



NOVA SCOTIA  
BARRISTERS' SOCIETY

# **Transforming Regulation and Governance in the Public Interest**

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# Transforming Regulation and Governance

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## 1.0 INTRODUCTION AND EXECUTIVE SUMMARY

Council's Strategic Plan for 2013 – 2016 focuses on two significant goals: transforming regulation and governance in the public interest, and enhancing access to justice for Nova Scotians. The purpose of this paper is to summarize the results of extensive research in support of Council's work around transforming regulation and governance. Aspects of this research are also relevant to the access to justice work.

The goal of this paper is to inform, not to persuade.

In adopting 'Transforming Regulation and Governance in the Public Interest' as a strategic priority, Council has signalled that it wants to consider fundamental and perhaps profound change. Council members will need to approach the concept of transforming regulation and governance with an open mind, prepared to explore the possibilities, and not burdened by questions of 'why?' so much as motivated by the question 'why not?'

In undertaking this review, Council will need to stay grounded and focused on the Society's current authority (although not constrained by it) and then determine if, in seeking change, it can do so within the current statutory and regulatory framework, or if legislative change will be required. Below is a series of questions/issues that Council will need to consider to address all matters raised by a consideration of comprehensive regulatory reform. Consider them to be points on a 'roadmap'; they are there to see but not all need to be visited at the same time or in any particular order.

For the Nova Scotia Barristers' Society, all of these discussions need to be grounded in s. 4 of the *Legal Profession Act*:

### Purpose of Society

- 4 (1) The purpose of the Society is to uphold and protect the public interest in the practice of law.
- (2) In pursuing its purpose, the Society shall
  - (a) establish standards for the qualifications of those seeking the privilege of membership in the Society;
  - (b) establish standards for the professional responsibility and competence of members in the Society;
  - (c) regulate the practice of law in the Province. 2004, c. 28, s. 4; and
  - (d) seek to improve the administration of justice in the Province by
    - (i) regularly consulting with organizations and communities in the Province having an interest in the Society's purpose, including, but not limited to, organizations and communities reflecting the economic, ethnic, racial, sexual and linguistic diversity of the Province, and
    - (ii) engaging in such other relevant activities as approved by the Council.

If Council begins its discussions about rethinking the form and nature of regulation with s. 4 of the LPA, the roadmap will require that we visit and consider a range of topics, including:

### **1.1 Why do we regulate lawyers?**

Is the present assertion/assumption that lawyer regulation is required in order that the public be protected from unqualified and unscrupulous practitioners appropriate in 2013? Are there elements of the rule of law or protection of individual rights, such as privileged communication, that justify regulation? (*Appendix 3 sets out some of the relevant background.*) Could we allow firms, with a demonstrated competence, to establish appropriate management systems (a phrase coined in Australia) that suit the nature of their clientele and areas of practice, to demonstrate their effectiveness, and then refocus our attention and resources on proactively supporting sole practitioners and small firms in achieving appropriate management systems and avoiding problems that impact the public? (*See 5.1 and Appendix 5.*)

### **1.2 What does Council want the regulatory system for lawyers to look like?**

Will regulation be proactive or reactive? (*Discussed in 2.2 and 2.3.*) Should there be a more principles-based approach to regulation? (See Outcomes Focused Regulation {OFR} discussions in 2.3.) Could we have an organizationally embedded risk-based approach to regulation? (An example is Australia's regulation of Incorporated Legal Practices.)

Are the regulatory purposes set out in s. 4 of the Act adequate? What does the public interest require in 2013? Should promoting access to justice and access to legal services be included? What about the Rule of Law and lawyer independence, consumer and client interests? Are there other things to consider? (*Discussed in 2.*)

### **1.3 Who should regulate lawyers?**

Is the current regulatory regime the right one? Should there be greater public participation in regulation? Are any forms of co-regulation worthy of consideration? (*See Appendices 3 and 5.*)

### **1.4 What should be regulated?**

Should we regulate categories of individuals as well as law firms (as we do at present), legal entities that practise law (sole practitioners, law firms, law corporations and law departments are some examples) or legal services, by whomever they are offered (such as the LSUC move to regulate paralegals – see p. 30 – or the English model of ‘reserved services’). Should new practice and business structures be enabled, including ABS (alternate business structures), MDPs (multi-disciplinary practices), virtual law firms and other, as yet not developed, models? (*See 4.3, 4.4 and Appendix 5.*)

