THE OFFICE OF THE
LEGAL SERVICES
COMMISSIONER

REGULATING FOR PROFESSIONALISM: THE NEW SOUTH WALES APPROACH

Steve Mark
Legal Services Commissioner
Office of the Legal Services Commissioner (NSW)
AUSTRALIA

5 August 2010
San Francisco

During a number of recent discussions I have had with regulators, academics and lawyers in the United States, Canada and the United Kingdom, it has come to my attention that many of my fellow colleagues appear to hold the view that regulation is anathema to professionalism. I have heard comments such as 'regulation is an unnecessary burden', 'regulation unduly compromises professionalism' and 'a regulatory framework that is not based on self-regulation suppresses professionalism.' I am both astounded and greatly concerned by these comments. I am well aware that many practitioners often complain about the amount of regulation they are subjected to, but hearing the view that regulation, and specifically, co-regulation thwarts professionalism was indeed a first. This is not a view I am accustomed to or in fact believe. In my view regulation and professionalism can coexist symbiotically. It is this view that has guided me in regulating the legal profession in New South Wales (N.S.W.), Australia for the past 16 years.

In N.S.W. regulation of the legal profession is shared between my office, the Office of the Legal Services Commissioner (OLSC), the Law Society of N.S.W (the professional body for solicitors) and the N.S.W. Bar Association (the professional body for barristers). The OLSC receives all complaints about solicitors and barristers in NSW in the first instance. If a complaint raises a question of misconduct on the part of the practitioner, the complaint will be investigated by the OLSC. The OLSC may however refer complaints to the Law Society of NSW or the NSW Bar Association for investigation. In our co-regulatory structure, the OLSC acts as independent statutory body and its decisions can only be challenged through the normal process of administrative law. This co-regulatory system has been in place since 1994.

The primary purpose of the OLSC as a co-regulator of the legal profession is to reduce complaints against lawyers within a context of client protection and support for the rule of law. This has been the OLSC's stated purpose since it was first established in 1994. The way in which the OLSC has proceeded to achieve this purpose has been through the employment of an effective and responsive regulatory regime that seeks to encourage lawyers to adopt more ethical work practices. At the

heart of this approach lies the notion of 'regulating for professionalism.' So, when the OLSC receives a complaint against a lawyer, our first response, where possible and appropriate is not to prosecute the lawyer but to work with him/her in trying to determine the underlying basis of the complaint. The OLSC's role as a regulator is therefore to work with the profession rather than against them in entrenching an ethical culture and promoting professionalism, while reducing complaints.

This 'education towards compliance' framework is the dominant paradigm of the OLSC and sits well within our philosophical approach of 'regulating for professionalism.' The approach is used in the regulation of all legal practices irrespective of their structure. In regulating Alternative Business Structures (ABS) such as multidisciplinary practices (MDPs) and incorporated legal practices (ILPs), for example, the OLSC has instituted a range of regulatory measures that seek to instil ethics and professionalism. One of these measures is that all ILPs (including MDPs) must appoint a 'legal practitioner director', that is, an Australian legal practitioner, who is responsible for ensuring that their practice has an appropriate ethical infrastructure that supports and encourages ethical behaviour and professionalism.

This paper will discuss the OLSC's regulatory approach.

PROFESSIONALISM AND THE PRACTICE OF LAW

The maintenance of a coherent professional identity is a constant task for those groups who lay claim to the belief that they are a 'profession.' For lawyers in particular it is a relentless task as it is they who constantly face criticism as well as claims of avarice and extreme commercialism. In the current wake of the global financial crisis for example, we have seen much written about the role of the lawyers in contributing to the subprime mortgage crash in the United States. We have also seen a litany of comments over the past few years about the unethical and unprofessional actions of lawyers in the corporate world. Think Enron, for example, or WorldCom or Tyco where lawyers were alleged to have been complicit in the demise of each corporation. The principal accusation against the lawyers was that they ignored their ethical and professional obligations for raising dilemma's like

conflicts of interests or financial misconduct when they arose in deference to profit. For a regulator of the legal profession such an accusation presents grave concerns and prompts questions about the status of lawyers as a 'profession.'

