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National Uniform Admission and the Legal Profession

The achievement of a 'national legal profession' should enable a legal practitioner to have their practising certificate from their 'home' state recognised throughout Australia without the need for seeking admission or obtaining a new practising certificate in other jurisdictions.

There have been some legislative moves towards that aim. Firstly, all jurisdictions have passed complementary mutual recognition legislation. Secondly, all places apart from Queensland and Western Australia, have adopted the 'national practising certificate scheme'. It is understood that the Queensland will join the national practising certificate scheme during 2002.

This Brief will focus primarily upon the reform of existing admission and registration requirements, including educational and practical training qualifications, needed to achieve a national legal profession.

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1 INTRODUCTION

A 'national legal services market' and a 'national profession' are concepts that have developed over the last decade reflecting the push for a more seamless flow of goods and services across borders without unnecessary cross-jurisdictional impediments and for greater competition in goods and services at an international level.[1]

There have been some legislative moves towards achieving a 'national legal profession' whereby a legal practitioner can have their practising certificate from their 'home' state recognised throughout Australia without the need for seeking admission or obtaining a new practising certificate in other jurisdictions. This has been facilitated, firstly, by all jurisdictions enacting complementary mutual recognition legislation, and secondly, by the adoption of the 'national practising certificate scheme' in all places apart from Queensland and Western Australia. It is understood that Queensland will join the national practising certificate scheme during 2002.[2]

There are a number of important differences between state and territory admission qualifications and requirements that impact upon the achievement of a national profession. Those include separate rolls for barristers and solicitors in some jurisdictions; disparities (even within one jurisdiction) in the length, content and mode of delivery of pre-admission and post-admission practical legal training; and differences in decision making about registration.

This Brief will focus primarily upon the reform of existing admission and registration requirements, including educational and practical training qualifications, needed to achieve a national legal profession.

The Commonwealth Attorney-General, the Hon Daryl Williams MP, recently outlined what he regarded, apart from consistent admission requirements, to be the important elements of a truly 'national profession' supported by a uniform regulatory framework. Those aspects (not considered in this Brief) are –

- uniform discipline and regulation arrangements (including a procedure for the mutual recognition of disciplinary decisions between jurisdictions); consistency in

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1 Law Council of Australia, *2010: A Discussion Paper – Challenges for the Legal Profession*, September 2001, p 167.

2 Law Council of Australia, 'Queensland to join national legal practice scheme', *Australian Lawyer*, p 4.

codes of conduct and ethical standards; and uniformity in complaints handling procedures;

- the facilitation of new uniform business structures, particularly multi-disciplinary practices (MDPs), where a firm may include accountants and architects etc as well as lawyers. Only New South Wales formally recognises MDPs at present; and
- consistency in professional indemnity insurance arrangements and fidelity fund contributions.[3]

2 VISION OF A NATIONAL LEGAL SERVICES MARKET

Governments began discussing national legal profession issues at the 1992 meeting of the Standing Committee of Attorneys-General (SCAG). It was proposed that governments work with professional bodies of each jurisdiction to facilitate the reciprocal admission of lawyers in each state and territory; harmonise legal training requirements; and remove unjustifiable impediments to national practice.

In addition, the 1994 Access to Justice Advisory Committee found that the separate regulatory regimes governing the legal profession throughout Australia have hindered the mobility of legal practitioners within Australia, impeded interstate competitiveness, and inconvenienced clients with interstate or national interests.[4]

In an address at the Law Council of Australia's 32nd Legal Convention in October 2001, the Commonwealth Attorney-General explained his vision for reform of the legal profession in Australia. Achieving a 'national legal services market' would enable the profession to respond to challenges posed by new technology and the more complex demands of consumers, both on a domestic and international level.[5] Mr Williams considered that the capacity of Australian lawyers to deliver high quality services was hindered by the lack of a national regulatory framework and by barriers preventing practitioners from competing on an equal footing in each state and territory. Lack of

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3 Hon D Williams AM, QC, MP, Commonwealth Attorney-General, *Law Council of Australia 32nd Australian Legal Convention*, House of Representatives, Old Parliament House, Canberra, Speech, 14 October 2001. Downloaded from the Commonwealth Attorney-General's website at http://www.ag.gov.au/ministers/attorney-general/speeches2000_2001.html. See also, Law Council of Australia, *2010: A Discussion Paper – Challenges for the Legal Profession*, September 2001, p 167.

4 Access to Justice Advisory Committee, 'Access to Justice: An Action Plan', *Final Report*, Commonwealth of Australia, 1994.

5 Hon D Williams AM, QC, MP, *Law Council of Australia 32nd Australian Legal Convention*.

uniformity, Mr Williams believed, was not conducive to remaining relevant, flexible and competitive in an increasingly borderless world.

2.1 COMPETITION POLICY REFORM IMPLICATIONS

In 1994, the Coalition of Australian Governments (COAG) adopted the principles of competition policy as outlined in the Hilmer Report, which included the application of competition policy to the delivery of legal services.

In March 1994, the former Trade Practices Commission released its report *Study of the Professions*.[6] It recommended reform of the legal profession to remove constraints on the development of a national market in legal services and development of other efficiency enhancing reforms. Recommendations also included formal recognition in each state and territory of the practising entitlements of lawyers admitted in other states and territories.