### **1.5 When should regulation occur?**

Should regulation be proactive and designed to try to prevent problems, especially in areas of lawyer conduct, as opposed to the present system, which is primarily reactive? What model best protects the public? What should be the nature of the relationship between the Society with lawyers and law firms, in order to ensure high quality and ethical practice? In summary, should we have a more proactive approach with lawyers and law firms through education, engagement, the creation of an Appropriate Management Systems-based approach like Australia, with the provision of tools and training to help firms of all sizes practise in the public interest and develop an embedded ethical

infrastructure? *(Discussed in sections that review OFR – 2.3 and 2.4 – used in England and the new regulatory models developed in New South Wales. Ethical infrastructure work has recently been undertaken by the CBA.<sup>1</sup>)*

## **1.6 How does regulatory reform link with the other strategic priority of Council of ‘enhancing access to legal services and the justice system for all Nova Scotians’? (See 2.7.)**

Though these questions are not specifically spelled out in this paper, they are the themes and issues which a rethinking of lawyer regulation requires to be considered and which, it is anticipated, Council and other readers will reflect on when they read of the changes that are happening elsewhere, and then apply them to the Canadian and Nova Scotian context.

The paper covers a range of research under the following headings:

- Self-regulation and the public interest – The foundation for where we are and where we might go (2)
- Current traditional regulatory models (3)
- The future of the legal profession and impact on regulation (4)
- New regulatory models – An environmental scan (5 and Appendix 5)
- Outcomes-focused and risk-based regulation – The England and Wales model (6 and Appendices 6 & 7)

It will become clear to the reader that throughout this paper, any regulatory reforms need to also be grounded in our priority to enhance access to justice. A number of the reforms discussed in this paper suggest a strong linkage between Council’s two priorities.

As Council works through these challenging questions, consider also whether you are examining these questions through a lens that instinctively prefers the status quo with ‘tweaking’ where appropriate, or adopting a ‘clean slate’ approach involving a rebuilding of the regulatory regime from the ground up. Keep in mind that many of the options examined in this paper may not require significant legislative reform.

There is a considerable amount of information contained in the body of and appendices to this paper. Though it is intended to be comprehensive, it is recognized that readers will come to it from different perspectives and with different backgrounds. For some there will be too much information; for others there will not be enough detail or explanation. Thus, Council might consider this paper as an itinerary of sorts for a ‘cruise around the world’ of regulation and the future of the legal profession. Should Council decide that a particular ‘location’ or idea looks worth pursuing, then further research and details can be provided for the next trip.

### **Acknowledgments**

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<sup>1</sup> <http://www.cba.org/CBA/activities/pdf/ethicalinfrastructureguide-e.pdf>

## 2.0 SELF-REGULATION AND THE PUBLIC INTEREST – THE FOUNDATIONS FOR WHERE WE ARE AND WHERE WE MIGHT GO

### 2.1 Independent lawyers – Independent regulators

*The legal profession has a unique position in the community. Its distinguishing feature is that it alone among the professions is concerned with protecting the person and property of citizens from **whatever quarter** they may be threatened and pre-eminently against the threat of encroachment by the state. The protection of rights has been an historic function of the law, and it is the responsibility of lawyers to carry out that function. In order that they may continue to do so there can be no compromise in the principle of freedom of the profession from interference, let alone control, by government.<sup>2</sup>*

Mr. Justice George D. Finlayson of the Ontario Court of Appeal (a former Treasurer of the Law Society of Upper Canada), in his presentation in 1984 to the Advocates’ Society, articulately captured the strong belief that the role of lawyers was to be fierce and independent guardians of the public. This should also be reflected in the regulator of lawyers, which must be equally independent and committed to protection of the public interest. He maintained it is a common error to believe that because a law society functions under powers legislatively delegated by government, it is therefore a creature of government. He stated, “This concept is at odds with history of the legal profession and is entirely invalid.”<sup>3</sup> Justice Finlayson concluded that even though as a profession we will never be loved, we will be respected for our independence and our commitment to the public, who we are sworn to protect.<sup>4</sup>

Before Council embarks on the journey to consider how and whether to transform the public interest regulation of lawyers in Nova Scotia, it is important to reflect on key principles in professional regulation, such as independence as it exists in reality, so these cornerstones are retained in any new foundation constructed.

It is also important to challenge assumptions. For example, is ‘independence’ a means or an end? The courts have interpreted judicial independence as a means to an end. As we grapple with our fear of ‘losing independence’ as a **regulator**, this should not be confused with the independence of the legal profession as a whole. As we will explore in this paper, there are strong advocates in Canada and elsewhere for having an intermediary public entity fulfilling some form of oversight role for the regulator of the legal profession. Is it necessary to forego full independence as a regulator in order to regulate ‘in the public interest’? If so, does this impact the independence of the legal profession itself? Some would say that independence of the regulator can only be justified if it is a means to the end of protection of the public interest.