Lawyers have always distinguished themselves from the commercial business world by claiming that they are a 'profession.' The term 'profession' has no commonly accepted definition. As one commentator has eloquently observed, the concept of a 'profession' "is a slippery one that is not entirely fixed in our conceptual geography." (Callahan 1999, p.77) The term was first used in the post-Reformation period, as a calling or vocation professed by the clergy. The term derived from the verb "to profess" which in medieval times had come to mean the taking of religious vows and later in the 16th century to embody the idea that those with a specific knowledge would use that position "to teach" the common people. It was during this period the definition extended to refer to the clergy's colleagues in law and medicine. Since then the term 'profession' has been ambiguously used to refer to many different things depending on the degree of inclusiveness.

The legal profession's claim to professional status historically has rarely been questioned. This is because the practice of law satisfies the most agreed upon definition of a profession: the law is a body of esoteric knowledge consisting of statutes, case law, doctrines, rules of evidence and procedures; it features institutionalized formal education requirements; it boasts elevated socio-economic and cultural status; it relies (at least in part) on self-regulation and has a monopoly over the provision of some legal services; it has a set of codified ethical rules and a public service claim.

The concept of 'professionalism' like 'profession' is elusive in definition. Professionalism can be both an individual characteristic and an ideological position. In *Professionalism, the Third Logic*, Eliot Freidson defines professionalism as follows: "[p]rofessionalism may be said to exist when an organized occupation gains the power to determine who is qualified to perform a defined set of tasks, to prevent all others from performing that work, and to control the criteria by which to evaluate performance" (Freidson, 2001,p. 12). Professionalism has also been described as the aspirations, conduct and qualities that make a professional person. Former

American Bar Association (ABA) President Jerome Shestack identified six components of professionalism: “ethics and integrity, competence combined with independence of judgment, meaningful continuing learning, civility, obligations to the justice system, and pro bono service.” (Shestack 1998) From this we have come to understand that the ethical rules of a profession represent merely the minimum standards below which a lawyer’s conduct must not fall, and ‘professionalism’ is a higher standard of conduct that all lawyers should aspire to.

For the OLSC professionalism is fundamental to the practice of law. As a regulator of the legal profession the OLSC has an societal obligation to ensure that lawyers demonstrate not only adherence to the stated professional and ethical requirements imposed by the practice rules but that they also demonstrate professionalism in practice. The OLSC’s obligation to ensure this arises from its position in society as a bastion for consumer protection and protection of the rule of law. The OLSC has thus structured its regulatory regime with this obligation in mind.

REGULATING ALTERNATIVE BUSINESS STRUCTURES IN N.S.W.

Historically, legal practitioners in Australia, like in many other common law jurisdictions, could traditionally form partnerships with other legal practitioners, but they were not permitted to practise in any other kind of business arrangement. Partnerships were regarded as the only appropriate business structure to preserve the independence of legal profession. Partnerships were seen to provide optimal protection to clients: because a solicitor partnership has unlimited liability, unlike a company established under the *Corporations Act (2001) (Cth)* and because partners are jointly and severally liable for the actions of the partnership. The structural limitation was also justified because it was feared that if non-lawyers were entitled to fees from legal work, they could influence the way in which lawyers conducted their work. Barristers were similarly only permitted to practise as sole practitioners. The sole practice rule for barristers was justified on the basis that it ensured independence and, moreover, promoted the primary duty of a barrister to the court and, thereafter, the client.

These limitations whilst understandable ignored the reality that the law has always been both a business and a profession. They remained the dominant paradigm in Australia until the late 1970s when the professional associations lobbied to relax the prohibition on receipt sharing. The professional associations asserted the rules concerning receipt sharing should be relaxed because there were a number of taxation advantages which flowed from the assignment of partnership income to members of a lawyer's family.

In 1990 legislation was introduced in N.S.W. allowing alternative business structures in the form of solicitor corporations. Solicitor corporations were incorporated under the provisions of the *Legal Profession Act 1987* (*LPA 1987*) and not under the uniform and Australia-wide *Corporations Act 2001 (Cth)*. The *Legal Profession (Solicitor Corporations) Amendment Act 1990* provided that any one or more persons could form a solicitor corporation by placing their names to the constitution of the incorporated body and complying with the registration requirements. However, the Law Society placed restrictions on solicitor corporations. These restrictions included a requirements that: the companies have unlimited liability (section 172E); voting shareholders must be solicitors holding unrestricted practising certificates; and shareholders must be 'approved persons', which can include solicitors and their relatives (section 172G). The solicitor corporation was in effect the same as limited liability practices (LLP's) in the United States.

