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Regulatory Innovation: What's in it for US?



**40th National Conference on
Professional Responsibility
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Panelists

Bob Heslett: Council Member (former President)
of The Law Society of England & Wales

Steve Mark: Former Legal Services
Commissioner, New South Wales, Australia

Victoria Rees: Director of Professional
Responsibility, Nova Scotia Barristers Society

Ted Schneyer: Professor of Law; ABA 20/20
Commissioner; leading commentator

Global Regulatory Developments

- **2007 UK Legal Services Act**
 - 1) changed the regulatory structure to create the overarching Legal Services Board (LSB) & front-line regulators such as the Solicitors Regulation Authority (SRA)(see TOC #7);
 - 2) changed the lawyer discipline system; and
 - 3) Permits ABS [alternative business structures]
- **Australia's 2013 Uniform Legal Profession Law** (implemented by Victoria & New South Wales in 2014) & earlier NSW Legal Profession Act (TOC #2)
- **Nova Scotia's "Transforming Regulation" Project** (approved Oct. 2013) (See TOC #18-20)

3



Innovations We Will Focus On

- Regulatory objectives (why regulate?)
- Entity regulation (what is regulated) [excluding ABS]
- Proactive regulation (when to regulate?)
- Outcomes-focused regulation (how to regulate)

"It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. V. Liebmann, 285 U.S. 262 (1932)(Brandeis, J. dissenting)

4

Questions We Hope to Address

- 1) Why each jurisdiction adopted this innovation;
- 2) The types of resources that were (or for Canada – seem to be) required in order to implement this innovation;
- 3) Any research or data that addresses the impact of this regulatory innovation; and
- 4) Whether the speaker would recommend this innovation and if so, what advice the speaker would offer to a US jurisdiction considering this development.

5

2007 UK LSA §1: Regulatory Objectives

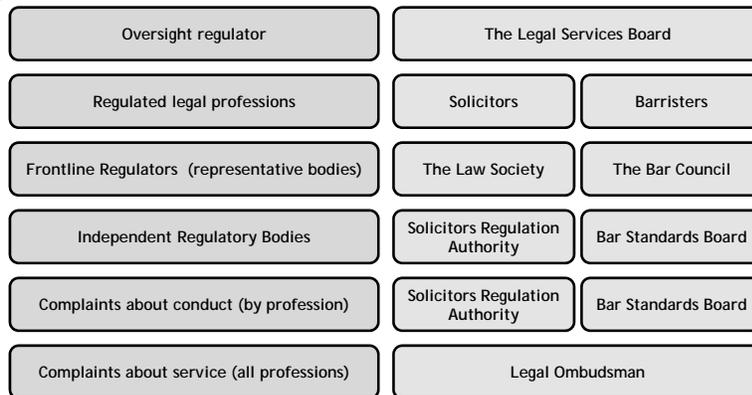
The regulatory objectives

- (1) In this Act a reference to “the regulatory objectives” is a reference to the objectives of—
- (a) protecting and promoting the public interest;
 - (b) supporting the constitutional principle of the rule of law;
 - (c) improving access to justice;
 - (d) protecting and promoting the interests of consumers;
 - (e) promoting competition in the provision of services within subsection (2);
 - (f) encouraging an independent, strong, diverse and effective legal profession;
 - (g) increasing public understanding of the citizen's legal rights and duties;
 - (h) promoting and maintaining adherence to the professional principles.

6



The regulatory landscape



supporting solicitors

Australia's Uniform Legal Profession Law

The objectives of this Law are to promote the administration of justice and an efficient and effective Australian legal profession, by—

- (a) providing and promoting interjurisdictional consistency in the law applying to the Australian legal profession; and
- (b) ensuring lawyers are competent and maintain high ethical and professional standards in the provision of legal services; and
- (c) enhancing the protection of clients of law practices and the protection of the public generally; and
- (d) empowering clients of law practices to make informed choices about the services they access and the costs involved; and
- (e) promoting regulation of the legal profession that is efficient, effective, targeted and proportionate; and
- (f) providing a co-regulatory framework within which an appropriate level of independence of the legal profession from the executive arm of government is maintained.