### 2.2 Independence is qualified – Regulators do not act alone

Though independence remains a foundational tenet of lawyer regulation, it can no longer be seen as ‘pure’ independence. For many years, one could describe the methodology for regulation of lawyers as the ‘command and control’ regime made up of a set of rules created and enforced with minimal lawyer consultation or involvement, and in a reactive, police-state manner and thus acting independently in an arbitrary manner.

In “Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a ‘Post-Regulatory’ World,” Prof. Julia Black notes, “Essentially the term (command and control) is used to denote all that can be bad about regulation: poorly targeted rules, rigidity, ossification, under or over-

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<sup>2</sup> Finlayson, GD. “Self-Government of the Legal Profession – Can It Continue?” (1985) 4 Advocates’ Soc J 11, p.1

<sup>3</sup> Ibid, p.2

<sup>4</sup> Ibid, p.5

enforcement, with unintended consequences.”<sup>5</sup> However, over the past 20 or more years in Canada, law societies have in many ways moved away from this command and control regime, recognizing that this approach to independent regulation provides little or no evidence that it effectively protects the public. Because of changes in expectations of the public and lawyers of the regulator; because of the creeping intervention of courts (e.g., some suggest that case law drove lawyer mobility<sup>6</sup> and conflicts rules<sup>7</sup>) and government (e.g., the *Fair Registration Practices Act*<sup>8</sup>) in what has been for some time an impregnable regulator fortress; and in recognition that such regimes create barriers to accountability and transparency, changes have occurred that have mitigated to nature of independent regulation previously applied. Black goes on to state:

*Regulation therefore cannot take the behavior of those being regulated as constant ... . ... regulation will produce changes in behavior and outcomes that are unintended (though not necessarily adverse), and that its form may have to vary depending on the attitude of the regulated towards compliance, an attitude which itself can effect, and that the autonomy of the actor will to an extent render it unsusceptible to external regulation.*<sup>9</sup>

One theme that has emerged in more modern thinking about self-regulation – described by Black as the “New Regulatory State” – is that regulators do not act alone, but rather they are part of a complex system of regulation impacted by other entities and stakeholders. This is certainly the case in the legal profession where government legislation, the courts, social policies and other factors impact and affect lawyers and the practice of law. For example, the behavior and conduct of lawyers can be impacted by tribunals such as securities regulators or utility boards that have prescribed rules for those appearing before them. Black argues that regulators need to recognize their role in the larger context of factors impacting lawyers, and take care to harness this when adopting a regulatory regime.

*The prescription is that regulation should be indirect, focusing on interactions between the system and its environment. It should be a process of coordinating, steering, influencing, and balancing interests between actors and systems, and of creating new patterns of interaction which enable social actors/systems to organize themselves ... .*<sup>10</sup>

What Black describes is the seed of a concept that has taken root in more modern regulatory regimes – what she refers to as ‘collective self-regulation’, or the need for multiple actors, including lawyers, to be a part of the regulatory system.

*The success of collective self-regulation depends, inter alia, on the relationship of the association to its members, and of intra firm regulation on the relationship of the compliance department to the rest of the organization. Both require knowledge, capacity and motivation in the same way that government regulation is assumed to for its effectiveness.*<sup>11</sup>

It is well recognized that government has been an important player in this complex system, serving various roles in the evolution of the legal profession, arguably in the public interest. For the past decade, we have watched with fear the apparent disintegration of the independence of legal regulators and the intrusion of government into what was thought to be an island of pure self-governance. The interest of government in legal regulation in Nova Scotia is best illustrated by the addition of s. 4(2)(d) of the *Legal Profession Act* when it was not specifically requested. Thus, the tension between law societies and

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<sup>5</sup> Black, Julia. “Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a ‘Post-Regulatory’ World” (2001\_ 54:1 *Curr Legal Probs* 103, p. 105

<sup>6</sup> *Black v. Law Society of Alberta*, [1989] 1 SCR 59

<sup>7</sup> *Martin v. Gray*, 1990 CanLII 32(SCC)

<sup>8</sup> SNS 2008, c 38

<sup>9</sup> Black, op cit , p. 108

<sup>10</sup> Ibid, p.111

<sup>11</sup> Ibid, p.123



government is seen by some as healthy, and by others as destructive. What is the reality of this relationship, and how is this relevant to any future regulatory regime?