State and territory governments agreed to review their own legislation governing the legal profession to achieve consistency with competition policy and to ensure that any restrictions or practices that remain are only those essential for public protection.

COAG established a working group to conduct a national review of mutual recognition arrangements in Australia. The COAG Working Party Report found that there needed to be a national scheme which would enable a practising certificate issued in one jurisdiction to be accepted in all others without further admission requirements or formalities. SCAG agreed that model provisions should be drafted to give effect to that recommendation.

These developments were consistent with some earlier comments made by the High Court in the case of *Street v Queensland Bar Association* (considered below) which focused directly on restrictions on interstate admission of barristers.

2.2 LAW COUNCIL OF AUSTRALIA PAPERS

The Law Council of Australia's (LCA) 1994 *Blueprint for the Structure of the Legal Profession: A National Market for Legal Services* sought to facilitate the above objectives. It was prepared with the cooperation of legal professional bodies in each jurisdiction, all of whom are members of the LCA, and it was endorsed by SCAG.[7] The

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[6] Commonwealth Trade Practices Commission, 'Study of the Professions – Legal', *Final Report*, Commonwealth of Australia, 1994.

[7] Law Council of Australia, *Blueprint for the Structure of the Legal Profession: A National Market for Legal Services*, July 1994, p 3.

Blueprint addressed admission procedures; processes regulating the ways in which lawyers practise; and the means by which quality and services to the public are assured.[8] It supported the facilitation of a national market in legal services.

In particular, the Blueprint emphasised the need for lawyers admitted in any state or territory to be able to practise law throughout Australia without facing unnecessary constraints. Only those regulations necessary for maintaining standards of practice at a high level to protect the public from lawyers with insufficient qualifications or training should be maintained. While lawyers would have a right to practise in all jurisdictions without needing separate practising certificates, they would be subject to the disciplinary control of the new state or territory in which they seek to practise. This concept appears to underlie the national practising certificates scheme, explained below, that has been adopted in most jurisdictions.[9]

The LCA's second key document that provides a point of reference for developing a national regulation framework is the National Profession Taskforce *2010: A Discussion Paper - Challenges for the Legal Profession*, produced in September 2001. The Discussion Paper attempted to provide a picture of the legal profession in the next decade in order to determine the issues to be dealt with to prepare for the changes. It noted that there was some frustration, particularly among large national firms, about the length of the process for achieving a 'national profession' but that it was generally believed that it would come about by 2010.

The Discussion Paper commented that national regulation, whether it be through a national regulatory body or through a set of essential national practice standards administered by existing state and territory regulatory bodies, must enable lawyers to practise nationally without having to comply with additional regulatory requirements. It considered that regulation of the profession should focus on protecting the public interest, allowing clients' needs to be better served, enhancing the accountability of the legal profession, and should not be unduly restrictive or anti-competitive.

It was suggested that a consistent approach to professional indemnity insurance and fidelity cover, as opposed to the current fragmented requirements of each state and territory, was important to practitioners wishing to practise in other jurisdictions.[10]

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8 *Blueprint for the Structure of the Legal Profession*, p 3.

9 The Blueprint considered other aspects of the profession in a national legal services market but, as they do not concern registration requirements and processes they are not dealt with here. An outline can be found in the Appendix.

10 Law Council of Australia, *2010: A Discussion Paper*, p 169.

3 ACHIEVING A NATIONAL PROFESSION: 2002 SCAG AGREEMENT

The Commonwealth Government prefers the regulatory basis for a national profession to be founded on cooperation between all governments and, importantly, uniform state and territory legislation allowing for different policy choices between jurisdictions. The Commonwealth Attorney-General believes that a uniform national legislative framework would be one within which legislation would conform in its core elements and would be integrated by including provisions that make the independent pieces of legislation mutually supportive.[11]

While the Commonwealth Attorney-General supports a cooperative approach, he has, in the past, expressed concern that there may not be swift unanimous agreement among the states and territories for a process to achieve nationally consistent laws. Mr Williams has canvassed the possibility of the Commonwealth Government stepping in using any constitutional powers available to it to pass the necessary legislation if there is significant resistance by other governments.[12]

However, on 7 March 2002, SCAG agreed to the development of a national uniform approach to admitting lawyers and ensuring that they meet the same training and professional standards in all jurisdictions. There was a commitment by all Attorneys-General to reform legislation and practices necessary to implement a national legal services market. The details will be ironed out at the next SCAG meeting in July 2002, before which time each state and territory must determine what needs to be done to ensure consistency of approach. If measures are agreed to in July, laws will be drafted for consideration at the November 2002 meeting and would, thereafter, be implemented in each jurisdiction during 2003.[13]

The Queensland Attorney-General, the Hon Rod Welford MP, has stated that the Queensland Government will introduce legislation during 2002 to, along with other reform measures, enable lawyers from other jurisdictions to practise in Queensland.[14] Those other reforms may embrace other elements of legal practice where uniform rules are needed to achieve a national profession, such as post-admission education and training;

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11 Hon D Williams AM, QC, MP, *Law Council of Australia 32nd Australian Legal Convention*.