Nova Scotia's Proposed Regulatory Objectives

1. Protect those who use and receive legal services
2. Promote the rule of law and the public Interest in the justice system
3. Promote access to legal services and the justice system
4. Establish required standards for professional responsibility and competence in the delivery of legal services
5. Promote diversity, inclusion, substantive equality and freedom from discrimination in the delivery of legal services and the justice system
6. Regulate in a manner that is efficient, transparent, consistent, focused and proportional

9

Entity Regulation in Australia



Office of the Legal Services
Commissioner

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Search

Complaints Register of Disciplinary Action Incorporated Legal Practices Education and Research Publications OLSC Portal

Home > Incorporated Legal Practices

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Incorporated Legal Practices

Obligations of Legal Practitioner Directors
Appropriate Management Systems to Achieve Compliance
Self Assessment Process
Compliance Audits

Incorporated Legal Practices

Since 1 July 2001, NSW legal service providers have been permitted to incorporate and provide legal services to clients either alone, or alongside other service providers who may, or may not be, legal practitioners. Such Incorporated Legal Practices (ILPs) can operate provided the ILP has at least one legal practitioner director and complies with the requirements of the *Legal Profession Amendment (Incorporated Legal Practices) Act 2000 (NSW)* and the *Legal Profession Regulation 2005 (NSW)* (the Regulations). Such provisions have been incorporated into the *Legal Profession Act 2004 (NSW)* (LPA 2004) and the Regulations.

10

Entity Based Regulation in the UK



Solicitors Regulation Authority

Home **Solicitors** Consumers Students About us mySRA

SRA Handbook	Investigation and enforcement	COLPs and COFAs	Firm-based authorisation
Welcome	If we are investigating you	What is a COLP and COFA?	New firm application
Introduction	Reporting and how to report	Responsibilities of COLPs and COFAs	Existing firms applications
Principles	Intervention and the SDT	Nominating COLPs and COFAs	How we make authorisation decisions
Code of Conduct	PC conditions, suspension, removal from the roll	Case studies	Register of licensed bodies (ABS)
Accounts Rules	Recognised sole practitioners	Resources	
Authorisation and Practising Requirements		More help	
Client Protection			

11

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∨ Firm-based authorisation

- » New firm application
- » Existing firms applications
- » How we make authorisation decisions
- » Register of licensed bodies (ABS)

Home > [Solicitors](#) > Firm-based authorisation

Firm-based authorisation



As a firm or sole practitioner, you can help ensure the process of applying for authorisation or recognition runs smoothly and efficiently by learning about and understanding our requirements. To help you and your firm prepare to apply, we outline the authorisation process for firms and role holders, and explain how we assess applications and make decisions. We also offer risk assessment tips and examples.

Compliance Officer for Legal Practice (COLP)

Compliance Officer for Finance and Administration (COFA)

12

Nova Scotia & Entity Based Regulation

What does a proactive, risk-focused, and principles-based regulatory regime look like?

Currently, the Society regulates the legal profession generally by creating and enforcing detailed rules and regulations that try to capture every permutation and combination of tasks and responsibilities for individual lawyers. With the dramatic changes in the way law is practised, some suggest this has become an impossible task because, in part, it fails to recognize that today, many decisions are made and services provided by law firms, rather than individual lawyers. Further, more lawyers now practise in environments – such as large corporate legal departments – that are not contemplated by the traditional one-size-fits-all, rules-based approach

13

Australia's Proactive Regulation

Appropriate Management Systems to Achieve Compliance



Office of the Legal Services
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Incorporated Legal Practices