In “Self-Regulation within the Regulatory State: Towards a New Regulatory Paradigm?” Bartle and Vass reiterate the message that there are multiple actors in the complex system of lawyer regulation, and it is important to recognize that regulation is not ‘unidirectional’ but involves public and private participants, agencies and stakeholders.<sup>12</sup> They go on to say:

*Whereas in classic statutory self-regulatory schemes, regulation can be said to have been ‘devolved’ by Parliament in legislation to the self-regulatory bodies, in many of the new schemes there is an intermediate public body involved.*<sup>13</sup>

We see this in the new regulatory regimes in Australia and England\*, as well as with the Office des Professions in Quebec. At issue is whether the public interest requires some level of external accountability by law societies, or whether this can be achieved by other means, such as with the extensive and impactful involvement of public representatives, for example. This will be explored later. Bartle and Vass maintain:

*Many of the new forms of self-regulation thus involve close or nuanced relationships between the state and regulated organizations and self-regulated bodies and few if any can be described as voluntary in the sense of there being no role for the state.*<sup>14</sup>

This recognition – that regulators do not act alone and play a role that stretches beyond pure regulatory compliance – reflects changes that have taken place in law societies over the past two decades, as the reference above to the *Fair Registration Practices Act* illustrates.

In *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance*, Malcolm Sparrow speaks of the complex role played by regulators, in terms of both lawyer expectations and those of the public, and the impact this can have on regulatory design.

*Regulators do so much more than administer laws. They also deliver services, build partnerships, solve problems, and provide guidance. They choose not to administer a law. And in addressing important public problems they frequently seek to influence behaviours that are not regulated ... . Regulators, depending on their conception of their role, may adopt an energetic and proactive stance in proposing and pursuing the kind of laws they think should govern their work.*<sup>15</sup>

The regulation of lawyers has become increasingly complex over the years, and requires an increasingly complex balancing of interests, as noted by Sparrow when he says regulators are not only trying to influence conduct, but behaviors. The complexities of finding the right regulatory balance described below will have a familiar ring for Council members and staff. The move towards national standards, through a Model Code of Conduct and National Admission Standards as examples, are ways that we have recognized the complexity and by seeking uniformity across the country, we have endeavoured to find the right balance as the regulator.

*Regulators, under unprecedented pressure, face a range of demands, often contradictory in nature: be less intrusive – but more effective; be kinder and gentler – but don’t let the bastards get away with anything; focus your efforts – but be consistent; process things quicker – and be*

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\* Throughout this paper ‘England’ will be used to refer to the regulatory domain covering England and Wales

<sup>12</sup> Bartle, Ian & Peter Vass. “Self-Regulation within the Regulatory State: Towards a New Regulatory Paradigm?” (2007) 85:4 Public Administration, p. 885 (Bartle & Vass)

<sup>13</sup> Ibid, p. 892

<sup>14</sup> Ibid, p. 895

<sup>15</sup> Sparrow, Malcolm K., *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance* (Washington, DC: Brookings Institution, 2000), p.6

*more careful next time; deal with important issues – but do not stray outside your statutory authority; be more responsive to the regulated community – but do not get captured by industry.*<sup>16</sup>

Sparrow suggests a simple formula for wading through the complexities of regulation, which he believes represents best practices in the regulatory field:

1. Have a clear focus on results.
2. Adopt a problem-solving approach.
3. Invest in collaborative partnerships.<sup>17</sup>

Again, we see the emergence of the theme of collaboration and shared responsibility for regulation, which we will return to later.

Other authors have applauded a simplified approach to regulation as a means for unleashing creativity and motivation among the regulated. Many describe the command and control regimes, and the traditional regulatory regimes as anti-competitive, eliminating freedom of thought amongst lawyers to problem-solve for clients, or the motivation to take responsibility for their actions.

*... simplifying the complex regulatory system can free up the capacity they have to innovate, diversify and grow. Striking the right balance – a level of regulation that promotes competition and stability without impinging on business' ability to operate – is therefore the core element of the government's strategy for economic growth. By freeing society from unnecessary laws, the government aims to create a better balance of responsibility between the state, business, civil society and individuals, and to encourage people to take greater responsibility for their actions.*<sup>18</sup>

This leads to the question of whether the Society is, to use the oft-cited metaphor, 'rowing or steering' the ship of regulation. Is our core function to provide leadership and create standards that must then be fulfilled by others (steering), or do we undertake the work to ensure the competence and compliance of lawyers with the rules and standards (rowing). At this point in time, we do both: our mandatory Continuing Professional Development program is an example of the Society 'steering' a process of continuing education – setting requirements and rules, but leaving it to others to provide, participate in and report on the education; our Professional Responsibility process sees the Society actively engaging with members through complaints resolution, investigations and audits to enforce compliance in the public interest (rowing). As we begin to consider a new regulatory model, will the 'command and control/rowing' model be more appropriate, or will we look to lawyers and law firms to become compliance champions, thus allowing us to 'steer' the regulatory ship?