12 Chris Merritt, 'Williams gets tough on states', *Australian Financial Review*, 8 March 2002, p 51.

13 Law Council of Australia, 'SCAG Agreement on National Practice', *Australian Lawyer*, April 2002, downloaded from the LCA website at http://www.lawcouncil.asn.au.

14 Chris Griffith, 'Historic accord frees up lawyers', *Courier Mail*, 8 March 2002, p 8.

indemnity insurance; fidelity fund requirements; protection of clients in matters such as trust accounts and cost agreements; and discipline and complaints procedures.[15]

Mr Williams has previously suggested that a non-partisan taskforce should be established to develop this uniform regulatory framework with representation from all jurisdictions and chaired by an outside expert. Currently, officers of Attorneys-General Departments of each state and territory are preparing proposals on various aspects of the regulatory framework, including discipline and business structures, to take to the July 2002 SCAG meeting.

The LCA has set up expert working groups corresponding to each of the elements of the legal profession that need nationally consistent rules in order to provide policy input for submission to the government process. The LCA President has commented that the timetable is a very tight one and that it might be difficult to achieve consistent reform of legislation concerning complex matters such as professional indemnity insurance. Areas such as those may require expert advice and to commission this, then have it completed and assessed by July 2002, will be an enormous undertaking.[16]

4 CURRENT REGISTRATION ARRANGEMENTS FOR LAWYERS

The legal profession is regulated chiefly by state and territory legislation. Although the Commonwealth Government has a limited regulatory role, due to constitutional limitations on its legislative powers, there are few areas of professional life that are not impacted on by Commonwealth law to some extent. For instance, Commonwealth legislation governs taxation and migration agents and lawyers who wish to practise in those fields must obtain a Commonwealth licence. This imposes an additional requirement on practitioners who wish to provide legal advice in those areas.[17]

In terms of the multilateral General Agreement on the Trade in Services (GATS), regulation of the legal profession in Australia is regarded as falling somewhere in the middle between being very closely regulated and loosely regulated.[18] GATS promotes free trade and transparent regulatory criteria. Australia is apparently regarded to be a relatively restrictive regulator of domestic legal practice in terms of matters such as

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15 Law Council of Australia, 'SCAG Agreement on National Practice'.

16 Law Council of Australia, 'SCAG Agreement on National Practice'.

17 Law Council of Australia, *2010: A Discussion Paper*, p 162.

18 Law Council of Australia, *2010: A Discussion Paper*, pp 165-166.

business structures, ownership, and reservation of work for lawyers.[19] However, it is also seen as being encouraging of foreign lawyers to practise in Australia.[20] It is acknowledged that the legal profession is more highly regulated than many others.[21]

The United States legal profession is similarly state-based with the conduct of lawyers governed by disciplinary processes of state bodies and courts. Despite the adoption by many US states of the American Bar Association Model Rules of Professional Conduct, there are many local differences in the application of such standards. Consequently the drive towards a national market is facing difficulties.[22]

The main legislative instruments governing the Queensland legal profession are the *Legal Practitioners Act 1995*; the *Queensland Law Society Act 1952* and Rules made thereunder; and the *Supreme Court of Queensland Act 1991* (and also the *Solicitors' Admission Rules 1968* and the *Barristers' Admission Rules 1975*). These laws seek, among other things, to ensure that practitioners meet adequate standards of knowledge and competency, and that they have appropriate professional indemnity insurance to protect consumers against poor quality legal services. They also aim to facilitate the administration of justice. The Legal Practitioners' Fidelity Guarantee Fund gives some protection to clients against misappropriation of trust moneys placed with solicitors.

Differences in regimes across Australian states and territories have come about for many reasons, mainly historical, such as the fact they were developed at different times under diverse funding arrangements.[23]

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19 Law Council of Australia, *2010: A Discussion Paper*, p 166 citing a Productivity Commission study comparing 29 nations: Nguyen-Hong Duc, *Restrictions on Trade in Professional Services*, Productivity Commission, Australia, August 2000.

20 See, eg the Model Practice of Foreign Law Bill adopted by the LCA upon which a number of jurisdictions have based legislation to ensure access to Australian jurisdictions by foreign lawyers. An example is the *Legal Profession Amendment (Practice of Foreign Law) Act 1998* (NSW).

21 Queensland Government, National Competition Policy Review, *Regulation of Legal Profession: Issues Paper*, November 2001, p 3.

22 Australian Law Reform Commission, 'Managing Justice' A Review of the Federal Civil Justice System, *Report No 89*, December 1999, para 3.55.

23 Law Council of Australia, *2010: A Discussion Paper*, p 159.

4.1 ADMISSION QUALIFICATIONS

Admission to practise informs the public and the courts that the practitioner has met prescribed minimum academic and practical training requirements and are fit to practise law.[24] In addition to the attainment of minimum levels of competency, admission may depend also on other factors that aim to protect the public, such as minimum age requirements and criminal history.

To be admitted anywhere in Australia, one must possess a Bachelor of Laws (LLB) and undertake a period of postgraduate practical legal training. Each jurisdiction has its own admissions body that accredits both qualifications as prerequisites for admission. Following admission, solicitors in all jurisdictions must obtain a practising certificate in order to practise.

