approved a revised version of a new Constitution that

it is intended to be put to members in the near future. The proposed changes to the quorum have been deleted. An additional amendment is being proposed to clarify the procedure for proposing a resolution at a general meeting.

Thanks

The activities recorded in this annual report only constitute a small part of the work done by and on behalf of the Bar Association. Many other activities are noted in *Bar News*, the daily *In Brief* and frequent @CPD, as well as on the web site. Due to the need to preserve the confidentiality of many of the association's dealings with state and federal attorneys-general, their departments and parliamentary committees, for example, a significant part of the association's work goes unpublicised. However, I can here publicly acknowledge much of the contribution made by members of the bar and friends of the bar to the business of the association.

Each year, hundreds of members of the association assist in its activities, whether as members of committees, sections, representatives on court liaison bodies; those who draft submissions and provide comments on legislation; those who present CPD seminars; the legal assistance volunteers and duty barristers. Others receive telephone calls from me and association staff in the early hours and on weekends as a result of media inquiries, and their helpfulness and tolerance in these trying circumstances is greatly appreciated. Sadly, too often the assistance and information we provide, usually which shows the bar and barristers in a good light, never makes it to press or broadcast. Editors and producers have a resistance to the positive portrayal of the profession, while the converse, where for example, a barrister or former barrister brings the bar into disrepute, assures extensive coverage. My sincere thanks are also due to the clerks and staff of barristers whose assistance we have called upon during the year.

I must also acknowledge the assistance given to me and the association's staff by the president. Senior staff of the association and I are unfortunately required to contact her by 'phone or e-mail at all hours of the day or night, seven days a week, about matters that usually need immediate resolution. The president tolerates this with a resigned good humour that is greatly appreciated. Similarly, the senior vice president has been more than tolerant of my frequent, often unheralded, visits to his chambers on urgent business.

The other members of the Executive, too, graciously provide assistance when requested. I acknowledge here the support I received from the now Justice Rachel Pepper in all her years on the Bar Council, particularly as its secretary from November 2005 until resigning from this position in April 2009 on being appointed to the Land and Environment Court.

The Bar Association's staff

As I said last year, the Bar Association's staff do not attend the association's office just to do a daily darg and then clock off. They consider themselves, as they are, an integral part of the Bar Association. Many are members of the association. They work long hours, including at night and on weekends, to provide the best service they can to the association's members and others who in some way have sought the association's assistance. While at times treated unreasonably by a troubled correspondent, caller or vexatious visitor to the office, they strive to provide a courteous, efficient service. I am proud of the contribution to the association made by all the staff and am grateful for their personal support and for the support they give to the association and those who seek the association's assistance.

PA Selth
Executive Director