### **2.3 Simplified regulation to promote competition and creativity**

Thus in Sparrow's 2000 book, and the best practices espoused by the Better Regulation Executive (BRE) in 2010, another theme emerges – creating a simplified regulatory regime that attempts to promote competition and creativity among the profession.

The Better Regulation Executive 2010 Report helps transition into a discussion of emerging best practices in regulation over the past five years. This report suggests that in order to eliminate what it terms 'avoidable burdens of regulation and bureaucracy', a regulator should:

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<sup>16</sup> Ibid, p. 17

<sup>17</sup> Ibid, p. 100

<sup>18</sup> UK, Better Regulation Executive, "Reducing Regulation Made Simple: Less Regulation, Better Regulation and Regulation as a Last Resort" by Mark Prisk, Oliver Letwin & Lord Sassoon (London: Department for Business, Innovation and Skills, 2010) p.3 (Reducing Regulation)

- remove existing regulation that unnecessarily impedes growth (in our case, of law firm business);
- introduce new regulation only as a last resort;
- reduce the overall volume of new regulation;
- improve the quality of the design of new regulation;
- reduce the regulatory cost to business and civil groups; and
- move to a risk-based enforcement regime where inspections are minimized.<sup>19</sup>

A good example of the Society's recent efforts to amend the regulations in accordance with these suggested best practices is the change to principle-based trust account regulation approved in 2012. Some Council members may recall the catharsis of the elimination of pages of detailed and complex regulations, to be replaced by simple, clear regulations based on key principles.

The theme of regulatory simplification has become a hallmark for new regulatory regimes, particularly as economic challenges have required regulators to become leaner and more efficient. The BRE Report goes on to say:

*Regulators' resources are often wasted on intrusive monitoring of the work of compliant businesses, and insufficient energy is given to dealing with those that choose to operate outside the system. The government aims to move away from a culture of rigid 'checkbox' regulation to one founded on professional competence, pragmatism and trust where businesses are treated as partners in securing the right regulatory outcomes and play a role in the design and implementation of standards, as well as the inspection and enforcement models which are right for the job.<sup>20</sup>*

In "Self-Regulation within a Regulatory State: Towards a New Regulatory Paradigm?," Bartle and Vass speak of the importance of the role of public oversight, and having an accountable and transparent regulatory system.<sup>21</sup> As is now the case in England, Australia and Quebec, Bartle and Vass advocate for the involvement of an 'intermediate public body' to ensure transparency and accountability.<sup>22</sup> Such a body may be State-run in whole or in part.<sup>23</sup> They highlight the oft-cited argument that a reduced role for public authorities has contributed to an increase in public distrust of regulators, and that it is felt "... that it will prove more difficult to achieve the public interest in self-regulatory regimes than in predominantly state regimes."<sup>24</sup> The counter-argument to this position, they suggest, is "... Rather than promoting a particular mechanism is it more important to have a clear idea of desired outcomes and objectives and to have a means of assessing their achievement."<sup>25</sup>

This then leads into their position on best practices in regulation:

*... three elements of regulatory governance can be identified which connect to the principles of good regulation: regulatory purpose, regulatory means and the regulatory framework. Regulatory purpose focuses on the objects and problems to be addressed, regulatory means focuses on the instruments, while regulatory framework focuses on the structure and process, with control mechanisms aimed at optimizing regulatory outcomes.<sup>26</sup>*

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<sup>19</sup> Ibid, p. 3

<sup>20</sup> Ibid, p. 14

<sup>21</sup> Bartle & Vass, p. 885

<sup>22</sup> Ibid, p. 892

<sup>23</sup> Ibid, P. 895

<sup>24</sup> Ibid, p. 896

<sup>25</sup> Ibid, p. 896

<sup>26</sup> Ibid, p. 898

We now begin to see the emergence of the theme of ‘outcomes-focused regulation’, which is, in the legal context, a regulatory regime that focuses on the high level principles and outcomes that should drive the provision of services by lawyers for clients.

‘**Outcomes focus**’ is designed to enable lawyers to put clients first, where this doesn’t prejudice the public interest; it is about achieving the right outcomes for clients; and it is flexible and a move away from prescriptive rules wherever this is appropriate.<sup>27</sup> It is part of the philosophy of an outcomes-focused approach that prescriptive rules are avoided if possible and practitioners use their professional judgment, reflecting on the unique needs of their own clients and the nature of their practice, to decide how best to achieve the required outcomes. The regulator provides only limited guidance.<sup>28</sup> Those who are familiar with the Society’s Practice Standards will know them as an initial foray into OFR, because they are drafted in ways that are not prescriptive, but state expected outcomes and depend on the exercise of lawyers’ professional judgment.