There appears to be a common acceptance throughout the country that a law school degree satisfies the academic requirements for admission (although, in NSW, a person may be admitted possessing a qualification from the Legal Practitioners Admission Board course). Thus, all law schools tend to ensure that their compulsory units conform to what admission bodies in their jurisdiction prescribe to be necessary for admission to practice.[25]

There is a wide diversity of type of practical legal training and its mode of delivery. Those are articled clerkships for solicitors; Readers' Courses and pupillage programs for barristers; institutional instruction; programs combining institutional instruction and training in employment; and clinical programs as part of the undergraduate training. There is also a new market developing for customised programs designed for the larger law firms. Some jurisdictions have abolished articles of clerkship while some offer only articles of clerkship. Most, however, provide a choice of types of training. Even in the case of institutional instruction, the lengths and content vary even within one state or territory. The recent LCA *2010: A Discussion Paper* gave an example of Victoria where two institutions offer a practical legal training course of differing lengths.[26]

In Queensland, the *Solicitors' Admission Rules 1968* and the *Barristers' Admission Rules 1975* govern admission requirements. To practise as a barrister, a law graduate must submit ten written reports on court proceedings to the Barristers' Board, then serve a 12 month pupillage with a barrister and attend lectures at the Bar Practice Course. A

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24 Queensland NCP Review *Regulation of Legal Profession: Issues Paper*, p 8.

25 Law Council of Australia, *2010: A Discussion Paper*, pp 76-77.

26 Law Council of Australia, *2010: A Discussion Paper*, p 30.

law graduate seeking admission as a solicitor in Queensland must undertake two years of articles of clerkship or complete the Legal Practice Course at the Queensland University of Technology plus, in the latter case, receive conditional admittance for one year in practice.

4.1.1 Attempts At Uniform Admission Qualifications

In July 1994, the Consultative Committee of State and Territorial Law Admitting Authorities (the Priestley Committee), headed by Professor Priestley, recommended that all Australian law schools adopt uniform areas of knowledge that students must cover during their law degrees to fulfil the necessary requirements for admission.[27]

These specifications, known as the 'Priestley 11', have been accepted by admitting authorities nationally and go some way to achieving some consistency in the theoretical training of all Australian law graduates.[28] They are endorsed by the LCA in its *Blueprint for the Structure of the Legal Profession*.[29]

In its *2010: A Discussion Paper*, the LCA commented that there will always be a need for students to have a solid grounding in 'core' subjects (the contents of which will change over time) and that those should be taught at a satisfactory uniform minimum standard to meet the demands of a national legal services market and to ensure portability of legal training.[30] One consideration that will, however, have to be kept in mind is that many law firms wish to ensure that their solicitors have adequate local knowledge.[31]

However, the same level of consistency has yet to be achieved with the Practical Legal Training component of qualifications for admission. The LCA's *Blueprint for the Structure of the Legal Profession* set out pre-admission and post-admission practical legal education requirements, including professional training and continuing legal

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27 Centre for Legal Education, *Uniform Admission in Australia: The Reports of the Consultative Committee of State and Territorial Law Admitting Authorities*, 1994.

28 See *Legal Practitioners Act 1995* (Qld), s 58(1), *Solicitors' Admission Rules*, r 17, *Barristers' Admission Rules*, rr 14A and 14B. Similar unit prerequisites exist in other state and territory equivalent legislation.

29 *Blueprint for the Structure of the Legal Profession*, pp 6-13.

30 Law Council of Australia, *2010: A Discussion Paper*, p 86.

31 Law Council of Australia, *2010: A Discussion Paper*, p 93.

education.[32] Standards known as the 'Priestley 12' were developed and endorsed by the Council of Chief Justices against which a candidate for admission must demonstrate an understanding and competence. Unlike the 'Priestley 11', these requirements have not been applied by all Australian admission bodies. A new set of competency standards, agreed to in 2001 by the Law Admissions Consultative Committee, will replace the 'Priestley 12' with effect from January 2003. The intention is to facilitate more consistent national content and competency standards and promote greater flexibility.

To date, there are still no uniform admission standards apart from the adoption of the 'Priestley 11'. The Attorney-General has canvassed the need for a set of core requirements for admission and a standardised admission procedure whereby a process would be developed for the notification and mutual recognition of admission decisions in each jurisdiction. This would eventually lead to the establishment of a common roll of all practitioners. He has indicated that a body to develop uniform admission requirements, including national education standards, needed to be established.[33]

The LCA's *2010: A Discussion Paper* also noted that the quality of education and training offered within each jurisdiction should be consistent if consumers are to be properly protected and suggested the establishment of a body to undertake a close scrutiny of the courses offered, their content, and mode of delivery, to ensure that standards in education be maintained. The proposed body would develop academic and practical training requirements against which it would appraise subjects offered by tertiary bodies.[34]

Greater legislative consistency in admission requirements would counteract forum shopping that commonly occurs among candidates for admission seeking to be admitted in the jurisdiction with the cheapest and simplest admission requirements.

4.2 ADMISSION PROCESS AND PRACTISING CERTIFICATES

Barristers and solicitors in every jurisdiction must go through an admission process. Practitioners are admitted to the Supreme Courts of their states and territories. In Queensland, persons are admitted as either a 'barrister' or a 'solicitor' and there are separate rolls. In Tasmania, persons are admitted as either a barrister or a legal practitioner. Other jurisdictions appear to provide for common admission to practise as

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32 *Blueprint for the Structure of the Legal Profession*, pp 6-13.

