



Striking the right balance

THE PRACTICE OF LAW IS EVOLVING BUT IS THE REGULATORY FRAMEWORK OF LEGAL PRACTICE EVOLVING FAST ENOUGH?



Professions generally have an uneasy relationship with government regulation that controls their own environments. The legal profession has demonstrated confidence in interpreting rules, policy and politics in the environment of relevance to a client, but less apparent interest in the regulatory architecture that governs their profession.

It has led to some interesting regulatory and legislative experiments over the years, with some leading to a greater fracturing of a national legal professional identity and increasingly vague jurisdictional boundaries.

In the legal regulatory environment of Australia there are:

- six different one stop statutory complaints and disciplinary systems across jurisdictions
- statutory insurance requirements in all jurisdictions
- profession led insurance providers in some jurisdictions (but not most) – a statutory insurance provider in only one
- practising certificate issuance powers for some legal professional bodies
- Uniform Law available to all jurisdictions but adopted in only two with radical difference between the two
- not even the relatively straightforward regulatory architecture of professional standards legislation has been able to deliver national uniform coverage, with Tasmania, the ACT and NT as notable hold-outs.

This is not a call for uniformity – only a calling out of the complexity of multiple models of regulation and the consequence for the idea of a national legal profession.

The legal profession is not alone in confronting new challenges to the way it operates and is regulated. Nationally and internationally, professions are grappling with technology, globalisation, deregulation, increased competition and practice

evolution, all of which impact on the role of professional associations.

Rather than a negative, this presents a new opportunity for the legal profession to forge a different and larger consideration of what role it might play in society. This is a particularly acute challenge for professional associations, as they represent the community, members and, when done properly, the regulatory face of the profession.

Regulatory authority has swung away from the profession and into the hands of statutory systems over recent decades. In response, many associations have attempted to reinvent themselves as member benefit organisations, identifying their primary contributions as activities offering services, benefits or advice to their members, even occasionally openly eschewing their role as public interest bodies.

Government has not always engaged strategically with the changing role of professions or found a way to build regulation that responds to a changing market and professional practice. Government's instinct is instead to respond to public risk and prioritise consumer protection. The consequence for professions is to focus regulatory energy on professional conduct and disciplinary activity.

The Professional Standards legislation exists because society and government want a profession to exist in areas of expert need. This ensures the community feels safe and can have the confidence of knowing a professional association is behind each genuine professional, establishing and monitoring standards.

Regulation in professions is about striking the right balance between government intervention and professional (self) regulation. Professions have just come through a period of increased government regulatory interest, with attempts

to encourage higher obligations on individuals who engage with consumers. The introduction of the Legal Profession Uniform Law and consumer protection measures around billing and complaints might be seen as part of this trend.

However, models of professional self-regulation or shared regulation are now also coming to the attention of government, with the recognition that these models can go beyond compliance to provide benefits for consumers and the professions in a cost-effective way to the community. It requires commitment and dedication. Not only does effective professional regulation rely on the association taking responsibility for professional infrastructure and monitoring of the profession, it also requires the professional association to engage in a dynamic relationship with the community and government.

Building regulation that encourages this dynamic relationship will take time. In the short term, it isn't a replacement to statutory regulation. However, it could begin a recalibrating of its primacy to shift authority back to the profession and the negotiated engagement with members on their commitment to a profession-led, rather than only statutory-led, set of obligations. In the absence of genuine commitment and dynamism from the profession, government's choices are limited.

The framework for such an outcome already exists, and works in other professions in Australia. It is a question of how much the legal practice community wants to be in charge of its regulatory future and professional identity. ■

Deen Sanders is Professional Standards Authority CEO. He advised the LIV Council's Taskforce on Regulation and Charitable purpose in 2016 and was a speaker at the Conference of Council in February.