Bartle and Vass argue that in terms of combining the themes of transparency, accountability and public oversight or involvement in regulation, the same control sequences of setting standards, monitoring and enforcement that regulators apply to lawyers should be applied to the regulator itself, by “giving reasons, exposure to scrutiny and the possibility of independent review.”<sup>29</sup> In other words, regulators should walk the talk, and hold themselves to the same standards to which they hold lawyers. Bartle and Vass speak of ‘giving voice to’ or having more transparent consultation processes with members and the public in the design and implementation of regulation.<sup>30</sup> They conclude by saying:

*The modern regulatory state manifests its continuing responsibilities but discharges its attendant obligations to effect outcomes by using different means, including the promotion of self-regulation. A more efficient and effective mode of operation for the regulatory state is required to ensure its legitimacy. Accountability of both the regulators and the regulated, through transparency of process and reporting, is the essential mechanism required to maintain the new regulatory paradigm.<sup>31</sup>*

In 2005, the Nova Scotia Government created the Better Regulation Task Force. In a report called “Better Regulation 2005-10 Summary Report”<sup>32</sup>, then Minister John MacDonell said:

*Through Better Regulation, government employees worked to help business be more competitive by creating simpler, more effective regulation, and reducing administrative burden without compromising protection for the public.*

This initiative resulted in the creation in 2008 of the Regulatory Management Policy and Principles, together with training and a plain language guide. The focus was on streamlining and creating greater efficiencies in the way government regulates business and industries. The Report suggests that one benefit of this initiative has been to reduce the regulatory burden on businesses, which has in turn driven down the cost of goods. Of particular interest is reference to ‘outcomes focus’ rather than process:

*Changes as a result of Better Regulation are often about making sure the focus is on the outcome of a regulation. That includes outcomes like protection for the public, stakeholders, and companies. So, if a simpler process produces the same benefits, it’s an easy choice.<sup>33</sup>*

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<sup>27</sup> <http://www.sra.org.uk/solicitors/freedom-in-practice/OFR/ofr-quick-guide.page>

<sup>28</sup> Andrew Hopper, Outcomes-Focused Regulation, 2011, Law Society Publishing

<sup>29</sup> Bartle & Vass, p. 899

<sup>30</sup> Ibid, p. 899

<sup>31</sup> Ibid, p. 903

<sup>32</sup> “Better Regulation 2005-10 Summary Report. Costs Less. Accomplishes More.” Province of Nova Scotia, 2011

## 2.4 Putting new theories into practice – Regulatory reform in England – Focus on outcomes

During the lead-up to the new 2007 *Legal Services Act* in England, the Better Regulation Task Force produced a report titled “Regulation – Less is More: Reducing Burdens, Improving Outcomes.” This report speaks of the so-called ‘Golden Rule’ of regulation, which is ‘what gets measured, gets done.’<sup>34</sup> The report elaborates on the Task Force’s version of best practices in regulation:

*Before new regulations are adopted and when existing regulations are reviewed, we expect them to pass five tests: proportionality, accountability, consistency, transparency and targeting ...*<sup>35</sup>

The report refers to the Dutch approach to regulation, which targets the regulatory burden put in place to implement their regulations. This approach “... *does not question the policy objectives of the regulations themselves, but seeks to ensure that the way the policies have been implemented is such that the policy outcomes are achieved with the minimum of burden.*”<sup>36</sup>

Nova Scotia’s Better Regulation Initiative has been driven by similar imperatives with similar results, namely: *Essentially, BRI became about changing from a culture of “regulation is necessary” to one of “if necessary, effective regulation.”*<sup>37</sup>

In order to achieve the regulatory targets, and reduce the administrative burden of regulation, the Report recommends that a regulator:

- 1) remove obsolete regulations that no longer address current policy objectives;
- 2) simplify regulations;
- 3) increase data sharing and proving information management so that [government and] regulators only ask for information once; and
- 4) help businesses comply with the regulations, saving them time through presenting the requirements in a user-friendly way.<sup>38</sup>

Concepts of simplified, ‘light touch’ regulation were raised in a report from the National Audit Office (NAO) in England dated November 2001, titled “Better Regulation: Making Good Use of Regulatory Impact Assessments”, and this theme has taken hold in the more modern regulatory regimes.