33 Hon D Williams AM, QC, MP, *Law Council of Australia 32nd Australian Legal Convention*.

34 Law Council of Australia, *2010: A Discussion Paper*, p 91.

both (eg in Victoria and South Australia, a person is admitted as a 'barrister and solicitor'). In all places, barristers tend to be governed by state or territory bar associations while solicitors are overseen by law society bodies. The distinction is far from clear and it is not always easy to tell if, in any particular jurisdiction, the profession is divided or fused.

Solicitors in every jurisdiction must hold a practising certificate issued by the relevant body in order to practise (see eg *Queensland Law Society Act*, ss 38, 39). In all places apart from Queensland and the ACT, a practising certificate issued by the relevant bar association is required to practise exclusively as a barrister.[35] Obtaining a practising certificate in Queensland is conditional upon payment of a fee and making a Fidelity Fund contribution. The position is similar elsewhere.

In a number of jurisdictions, there is one practising certificate for all practitioners, whether practising as a solicitor or a barrister, but the situation varies markedly across states and territories.

The difficulty for interstate practitioners seeking to practise in Queensland is that they can be admitted only as a barrister or as a solicitor. This may disadvantage a practitioner whose 'home' jurisdiction has a common admission process. In his recent address to a LCA Convention, the Commonwealth Attorney-General noted that the current procedures for admission of interstate and overseas practitioners was haphazard, despite mutual recognition legislation and the adoption by most places of the national practising certificates scheme. The Attorney-General considers that the area of admission requirements is a key area in which consistency needs to be achieved to progress the movement toward a national uniform legal profession and that the efforts to date had been piecemeal.

The Attorney-General commented that there was considerable support for a National Appraisal Council, as discussed by SCAG in 1997 and similarly proposed by the Australian Law Reform Commission, to achieve uniformity.[36]

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[35] Except in Western Australia, practising certificates are issued to both professions by the Legal Practice Board.

[36] Hon D Williams AM, QC, MP, *Law Council of Australia 32nd Australian Legal Convention*.

5 PROGRESS TOWARDS A NATIONAL PROFESSION

A significant step forward towards achieving a 'national legal profession' has been the passage of complementary mutual recognition legislation in all states and territories and, more importantly, the growth of the 'national practising certificates scheme' (NPCS).

Queensland has mutual recognition legislation but is not part of the NPCS. Before the *Mutual Recognition (Qld) Act 1992* and *Trans-Tasman Mutual Recognition (Qld) Act 1999*, the admission process for interstate and New Zealand practitioners coming to Queensland was governed by more restrictive admission rules. Practitioners from other states and territories or from England, Scotland or Northern Ireland sought 'conditional' admission as a solicitor in Queensland if they intended to practise in Queensland for at least nine of the next 12 months. Admission was made 'absolute' after one year if the court was satisfied that the practitioner has satisfied the residency requirements.[37] It was those requirements that the High Court considered in *Street v Queensland Bar Association*.[38]

5.1 STREET V QUEENSLAND BAR ASSOCIATION

The landmark High Court decision in *Street v Queensland Bar Association* gave impetus to reforming restrictions on legal practitioners being able to practise in other jurisdictions apart from their own.

Mr Street was a New South Wales barrister who had obtained admission in the Supreme Courts of a number of jurisdictions but was refused admission as a barrister in Queensland in May 1987 on the ground that he could not satisfy the conditional residency requirements for admission. He wished to remain resident in NSW which the Queensland Barristers' Admission Rules did not permit.

The High Court found that the Rules subjected Mr Street to a disability or discrimination on the basis of residence, contrary to s 117 of the *Commonwealth Constitution*. The Court acknowledged that some difference in treatment of interstate practitioners would be permitted to protect Queensland residents if qualifications and experience required for admission were less rigorous in the other state than in Queensland. However, the Rules here did not purport to do other than discriminate on the mere fact of residence. Indeed,

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37 See *Solicitors' Admission Rules 1968*, rr 74-76. Barristers from other jurisdictions had to also seek conditional admission under the *Barristers' Admission Rules 1975*, r 15(d).

38 (1989) 168 CLR 461.

Brennan J commented that their only purpose appeared to be to protect the Queensland Bar from competition from interstate barristers.

Toohey J noted that many factors (even at the time of deciding this case) pushed towards there being a national legal profession. Those included cross-vesting procedures for legal matters and reciprocity of admission between jurisdictions. McHugh J commented that it was a matter of national importance that an interstate resident should have the services of legal practitioners from their own state when conducting litigation in another state's courts and vice-versa. In addition, he noted that the practice of law played an increasingly important part in the national economy and contributed to maintaining the single economic region, which is a prime object of federation.[39]

5.2 MUTUAL RECOGNITION LEGISLATION

Mutual recognition legislation in each jurisdiction was the outcome of a series of meetings between state, territory and federal governments over a two-year period. The meetings had the objective of achieving better intergovernmental relations to improve the operation of the national economy and enhance the quality and effectiveness of government services.[40] In the legal profession context, legislation was apparently prompted by the *Street* decision, explored above.[41]

The legislation allows a legal practitioner who satisfies the registration requirements in their own state or territory, to seek admission in another state or territory without meeting any further requirements regarding qualifications, experience, character or fitness to practise law, even though the admission requirements in the new place might be different. The admission authorities in the new jurisdiction must accept the judgment of their interstate counterparts.