These rigid structural rules continued until 1994 when the *LPA 1987* was further amended allowing a broader type of alternative business structure - the multidisciplinary practice (MDP). Section 48G, inserted into the *LPA 1987*, provided that a barrister or a solicitor may be in partnership with a person who is not a barrister except to the extent (if any) that the regulations, barristers rules, solicitor rules, or joint rules otherwise provide. The legislation permitted a limited sharing of receipts (section 48G(3)(d) of the *LPA 1987*). The introduction of this new business structure was justified on the assumption that it would assist in eliminating restrictive practices. However, the profession showed very little interest in adopting these alternative business structures. There was also little client demand.

In relation to the profession, the lack of interest was largely because the legislation continued to impose several restrictions. The most notable and problematic restriction was the requirement that legal practitioners had to retain the majority voting rights in the MDP. The 1994 legislation also required legal practitioners to retain at least 51% of the net income of the partnership. The reason for the 51% rule was to ensure that the majority of ownership and control was in the hands of legal practitioners, thus encouraging law firms to retain their professional culture and structure.

In 1999 the concept of the 51% rule was abolished after being found to be anti-competitive in a statutory review. The review was undertaken pursuant to a requirement of the Australian Governments Competition Principles Agreement to consider any potentially anti-competitive restrictions in legislation and whether they are in the public interest; and pursuant to a statutory requirement that the amendments made by the *Legal Profession Reform Act 1993* (N.S.W.) be reviewed within four years of their commencement. The review determined that, despite the earlier attempt at liberalizing the rules for MDPs (under the 1994 Act), the rules governing MDPs were still anti-competitive and should be repealed (Attorney General's Department of N.S.W, 1998). The abolition of the 51% rule ultimately allowed MDPs to exist unfettered by any formal structural regulation. This situation was however untenable and calls were soon made for the regulation of MDPs to be reconsidered.

In July 2001 the N.S.W. government enacted legislation allowing legal service providers to incorporate as companies with the Australian Securities and Investments Commission (ASIC), the agency responsible for ensuring compliance with the *Corporations Act 2001 (Cth).* For the first time in Australian legal history, legislation permitted legal practices to incorporate, share receipts and provide legal services either alone or alongside other legal service providers who may, or may not be legal practitioners. In order to be able to do so, however, the legislation required legal practices to fulfil two, inter alia, important requirements.

The first requirement is that on incorporation a legal practice must appoint at least one legal practitioner director. The legislation requires that a legal practitioner

director must be an Australian legal practitioner who holds and unrestricted practising certificate. The second requirement stipulated that, in addition to his/her usual professional obligations, the legal practitioner director, must implement and maintain 'appropriate management systems' to enable the provision of legal services in accordance with the professional obligations of solicitors and the other obligations imposed under LPA 2004. To fulfil this duty, a legal practitioner-director of an ILP must demonstrate that it has implemented a management system that addresses ten objectives that were developed by the OLSC together with large sections of the legal community in N.S.W. These objectives include, inter alia, competent work practices to avoid negligence and achieve effective communication, acceptable processes for liens, timely identification and resolution of conflicts of interest, and effective staff supervision (Annexure A). The legal practitioner director is responsible and accountable for insuring the implementation of appropriate management systems. Failure to implement and maintain appropriate management systems constitutes professional misconduct and can result in a legal practitioner director loosing their practising certificate.

In order to demonstrate that an appropriate management system has been implemented, the ILP must complete a self-assessment document (Annexure B). The self-assessment document takes into account the varying size, work practices and the nature of operations of practices, eschewing a 'one size fits all' approach requiring the fulfilment of uniform criteria. The self-assessment document instead suggests indicative criteria to assist legal practitioner directors to address each of the ten objectives together with examples of what an incorporated practice *may* do that would provide evidence of compliance.