Obligations of Legal Practitioner
Directors

Appropriate Management Systems to Achieve Compliance

Self Assessment Process

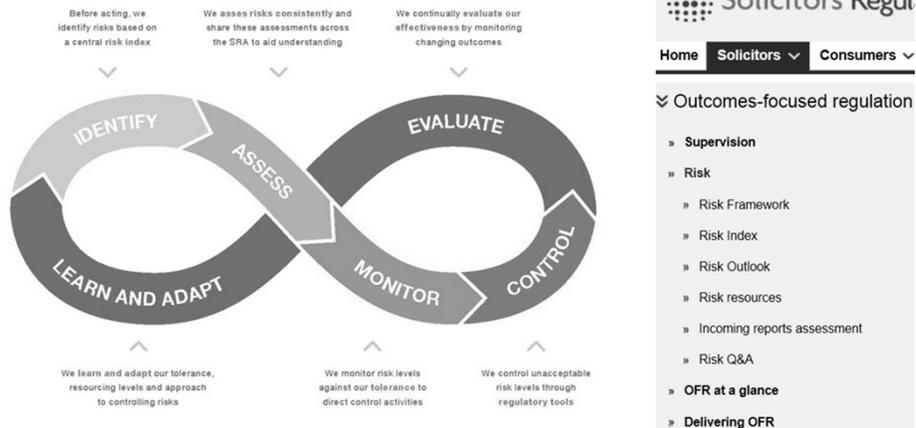
Compliance Audits

10 objectives for which the ILP must have appropriate management systems:

- 1) negligence;
- 2) communication;
- 3) delay;
- 4) liens/file transfers;
- 5) billing practices & disclosures;
- 6) conflicts of interest;
- 7) records management;
- 8) undertakings (to the Courts & others);
- 9) supervision of staff;
- 10) trust account requirements.

14

UK's Proactive (Risk-based) Regulation



Nova Scotia & Proactive Regulation

- ***A proactive, risk-focused, principles-based regulatory regime should include:***

“A proactive approach to regulation through education and engagement with firms, development of appropriate management systems for firms, and the provision of tools and training to help firms of all sizes achieve regulatory objectives, and to practise ethically and competently in the public interest. This would include helping law firms put client management and quality control systems in place, which would reduce future quality of service complaints and professional liability insurance claims.”

UK Outcomes Focused Regulation

OFR is...

- Designed to enable you to put clients first, where this doesn't prejudice the public interest
- About achieving the right outcomes for clients
- Flexible
- A move away from prescriptive rules wherever this is appropriate

OFR isn't...

- Light-touch regulation
- A tick-box approach to regulation
- A "one-size-fits-all" approach to regulation

Outcomes-focused regulation

Supervision

Risk

OFR at a glance

Delivering OFR



Solicitors Regulation Authority

Home

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About us ▾

mySRA ▾

17

Australia & Principles-Based Reg.

- “The regulatory goals in PMBR set by the regulator are based on principles. The goals are typically drafted at a broad level of generality, with the intention that there should be overarching requirements that can be applied flexibly. The goals as principles contain terms that are qualitative and not quantitative and are purposive, expressing the reason behind the rules. The goals represent in effect behavioural standards. The benefits of PMBR are many. ...” See Table of Contents #2, pp. 8-9

18

Nova Scotia & Outcomes-Based Reg.

A proactive, risk-focused, principles-based regulatory regime should include

“A proactive approach to regulation through Simplified regulations based on principles rather than details, to reduce regulatory burden and give firms the ability to adopt different ways to achieve principles-based goals, based on the context and nature of their practice and clientele. For example, adopting the principle that law firms are responsible for ensuring that client trust monies and property are properly handled, recorded and protected, and eliminating the current detailed regulations respecting deposit and, withdrawal of trust monies, and maintenance of specific books, records and accounts. The *Code of Professional Conduct*, and many of the current Practice Standards (real estate, family, law office management) are examples of principles-based regulation.

19

The Regime Should Include...

...a risk-based focus as the framework and foundation for all regulatory requirements and activities. By clearly identifying actual and foreseeable risks to the public, the profession and the Society itself, the Society can better regulate in a way that focuses resources on areas of greater risk. For example, some firms will be better positioned to demonstrate early on that they have adopted appropriate management systems, while others will require more time and assistance. The Society’s efforts and resources would therefore be more focused on those firms requiring assistance in achieving regulatory goals, whether through voluntary compliance or enforcement measures.

20