A practitioner must seek registration in the new state or territory but the requirements and additional costs are less onerous than what would be the case in the absence of mutual recognition legislation. The legislation covers registration and entry only and practitioners must obtain a practising certificate in each jurisdiction in which they choose to practise and comply with other practising requirements.

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39 (1989) 168 CLR 461, 598.

40 Hon R V Free MP, Minister for Science and Technology and Minister Assisting the Prime Minister, Mutual Recognition Bill 1992 (Cth), Second Reading Speech, *Hansard Online*, 3 November 1992.

41 ALRC, *Report No 89*, Ch 3, footnote 117.

No doubt mutual recognition legislation was met with concern that practitioners in one state would be forced to compete with practitioners from other states whose admission qualifications in their home state may not have been as rigorous. This prompted legal associations across Australia to consider the setting of national standards for admission. However, this is yet to be achieved.

The governing legislation is the *Mutual Recognition Act 1992* (Cth) which has been adopted in each state and territory. In Queensland, this has been done by the *Mutual Recognition (Qld) Act 1992* (Qld).

5.2.1 Admission Procedure under the *Mutual Recognition (Qld) Act 1992*

The *Mutual Recognition (Qld) Act 1992* enables barristers and solicitors from another state or territory to be eligible to practise in Queensland under a simplified registration process. From March 1999, the *Trans-Tasman Mutual Recognition (Queensland) Act 1999* gave the same recognition to New Zealand practitioners seeking to practise in Queensland. In both cases, there is no need for practitioners from other jurisdictions to appear before the Supreme Court of Queensland to seek admission.

A practitioner seeking admission in Queensland takes the following steps –

- prepares a registration application (for which there is a standard form) for the Queensland roll (either the Solicitors' roll *or* the Barristers' roll);
- prepares a statutory declaration to verify statements and other information in the application;
- obtains a certificate evidencing existing registration from the relevant officer of the Supreme Court of the jurisdiction in which the practitioner is currently registered or from the High Court of New Zealand. The certificate must not be more than one month old;
- transmits the prescribed fee to the Supreme Court Library and lodges the above documents (plus a copy) with the Supreme Court Registrar in Brisbane.[42]

The practitioner must also verify that he or she is not the subject of disciplinary proceedings in any other place nor otherwise prohibited from practising due to some criminal, civil, or disciplinary action in any jurisdiction.

The Registrar sends copies of all of the above documents to the Solicitors' Board or the Barristers' Board. The relevant Board will consider the application and then transmit its

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[42] Queensland Courts, 'How to register in Queensland if you are a lawyer from anther State or New Zealand', *Information for Lawyers*, December 1999. Downloaded from the Queensland Courts' website at http://www.courts.qld.gov.au/

recommendations to the Registrar (within 21 days of lodgment of the application). The Registrar considers the recommendation and determines whether or not registration should be granted, granted with conditions, or refused or postponed. If registration is granted, the name of the practitioner is entered on the relevant roll. An adverse decision may be reviewed by the Administrative Appeals Tribunal.

Pending registration, the interstate lawyer is entitled to commence practising and is deemed to be registered in the new place until the Registrar makes a decision.

5.2.2 Some Difficulties With Mutual Recognition Legislation

Mutual recognition procedures in other jurisdictions are fairly similar. However, there are some variations because of the different admission processes that pertain to practitioners seeking registration in the relevant state or territory itself. For example, the Queensland Rules require admission as either a barrister or a solicitor but not both. Some differences have also been created by the fact that each jurisdiction has imposed additional hurdles in their mutual recognition requirements. For instance, in some jurisdictions, including Queensland, it is necessary for the certificate evidencing the practitioner's existing registration to be no more than a month old.

The LCA has commented that while mutual recognition legislation has helped to break down the barriers between jurisdictions, it is not completely satisfactory for a person wanting to practise on a national basis.[43] Admission in the new jurisdiction still has to be obtained. Thus, interstate practice under the mutual recognition scheme is more expensive and difficult than under the NPCS, considered below.

5.3 NATIONAL PRACTISING CERTIFICATES SCHEME

A portable national practising certificates scheme (NPCS) between the participating jurisdictions allows a practitioner to rely on the practising certificate of their 'home' state to practise law in another state (the 'new' jurisdiction). It facilitates interstate movement of practitioners because, unlike the mutual recognition scheme, there is no need to seek separate admission or a new practising certificate in the new place. It was a vision of the LCA's *Blueprint for the Structure of the Legal Profession*.

The NPCS is based on reciprocity rather than recognition and the drawback of this is that not all jurisdictions have joined in. The scheme is yet to be adopted in Queensland

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[43] Law Council of Australia, *2010: A Discussion Paper*, p 163.

and Western Australia. It is understood that some smaller professional state bodies have been concerned to maintain their identity, competitiveness and market share.[44]

An example of legislation adopting the NPCS is the NSW *Legal Profession Act 1987*. It was amended in 1996 to allow the Attorney-General to recognise corresponding laws of other states and territories to enable NSW practitioners to practise in those other states and territories without the need to obtain a new practising certificate. In reciprocation, the Act allows practitioners from recognised states and territories to practise in NSW using their home jurisdiction's practising certificates.[45] In jurisdictions where there is no NPCS legislation, NSW practitioners have to seek registration using mutual recognition legislation.