In addition to implementing and maintaining an appropriate management system, a legal practitioner director also has a responsibility to report to the Law Society of N.S.W. any conduct of another director of the practice (whether or not a legal practitioner) that has resulted in, or is likely to, result in a contravention of that person's professional obligations or other obligations imposed by or under the Act. The legal practitioner director must also report to the N.S.W. Law Society any professional misconduct of a solicitor employed by the practice and must take all action reasonably available to deal with any professional misconduct or

unsatisfactory professional conduct of a solicitor employed by the practice. Finally, a legal practitioner director also has an obligation to disclose which of the services to be provided by the ILP are legal services are which are not and whether or not the services to be provided will be provided by a legal practitioner. In making such disclosures the legal practitioner director must identify those services and indicate the status or qualifications of the person(s) who will provide the services.

Since the enactment of this legislation, ABS have been increasingly embraced in N.S.W. There are today more than 1000 ILP's in NSW or about 20% of the profession. The majority of these firms are small in size with three or more solicitors. A large number of sole practitioners and several large national firms have also incorporated. The reason as to why the ILP structure has been so widely embraced is threefold. Firstly, ILPs offer limited liability as the partners in an ILP become shareholders whose liability is limited to that of their investment in the practice. Secondly, there are a number of financial benefits in a corporate structure. These financial benefits may include tax advantages as well as favourable superannuation and redundancy arrangements. Such financial benefits may soon be extended after murmurs of a move by the Australian Taxation Office (ATO) to no longer subject ILPs to capital gains tax and stamp duty recently arose (Nickless, 2010, p.43). Thirdly, the ILP structure provides better management options.

Incorporation in New South Wales has taken a number of different forms. These have included MDPs which provide a 'one-stop shop' for clients of property and financial services as well at least one firm that has franchised their practice. Today there are only about 30 MDPs in N.S.W. These MDPs, for example, feature law firms providing legal services together with real estate agents, law firms providing legal services together with financial advisors and law firms providing legal services together with mediators. Although the MDP structure offers a potential increase in the range of choices available to consumers by combining existing professional services and by effectively creating new ones, client demand for MDPs in N.S.W. remains relatively low.

In addition to ILPs and MDPs we have also had two law firms list on the Australian Stock Exchange (ASX) and a small number of other firms expressing an interest in

listing. In May 2007 we saw Slater & Gordon make legal and corporate history when it became the first law firm in the world to list its entire firm on the Australian Stock Exchange. Slater & Gordon is an Australian law firm specialising in personal injury, commercial, family and asbestos-related class action law. Then in 2008 we saw Integrated Legal Holdings (IHL), a Western Australian based law firm list.

The public listing of law firms has not been without controversy. We were well aware in Australia that the public listing of a law firm raised a number of regulatory challenges. We were aware, for example, that public ownership in a law firm could cause tension between a solicitor-director's professional obligations and a solicitor-director's duties to a company's shareholders. We were also aware that public listing could result in a conflict in legal profession regulation and corporations law. Our concerns were however addressed by the legislation and our approach in regulating firms who publicly list. We worked with the profession about the challenges of alternative business structures, such as listing, and how they can successfully be addressed. We were aware early on that the duties owed to the company and shareholders and the duties owed to the court and to clients could come into conflict so we worked together with law firms prior to listing to ensure such conflict could be adverted. We did this by encouraging firms, specifically Slater & Gordon, to specify in their prospectus, constituent documents and shareholder agreements that the duty to the court was the primary duty, the duty to clients was the second duty and the duty to shareholders was third. Slater and Gordon's prospectus thus states:

> The constitution states that where an inconsistency or conflict arises between the duties of the company (and the duties of the lawyers employed by the company), the company's duty to the court will prevail over all the duties and the company's duty to its clients will prevail over the duty to shareholders. (Slater & Gordon Prospectus 2007)

The primacy of a lawyer's duties to the court is reflected throughout the prospectus. For example, in the investment overview section of the prospectus, Slater & Gordon acknowledge that the conflict of duties is a key commercial risk and may therefore impact on the performance and financial position of the firm. The conflict is also mentioned again in risk section of the prospectus. In addition to the prospectus the conflict is also reflected in Slater & Gordon's constituent documents and shareholder

agreements. In specifying the hierarchy of duties, Slater & Gordon will be able to effectively deal with issues concerning confidentiality, disclosure and reporting should they arise. IHL's prospectus, constituent documents and shareholder agreements also specify this same hierarchy.

