

## DISCUSSION NOTES PREPARED FOR THE NATIONAL LEGAL PROFESSION REFORM CONSULTATIVE GROUP

### BUSINESS STRUCTURES

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Under the various Legal Profession Acts a legal practitioner has the option (except in South Australia) to operate as an employee of an incorporated legal practice (ILP) that has non-legal practitioner owners.

Despite the initial concerns expressed by some stakeholders it seems that there is now general support for the notion (with some qualifications) that there is no good policy reason to restrict either the legal structure within which practitioners perform legal services or the form of ownership those legal structures adopt. The most important qualification is that legal practitioners providing legal services within a particular business or ownership structure are regulated in a way that ensures that the hierarchy of duties owed by those legal practitioners, first to the court and second to clients, is not undermined.

In broad terms the current provisions provide an appropriate balance between the need to provide flexibility and the need to ensure legal practitioners operating within an ILP are bound by the same professional obligations as other legal practitioners. Primarily this is done by regulating the grant and renewal of practicing certificates and by ensuring that an ILP has a legal practitioner director. The legal practitioner director is accountable for the conduct of all employee legal practitioners and for ensuring that the ILP has adopted and maintains appropriate management systems.

There is some evidence that the appropriate management systems (AMS) model,<sup>1</sup> with an emphasis on self audit requirements, has produced a higher level of awareness of risk management and the need to monitor, supervise and improve legal services to clients.<sup>2</sup> It has been suggested by some regulators that there is merit in the idea that the requirement that ILP's have in place AMS be applied to all legal practitioners whatever business structure they employ.

Generally, the current provisions provide adequate guidance to legal practitioners charged with oversight and management of ILP's. There is an opportunity to harmonise the language which is used both in legislation in various jurisdictions and in the design of an AMS regime which provides more guidance to firms on the measures which they would be expected to implement relevant to their own circumstances.

It has been our experience at Slater & Gordon that the need to be externally accountable for the implementation of AMS has tended to create a greater level of awareness of compliance issues and as a consequence has generally improved the quality of our legal services. The application of AMS across all legal practices, regardless of the ownership structure, should serve to improve professional standards, and accordingly, ethical standards and client service should also improve. My concern is that from a practical perspective the requirements may prove unnecessarily cumbersome for sole practitioners, barristers or very small firms. In this context I have chosen an arbitrary cut off point as a definition of a small firm, as a firm that employ's less than three full time equivalent legal practitioners or less than ten full time equivalent staff in total.

Different management systems will be appropriate in different settings. The application of self-regulated AMS allows for flexibility depending on what is appropriate in different settings. For example, small and medium sized legal practices will have different management system needs; similarly, a mono-jurisdictional practice will have different needs to a national practice; and, consumer legal services and general practices will have different requirements to practices serving corporate clients.

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<sup>1</sup> Introduced by the Office of the Legal Services Commissioner (NSW), section 140 Legal Profession Act 2004 (NSW)

<sup>2</sup> Parker, C., Mark, S., Gordon, T., Assessing the Impact of Management-Based Regulation on NSW Incorporated Legal Practices: Research Report, 25 September 2008.

In New South Wales, Victoria and Queensland, ILP's are sent a self-assessment document to complete and return to the Office of the Legal Services Commissioner. The ILP is required to assess its levels of compliance with the ten stated objectives of the appropriate management systems regime. In a recent study of the self assessments regime it was reported that:

*"The self-assessment document takes into account the varying size, work practices and nature of operations of different ILP's, eschewing an inappropriate "one size fits all" approach requiring the fulfillment of uniform criteria."*<sup>3</sup>

The authors concluded that this education towards compliance approach has significantly impacted on the internal management systems of the firms and has had a positive impact on client satisfaction levels, reducing complaint numbers.<sup>4</sup>

Whilst the advent of non-legal practitioner ownership in a legal practice creates a new layer of potential conflicts of interest, this is in practice readily manageable by the consistent application of the hierarchy of duties "rule" which imposes on legal practitioners the need to ensure that legal services are provided in a way that ensures observance of, the obligation to place legal practitioners duty to the court and to the administration of justice before all other obligations, followed by a legal practitioners duty to clients. Having said that, it would be useful to introduce a legislative requirement which sets out the hierarchy of duties and ensures that they are embedded in the governance structures of legal practices whether incorporated or otherwise.

## OBSERVATIONS

The regulation of business structures in the proposed new national model should be designed to:

- (i) Reduce restrictions on the form of structure utilised to operate and own a legal practice, save that if an incorporated structure is utilised, at least one director of the ILP must be a legal practitioner director;
- (ii) Require as a condition of the grant or renewal of a practicing certificate that a legal practitioner director(s) or principal(s) providing legal services within a "legal practice" ensures that the legal practice adopt and maintain AMS in a form which complies with the principles set out from time to time by the proposed new National LSB and provide the LSB with such evidence as it may require from time to time as to the implementation of the AMS within the legal practice;
- (iii) Ensure that the LSB is an oversight regulator with power both to set the conditions for grant or renewal of a practicing certificate as well as approving "local" regulators to conduct the monitoring, surveillance and (if necessary) audit functions on its behalf;
- (iv) The new national legal profession model should entrench the hierarchy of duties directly into the legislative framework for all legal practices that is, it should direct that the duty to the court and to the administration of justice is paramount, followed by the duty to clients and the duty to the owners, company and/or shareholders; and
- (v) All other legal practices (as well as ILP's), save for small practices<sup>5</sup>, should be required to comply with the AMS regime.

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<sup>3</sup> Parker, C, et al, p.16.

<sup>4</sup> See Parker, C. et. al.

<sup>5</sup> employing no more than three legal practitioners (on a full time equivalent basis) or no more than ten staff (on a full time equivalent basis)