If a practitioner from another state or territory wishes to establish a legal office in the new state or territory, additional requirements imposed by the new jurisdiction will usually have to be met (eg holding additional professional indemnity insurance and contribution to the Fidelity Fund) and those requirements can vary between jurisdictions. Despite this, overall, the NPCS is somewhat closer to the desired 'national profession', enabling practitioners to practise anywhere in Australia (once Queensland and WA have adopted the system) with few impediments. The LCA is developing protocols for matters such as disciplinary processes and indemnity insurance for 'travelling' practitioners.

It is understood that participation in the NPCS will form part of the legal package that the Queensland Attorney-General, the Hon Rod Welford MP, will take to Cabinet this year and that the Queensland Parliament will pass the necessary legislation by 1 July 2002.[46] WA has also committed to joining the scheme. This will mean that by 1 July 2002, lawyers throughout Australia will be able to practise in every jurisdiction based on recognition of their 'home' practising certificate.

There is still to be discussion between governments about whether regulation of the profession would continue to occur through state and territory professional bodies or would be through a national regulatory body. It appears that a cooperative approach would be preferred by the Commonwealth Attorney-General. It appears that the March 2002 SCAG agreement was for each state and territory to undertake preliminary work

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44 ALRC *Report No 89*, para 3.53.

45 *Legal Profession Amendment (National Practising Certificates) Act 1996* effected that amendment.

46 Law Council of Australia, 'Queensland to join national legal practice scheme', *Australian Lawyer*, February 2002, p 4.

within their respective Attorneys-General Departments for approval at the July 2002 meeting of SCAG.[47]

6 QUEENSLAND'S POSITION

In November 2001, the Queensland Attorney-General agreed that Queensland will join the NPCS. This occurred at a meeting with the LCA President, Queensland Law Society President and Queensland Bar Association President. The meeting also looked at Queensland's position on –

- lawyers' business structures including MDPs;
- practice of foreign law;
- model rules of professional conduct;
- proposals to progress national practice; and
- the Attorney-General's process of reform of Queensland's legal profession.

Mr Welford is understood to have indicated his desire for a national practice and that his review of measures previously announced by former Attorney-General, the Hon Matt Foley, was to ensure that professional standards and ethics and their governance are at high levels for the protection of consumers and the standing of the legal profession.[48]

The Attorney-General stated that he was not questioning the desirability of facilitating the national practice of law but was seeking to achieve national uniformity in appropriate areas.[49] He believed that each state and territory should continue to manage its own complaints process. Mr Welford said that the Legal Ombudsman would manage the complaints process but the Law Society would investigate serious complaints.[50]

In line with the recent SCAG agreement on facilitation of a national legal services market and the need to consider the differences in, and then harmonise, legislation applying to various parts of the legal profession, the Attorney-General's Department of each jurisdiction is undertaking work on the various aspects. The aim is to have policy proposals ready for SCAG's July 2002 meeting. Queensland is looking at rules of practice and the admission of practitioners. Victoria is considering legal costs.

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47 Law Council of Australia, 'SCAG Agreement of National Practice', *Australian Lawyer*, April 2002, p 1.

48 . Law Council of Australia, 'Queensland to join national legal practice scheme'.

49 Law Council of Australia, 'Queensland to join national legal practice scheme'.

50 Chris Griffith, 'Fast track for state legal reforms', *Courier Mail*, 10 December 2001, p 7.

6.1 PREVIOUS GOVERNMENT PAPERS

Legal profession reform was an election commitment made by the current Government. Papers have been produced addressing the issue, including the 1998 *Legal Profession Reform Discussion Paper* prepared by the Department of Justice and Attorney-General and the 1999 *Green Paper on Legal Profession Reform*.

Both papers considered many aspects of the legal profession that are outside the scope of this Brief, with the proposed reforms of the complaints handling and disciplinary procedures receiving considerable media attention. Both papers advocated the facilitation of a national legal profession and, in this context, made recommendations and proposals for common admission of barristers and solicitors and modernisation of admission requirements. The *Green Paper* supported Queensland joining the NPCS (which was preferable to mutual recognition legislation procedures) and noted that professional indemnity insurance and Fidelity Fund obligations would apply to practitioners maintaining an office in Queensland.[51]

The *Green Paper* proposed that separate practising certificates would be issued for those wishing to practise as solicitors and barristers and those wishing to practise as barristers only. Maintaining such distinction between the two would, it was considered, differentiate practitioners for a number of purposes, including mutual recognition purposes. Practical legal training for practitioners coming to Queensland under mutual recognition would be voluntary, thus emphasising the need for consistent standard to be applied across the nation.[52]

In December 2000, the former Queensland Attorney-General, the Hon Matt Foley made some decisions regarding legal profession reform including (among a number of other matters) proposals for common admission, modernised admission rules, and interstate and foreign lawyer practising certificates.