The OLSC's regulatory approach to the public listing of law firms followed its stated mantra of 'regulating for professionalism.' The OLSC took the view that whilst it was aware that the public listing of a law firm could threaten the integrity of legal practice, the threat could be overcome by working together with the profession in coming up with a suitable solution. This process reflected our framework of education towards compliance and was directed at our purpose of reducing complaints against lawyers within a context of consumer protection and protection of the rule of law.

PRESERVING ETHICS AND INTEGRITY THROUGH REGULATION

The NSW experience in regulating incorporated legal practices has been extremely positive. Far from being the means by which legal practitioners subvert the ethics of the profession, as was commonly thought, ABSs have provided lawyers with the incentive to more stringently formalise ethical behaviour. We have found that, by and large, law firms who have adopted alternate business structures have embraced the systemization of compliance we have introduced, and as a result have reaped the rewards in terms of effective and efficient management.

We know this because we have seen a fall in the number of complaints for incorporated legal practices. An empirical study of incorporated legal practices in N.S.W. in 2008 showed they their complaint rates had dropped by two thirds after having gone through the self-assessment process. (Gordon et al, 2010). In addition to the complaints data the study also found that the majority of ILPs assess themselves to be in compliance on all ten objectives from their initial self-assessment (62%). Of the remaining 38%, about half became compliant within three months of the initial self-assessment with the assistance of the OLSC.

We also know that the system is a success because we hear this from the profession itself. We have received thanks from ILPs who have completed the self-assessment process and ILPs that have been through a practice review. We have found that

whilst practices may have initially been nervous about the self-assessment or practice review process they understood its function and purpose and were ultimately very accommodating. This is largely because we take a positive, non-adversarial approach to the practice review and at all times emphasize that we are assisting and working with the ILPs, notwithstanding the understanding that a review can lead to disciplinary consequences. The OLSC approach is centered on transparency. In our practice reviews we will send each ILP a copy of the OLSC practice review workbook, which contains questions that we ask, before the review occurs. This gives the firm time to prepare and formulate the answers to the questions and also to obtain copies of any documents that we might request. We have not come across anyone that has been particularly adverse as yet.

The success of the N.S.W. model of regulating ILPs (including MDPs) is founded on a number of specific measures. First, as discussed above the N.S.W. legislation stipulates that an ILP must appoint a 'legal-practitioner director'. The rationale for this requirement is to ensure that a legal practitioner maintains a direct interest and accountability in the management of legal services of the practice. The requirement that the legal practitioner director must be an Australian legal practitioner is by and large grounded on the same premise as the 51% rule. That is that the overall management and control of a law firm should be based on maintaining the high ethical standards of the legal profession. This means that the practice is able to retain their professional structure as a law firm.

Second, as stated above, the N.S.W. legislation stipulates that a legal practitioner director of an ILP implements and maintains 'appropriate management systems.' The rationale for this is to ensure that the legal practice considers and implements measures that support and encourage ethical and client-focused behaviour. We require this because we know that whilst people may be ethical at the end of the day if the organisation whom they work for does not have an ethical culture then personal ethics can be threatened. We were of the view that the best way to ensure that the integrity of legal practice is preserved and professionalism is protected was by mandating law firms to address such.

One of the most important features of this framework, aside from the fact that it promotes ethics and professionalism is that we are not only regulating lawyers per se as appropriate management systems apply to all those in ILPs, including non-lawyers, we are now regulating 'legal work.' In an evolving market for professional services it is very difficult to restrict the interpretation of tax law, or the compliance aspects of migration law, to lawyers, while prohibiting tax accountants and migration agents from interpreting the law and performing such work. The framework we have instituted means that in relation to ILPs we no longer have to do so, while still applying the high level of legal professionalism as required in non-incorporated legal practices.

Third, as stated above the OLSC encouraged those law firms seeking to preserve the ethics of legal practice by explicitly stating in the prospectus, constituent documents and shareholder agreements a hierarchy of duties. So if Slater & Gordon were, for example, acting in a class action against a tobacco company where there is a very good chance of them receiving substantial damages for clients who are dying of emphysema, Slater & Gordon would have to act in accordance with the hierarchy of duties set out in their documents. This means that Slater & Gordon may have to subjugate the interests of shareholders who would argue that the matter be prolonged as long as possible (because lengthy proceedings and the possibility of a court case would mean greater share value), and settle the matter as quickly as possible because their clients are dying. In doing so Slater & Gordon would not be at risk of being sued for their decision, unlike other listed companies, because their constituent documents and shareholder agreements clearly state that their first duty is to the court, the second duty is to their client and the third duty is to their shareholders. It is thus essential that any law firms who wish to incorporate and publicly list explicitly acknowledge and publicly state the hierarchy of duties.

Similarly, if Slater & Gordon are running an action against a particular individual who is very well-resourced, and that individual buys a substantial number of shares in Slater & Gordon and then demands that the action against him cease, the dilemma ceases to arise because Slater & Gordon's prospectus explicitly states that legal professionals have a primary duty to their client in the event of such a conflict. The prospectus also makes it explicitly clear that the interests of shareholders are second

to the firm's duty to the court. This then covers off the potential for a well-resourced person against whom the firm is conducting proceedings to purchase a significant stake in the firm with a view to demanding the cessation of the action.

The stipulation that the primary duty of a listed law firm is to the Court (standing for the community) effectively transforms the nature of corporations law and the corporate environment. Under this model, shareholder value can no longer be the driving force of corporations. The implications of this approach are considerable and timely particularly as the global financial crisis continues to take its toll.

Fourth, we believe that our model has been a success because we abandoned the traditional regulatory framework of prescriptive regulation in favour of an outcomes-based model for ILPs. Outcomes-based regulation means moving away from reliance on detailed, prescriptive rules and relying more on high level, broadly stated rules or principles to set the standards by which regulated practitioners and firms need to practice. (Black et al 2007) Outcomes-based regulation is aimed at improving a practitioner or firm's approach to providing services to its clients. This is more likely to be achieved by considering the intended outcomes of the regulatory regime (the so-called "spirit" of the regulatory regime), rather than the mechanical process by which a firm complies with rules. Outcomes-based regulation places significant responsibilities on senior management to interpret and apply the regulatory framework.

For the OLSC one of the greatest advantages of outcomes-based regulation is that it can provide a basis for open dialogue between the regulator and regulated, facilitating a co-operative and educative approach to supervision. Enhanced co-operation is particularly important for those practitioners and firms who are well intentioned, but either ill informed, or simply confused as to what the regulatory provisions require. Similarly, outcomes-based regulation also allows the consumer to have a voice through the regulator. This is a particularly important benefit because of the OLSC's stated function which is to reduce complaints against lawyers within a context of consumer protection.

There is thus compelling evidence that the Australian legislative approach in regulating incorporated legal practices makes a big difference to how well these firms are managed and achieve ethical lawyer behaviour. The reasons for this is largely due to the fact that the regulatory measures we have instituted are aligned with our stated function and purpose and fit well within our education towards compliance framework.

CONCLUSION

New South Wales (N.S.W.) was the first jurisdiction in Australia and indeed the rest of the (common law) world to permit law firms to structure their practices as multi-disciplinary practices or incorporated legal practices. Such permission was not however without controversy. One of the main concerns was whether and how the legal profession would be able to maintain its ethical responsibilities and professional duties in the face of commercial pressures. Realizing this, the OLSC established a regulatory regime that was responsive to such a threat. In doing so, the OLSC sought to continue its function and purpose of reducing complaints against lawyers, promote consumer protection and protect the rule of law. At the heart of the OLSC's regime lay the concept of 'regulating for professionalism' and preserving legal ethics.

We believe that the path that N.S.W. has taken to preserve the ethics and integrity of the legal profession is important. We have focused on entrenching and promoting ethical behaviour and encouraging the legal profession to remain a true profession as well as operate as a business. The management systems we require ILPs to maintain act as a quasi-educative mechanism teaching practitioners best practice to achieve compliance with the requirements of the legislation and promote cultural change. We do this for the 25,000 legal practitioners in N.S.W. with a staff of twenty-eight people and a budget of approximately $(AUD) 4 million per annum.