In November 2001, the Government released an Issues Paper for public consultation, with the review process to be overseen by a Review Committee comprising a number of senior representatives from government agencies.

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[51] 'Legal Profession Reform' *Green Paper*, p 30.

[52] Queensland Government, 'Legal Profession Reform' *Green Paper*, June 1999, pp 14-15.

6.2 REGULATION OF THE LEGAL PROFESSION NCP ISSUES PAPER

The Queensland National Competition Policy (NCP) Review *Regulation of the Legal Profession Issues Paper* forms part of the NCP review process being undertaken by all governments to meet their obligations under the *Competition Principles Agreement* to review, and where necessary, reform, by 30 June 2002, all legislation restricting competition unless the benefits of the restrictions to the community outweigh the costs. The Attorney-General has indicated that he is aiming to have the Review completed in early 2002.[53]

The Review is considering the issues of current restrictions on competition; proposed amendments to legal practice legislation; and key alternatives to current restrictions. While the *Issues Paper* considers many potentially restrictive requirements on various aspects of the legal profession, only the issues relating to registration, and then only in the mutual recognition context, will be discussed in this section.

The *Issues Paper* notes that the current admission and additional practising certificate requirements provided consistency with other jurisdictions which also require seeking admission followed by obtaining a practising certificate. However, interstate practitioners (where there is a common admission process) seeking admission in Queensland might be disadvantaged by having to be admitted as either a solicitor or a barrister. A number of alternatives to this current separate admission regime were put up for consideration, noting that a change to a common admission regime would remove the restriction for both Queensland practitioners and those seeking mutual admission from other jurisdictions.[54]

One matter raised in the context of the practising certificate requirement was the Government's commitment to joining the NPCS and providing for the registration of foreign lawyers. It was noted that obligations regarding professional indemnity insurance and Fidelity Fund contributions would apply to practitioners wanting to set up an office in Queensland but that practitioners who do not would need to have insurance cover under another compulsory scheme and to disclose that cover to clients.[55] Under the *Queensland Law Society (Indemnity) Rules 1987*, the Society can exempt practitioners from taking out indemnity insurance if they do not maintain an office in Queensland or they conduct private practice in another state or territory where they hold cover under a compulsory professional indemnity insurance scheme.

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53 Law Council of Australia, 'Queensland to join national legal practice scheme'.

54 Queensland Government, Queensland NCP Review *Regulation of the Legal Profession Issues Paper*, November 2001, p 9.

55 Queensland NCP Review *Regulation of the Legal Profession Issues Paper*, p 30.

The *Issues Paper* also discusses the issue of national regulation and suggests, on a similar basis to the LCA, that this could be achieved in either of two ways. The first is through a single national body with responsibility for regulating the profession, for setting national standards, administering a single national practising certificate register, and dealing with a number of other matters such as fidelity fund cover, indemnity insurance etc. The alternative means is via uniform regulation through all jurisdictions working together to ensure that the same regulatory arrangements apply seamlessly throughout Australia.[56]

7 CONCLUSION

The Commonwealth Attorney-General, Mr Daryl Williams MP, believes that the benefits that would flow from removing jurisdictional barriers to the free flow of legal services include the ability of lawyers to compete with other 'advice providers' who do not face the same barriers to flexible practice.[57] It is important for the Australian legal profession to be in a position to provide legal services internationally and to respond to the growing needs of Australian consumers domestically. A national legal services market may also improve access to justice and legal services by the general public.

While a number of aspects of the legal profession need to be regulated (eg disciplinary procedures, conduct rules, indemnity insurance), the necessary laws need to be relevant to client protection and to meeting the public interest in the proper administration of justice rather than to protecting the interests of a local profession.

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[56] Queensland NCP Review *Regulation of the Legal Profession Issues Paper*, p 90.

[57] Hon D Williams AM, QC, MP, *Law Council of Australia 32nd Australian Legal Convention*.

APPENDIX

The Law Council of Australia's 1994 *Blueprint for the Structure of the Legal Profession* outline of other issues for achieving a national uniform legal profession included –

- uniformity in the regulation of the legal profession through state and territory legislation but that this should be through a system of self-regulation subject to external and transparent accountability processes;
- development of a uniform code governing lawyers' professional conduct and ethics and a program for its implementation by state and territory rules;
- development of a model disciplinary process for lawyers under which the courts would retain their inherent right to regulate the profession and the legal profession would be able to handle complaints but with the process being accountable.
- that practitioners should have the option of incorporating with limited liability, subject to relevant professional rules
- a national specialist voluntary accreditation scheme whereby a national body would be involved in identifying and accrediting practitioners with long experience in a particular area (eg mediation);
- the enactment of uniform legislation to regulate the practise of foreign law;
- the establishment of multi-disciplinary practices (MDPs) after further work is undertaken by the LCA and government to explore issues such as conflict of interest; disciplinary processes and legal professional privilege – only NSW has passed legislation to enable MDPs to be established;
- the need for consumer protection through comprehensive education and training of the profession; the creation of a uniform standard of client care; and to ensure that consumers were provided with proper information about the quality and costs of legal services;
- drafting of national model legislation covering trust account obligations, records keeping, and fidelity funding;
- establishment of a system of compulsory (although compulsion should be kept under review) professional indemnity insurance cover offering Australia-wide protection.

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