In setting up our regulatory structure we have, in effect, moved away from sole reliance on complaints-based regulation alone to compliance based regulation (or as I prefer "cultural regulation") and in doing so can hope to provide far greater protection to consumers by ensuring that practitioners are acting ethically and professionally. The regulatory framework we have devised also allows us to acknowledge that law is both a profession and a business and sets boundaries to

ensure that law firms maintain their professional and ethical obligations to the Court. In setting these boundaries we can hopefully mitigate the risk of the profit driven commoditisation of legal practice.

ANNEXURE A

‘TEN AREAS TO BE ADDRESSED TO DEMONSTRATE COMPLIANCE WITH "APPROPRIATE MANAGEMENT SYSTEMS"

1. **Negligence** - (providing for competent work practices)
2. **Communication** (providing for effective, timely and courteous communication)
3. **Delay** (providing for timely review, delivery and follow up of legal services)
4. **Liens/file transfers** (providing for timely resolution of document/file transfers)
5. **Cost disclosure/billing practices/termination of retainer** (providing for shared understanding and appropriate documentation on commencement and termination of retainer along with appropriate billing practices during the retainer)
6. **Conflict of interests** (providing for timely identification and resolution of “conflict of interests”, including when acting for both parties or acting against previous clients as well as potential conflicts which may arise in relationships with debt collectors and mercantile agencies, or conducting another business, referral fees and commissions etc)
7. **Records management** (minimising the likelihood of loss or destruction of correspondence and documents through appropriate document retention, filing, archiving etc and providing for compliance with requirements regarding registers of files, safe custody, financial interests)
8. **Undertakings** (providing for undertakings to be given, monitoring of compliance and timely compliance with notices, orders, rulings, directions or other requirements of regulatory authorities such as the OLSC, courts, costs assessors)
9. **Supervision of practice and staff** (providing for compliance with statutory obligations covering licence and practising certificate conditions, employment of persons and providing for proper quality assurance of work outputs and performance of legal, paralegal and non-legal staff involved in the delivery of legal services)
10. **Trust account regulations** (providing for compliance with Part 3.1 Division 2 of the Legal Profession Act and proper accounting procedures) ‘

ANNEXURE B

EXECRP FROM SELF-ASSESSMENT DOCUMENT CONCERNING OBJECTIVE 1 'NEGLIGENCE'

'SUGGESTIONS CONCERNING THE ELEMENTS OF "APPROPRIATE MANAGEMENT SYSTEMS" FOR INCORPORATED LEGAL PRACTICES IN NSW

Section 140(3)(a) of the Legal Profession Act 2004 requires legal practitioner directors of incorporated legal practices (ILPs) to ensure that "appropriate management systems" are implemented and maintained to ensure that the provision of legal services by ILPs comply with the requirements of the Act and Regulations. Failure to comply can amount to professional misconduct. The Office of the Legal Services Commissioner (OLSC) and the Council of the Law Society of NSW (LSC) each has power under the Act (Chapter 6) to investigate or audit ILPs in connection with the provision of legal services.

While the legislation does not define "appropriate management systems", OLSC, working collaboratively with LSC, LawCover and the College of Law, has adopted an "education towards compliance" strategy to assist ILPs. This document deals with the ten areas (reflected in the Objectives column in this document) that OLSC suggests should be addressed in considering "appropriate management systems".

To enable legal practitioner directors to assess the systems in place in their practices when considering these "appropriate management systems", it might be helpful to use the ratings shown below. All examples provided in this document are suggestions only because ILPs vary in terms of size, work practices and nature of operations and thus no "one size fits all". Legal practitioner directors are encouraged to contact the OLSC or the Law Society of NSW for any clarification needed or additional examples.

SELF-ASSESSMENT RATING	CODE	EXPLANATION
Non-Compliant	NC	Not all Objectives have been addressed.
Partially Compliant	PC	All Objectives have been addressed but the management systems for achieving these Objectives are not fully functional.
Compliant	C	Management systems exist for all Objectives and are fully functional.
Fully Compliant	FC	Management systems exist for all Objectives and all are fully functional and all are regularly assessed for effectiveness.
Fully Compliant Plus	FC Plus	All Objectives have been addressed, all management systems are documented and all are fully functional and all are assessed regularly for effectiveness plus improvements are made when needed.

Please consider each key concept and rate yourself as either "NC/PC/C/FC/FC PLUS". If you rate yourself NC or PC please outline the action you will take to comply. If you use an alternate system to those described in this form as most likely to lead to compliance, please describe it. If you believe any of the key concepts are not applicable, please note them as being inapplicable and provide reasons.

Objective	Key concepts to consider when addressing the Objective	Examples of possible evidence or systems most likely to lead to compliance	Action to be taken by ILP (if needed)
Competent work practices to avoid NEGLIGENCE	Fee earners practise only in areas where they have appropriate competence and expertise.	A written statement setting out the types of matters in which the practice will accept instructions and that instructions will not be accepted in any other types of matters.	
	All fee earners have a good grasp of issues involved in running a practice and serving clients.	Written records of attendance at CLE programs indicating some attendance at programs concerning practice management, staff management and risk management.	
	The legal practitioner directors meet on a regular basis to review the performance of the practice or, in the case of sole practitioner practices, meetings are held regularly with staff.	Minutes/notes recording the decisions taken at meetings and the actions taken.	
	Legal practitioner director/s regularly consider and review workloads, supervision, methods of file review, and communication with clients.	Written records including file registers, number of files assigned to each fee earner, dates and methods of file review.	
Competent work practices to avoid NEGLIGENCE (Continued)	Legal practitioner director/s ensure that legal services are always delivered at a consistently high standard.	Up to date precedents covering relevant practise areas are available and used, the practice has appropriate resources for legal research in the areas in which it accepts	

Objective	Key concepts to consider when addressing the Objective	Examples of possible evidence or systems most likely to lead to compliance	Action to be taken by ILP (if needed)
		instructions (whether subscriptions to loose leaf services, up to date text books, training in internet based research) and the work of all employed solicitors and paralegals is properly supervised.	
			Overall rating for Objective (Please circle one rating) NC PC C FC FC Plus

BIBLIOGRAPHY

ATTORNEY GENERAL'S DEAPRTMENT OF N.S.W, (1988) 'National Competition Policy Review of the Legal Profession Act 1987', available at http://www.lawlink.nsw.gov.au/report%5Clpd_reports.nsf/pages/ncp_index, (accessed on 24 May 2010).

ATTORNEY GENERAL'S DEAPRTMENT OF N.S.W (1988), 'National Competition Policy Review of the Legal Profession Act 1987: Final Report', available at http://www.lawlink.nsw.gov.au/report%5Clpd_reports.nsf/pages/ncpf_toc, (accessed on 24 May 2010).

BARKER, R., (2010) "No, Management is *Not* a Profession", Harvard Law Review, July/August.

BLACK, J., HOPPER, M. & BAND, C., (2007) "Making a success of Principles-based regulation", *Law and Financial Markets Review*, Vol 1, No.3 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1146977

CALLAHAN J.C., (1999) Ethical Issues in Professional Life, New York: Oxford University Press, in Stephen F. Barker, "What is a Profession?", 1 Professional Ethics.

FRIEDSON, E, (2001), PROFESSIONALISM, THE THIRD LOGIC, University of Chicago Press, Chicago.

GORDON, T., MARK, S.A., PARKER, C.E., 'Regulating Law Firm Ethics Management: An Empirical Assessment of the Regulation of Incorporated Legal Practices in N.S.W.' (December 23, 2009), Journal of Law and Society, 2010; U of Melbourne Legal Studies Research Paper No 453, SSRN: http://ssrn.com/abstract=1527315

MARK, S. (2007) 'The Corporatisation of Law Firms - Conflicts of Interests for Publicly Listed Law Firms', Australian Lawyers Alliance National Conference 2007, Hobart, 11-13 October 2007, available at http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/OLSC_speeches, (accessed on 22 May 2010).

MARK, S. & COWDROY, (2004) 'Incorporated Legal Practices - A New Era in the Provision of Legal Services in the State of New South Wales' 22(4) *Penn State International Law Review* 671.

MARK, S. & GORDON, T (2009) 'Innovations in Regulation - Responding to a Changing Legal Services Market' *22 Geo. J. Legal Ethics* 501.

PARKER, C., (2004) ‘Law Firms Incorporated: How Incorporation Could and Should Make Firms More Ethically Responsible’, 23(2) *University of Queensland Law Journal* 347.