*... regulation, where it is needed, should have a light touch with the right balance struck between under-regulation (so failing to protect the public) and over-regulation (so creating excess burdens).*<sup>39</sup>

## 2.5 Putting new theories into practice – Regulatory reform in England – Focus on risk

The NAO focused on the benefits of using Risk Impact Assessments or RIAs, as means of setting out the costs and benefits of a regulatory proposal, and the risks of not acting, as a means for delivering better regulation.<sup>40</sup>

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<sup>33</sup> Ibid, p.9

<sup>34</sup> UK, Better Regulation Task Force, “Regulation – Less is More: Reducing Burdens, Improving Outcomes” (A BRTF Report to the Prime Minister, Executive Summary), (London, Cabinet Office Publications & Publicity Team, 2005) 3

<sup>35</sup> Ibid, p.11

<sup>36</sup> Ibid, p. 18

<sup>37</sup> [See](#) fn. 32

<sup>38</sup> UK Better Regulation, , p. 26

<sup>39</sup> UK, HC, “Better Regulation: Making Good Use of Regulatory Impact Assessments”, 329 in *Sessional Papers* (2001-02) 1

<sup>40</sup> Ibid

*The purpose of the Risk Impact Assessment is to explore the objectives of the regulatory proposal, the risks to be addressed and the options for delivering the objectives. It should make transparent the explicit costs and benefits of the options for the different bodies involved ... and how compliance with the regulatory options would be secured and enforced ... . Policy makers could send the RIA to interested parties for comment.<sup>41</sup>*

According to the NAO, ‘the conclusion to be reached is to clearly demonstrate that the benefits justify the costs, and will achieve the outcome.’<sup>42</sup> Refer to Appendix 1 for details of what a RIA should cover.

The NAO sets out its list of best practices in regulation at page 7 of its Report, and this list includes:

- i) assessing the risks of not regulating,
- ii) considering the likely level of compliance,
- iii) explaining how the new regulation is to be explained to those affected,
- iv) considering alternative approaches to enforcement, and
- v) setting out arrangement for monitoring and evaluation.<sup>43</sup>

## **2.6 Putting new theories into practice – Regulatory reform in England – Sharing responsibility for lawyer regulation and compliance**

This leads into a final theme we will explore in self-regulation relating to ‘co-regulation’, risk identification and management, and risk-based enforcement. This theme has become the cornerstone of the modern outcomes-focused regulatory regimes, particularly in England and Australia. In the earlier referenced report “Reducing Regulation Made Simple,” the author states:

*One of the more challenging aspects of implementing truly risk-based enforcement of regulation is to give appropriate recognition to a business’ own efforts to comply with regulation. More needs to be done to ensure that, where businesses have a good track record of compliance, this is taken into account by regulators, who will then reduce the inspection burden for them.<sup>44</sup>*

A related theme is called ‘regulatory risk differentiation’, which is a means for identifying risk and applying regulatory resources to areas of higher risk in the public interest – a theme we have been adopting at the Society for a number of years, as evidenced by our Trust Audit Program. This process is also at the heart of the English model. According to Wikipedia,

*Regulatory Risk Differentiation is the process used by a regulatory authority (the regulator) to systematically treat entities differently based on the regulator’s assessment of the risk of the entity’s non-compliance... . The process requires the regulator to directly link a robust risk assessment to a suggested regulatory response.<sup>45</sup>*

The well-known Australian author in this area, John Braithwaite, in his article written with Ian Ayres titled “Responsive Regulation: Transcending the Deregulation Debate,” sets out his ‘compliance pyramid’ model, which, he suggests, creates incentives for regulated individuals and entities to move towards more compliant behavior. Such a model requires effective risk assessment, an understanding of the nature of

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<sup>41</sup> Ibid, p.2

<sup>42</sup> Ibid

<sup>43</sup> Ibid, p.7

<sup>44</sup> Reducing Regulation, p.14

<sup>45</sup> [www.wikipedia.com](http://www.wikipedia.com) Regulatory Risk Differentiation, September 2013

human behavior in responding to the need for regulatory compliance, and having different tools available to address these varying compliance responses. This includes:

- The disengaged who have **decided** not to comply,
- The resistant who don't **want** to comply,
- The captured who **try** to comply but don't always succeed, and
- The accommodating who are **willing** and able to comply.<sup>46</sup>

Braithwaite indicates that the thrust of any regulatory regime must be to move all such lawyers to the point where they are ready, willing and able to comply. It is therefore important for every regulator to recognize each group that exists within its membership and find the optimal way to reach out to these groups. In some industries, such as oil and gas, aviation and finance, the tools have focused on 'deter, detect and deal with'. He states:

*From a risk management perspective, the regulator has a more significant interest in higher consequence clients or events than lower consequence ... . These strategies are proactive and continuous for higher consequence, reactive and periodic for lower consequence. The strategies are reviewing for [taxpayers] more likely to break the law, and only monitoring for those less likely .... This allows more resources to be allocated to more intensive strategies focusing on higher risk entities, providing an incentive to entities to want to be seen to be compliant. The robustness of the risk assessments, and the quality of data on which the assessment rely, are therefore very important.<sup>47</sup>*

## 2.7 Reflections on the current state of Canadian legal regulation

Professor Richard Devlin, Associate Dean at the Schulich School of Law at Dalhousie University, has for some years advocated for and led a cadre of academic thinking about the need for dramatic change in regulation of the legal profession. In his paper with Albert Chang titled "Re-calibrating, Re-visiting and Re-thinking Self-Regulation in Canada," he argues, "... recent developments in Canada ... suggest there has been a significant increase in the regulatory vigour of law societies driven in part by a fear of losing self-regulation."<sup>48</sup> He goes on to say, "... law societies in Canada have been adopting an increasingly muscular approach to regulation of the profession."<sup>49</sup>

Prof. Devlin states:

*Increasingly, Canadian law societies have recognized that their governance structures are antiquated and in need of modernization in order to respond to contemporary accountability norms and economic needs.<sup>50</sup>*

He observes law societies becoming more proactive in their regulation, rather than purely reactive, particularly with regard to complaints, and gives a number of examples of this:

- initiatives to enhance operational efficiencies;
- paralegal regulation;
- discussions around multi-disciplinary practices; and

<sup>46</sup> Braithwaite, John. "Responsive Regulation and Developing Economies" (2006) 34:5 World Development 884, p. 35

<sup>47</sup> Ibid

<sup>48</sup> Devlin, Richard & Albert Chang. "Re-Calibrating, Re-Visioning and Re-Thinking Self-Regulation in Canada" (2010) 17:3 *International Journal of the Legal Profession* 233 (Devlin & Chang)

<sup>49</sup> Ibid, p. 234

<sup>50</sup> Ibid, p. 235

- reforms to complaints and discipline processes.

But Devlin queries whether in 2010, law societies were engaging in a ‘regime of defensive self-regulation’.<sup>51</sup> He cites examples of law societies’ battles to retain pure self-regulation in response to ‘judicial cajoling’ (the cases of *Finney*<sup>52</sup>, *FCT Insurance Co. v. LSNB*<sup>53</sup>, and conflicts cases) and attempts by government to embark on legislative interventions to self-regulation, such as through the Fair Access legislation, Agreement on Internal Trade and anti-money laundering legislation, and the response to the Competition Bureau.<sup>54</sup>

Devlin suggests it is time to rethink regulation, in a way that focuses on the core values of regulation of the profession: democracy, efficiency, effectiveness and equitability. (See the Appendix 2 Core Values Chart). He also suggests that best practice regulation would identify the key facets of regulation – resources, processes and outcomes – and align these to support the core values. The outcomes-focused theme thus continues to emerge.

Before we complete this section of the paper, which examines key themes and trends in self-regulation in the past two decades, it is useful to turn to another piece of critical thinking by Prof. Devlin in his 2007 paper, “The End(s) of Self-Regulation?” In it, he argues that during the major overhaul of the *Barristers’ and Solicitors’ Act* in 2000, there was never a discussion of the appropriateness of self-regulation. Rather it was taken for granted as something to be perpetuated. He states:

*... the current Canadian complacency is unwarranted. At every level of a regulatory regime – establishing standards, monitoring conduct and enforcing penalties – there appear to be serious problems that require us to question whether self-regulation is truly in the public interest.*<sup>55</sup>

In Devlin’s opinion, at the time that the LPA was passed, England and Australia had rejected self-regulation as a defensible model of governance because ‘of a constellation of forces: governmental priorities, consumer demands, mobilization within the profession itself, and increasingly complex regulatory theory and practice.’<sup>56</sup> He points to the changes in the approach to regulation in England, Scotland, Ireland, Australia, New Zealand and South Africa, where the traditional self-regulation model was being replaced in whole or in part with one that splits the regulatory and representative functions. In this way, Devlin believes governments have addressed the inherent conflicts that exist within a single regulator. Though for many this change was profound, it is not as relevant in Nova Scotia, because the Society has not acted in a representative capacity for many years; however, Devlin’s criticism that no analysis of the premises of self-regulation occurred is correct.

Devlin highlights the arguments that have been made in favour of maintaining pure self-regulation:

- maintaining independence of the profession;
- maintaining independence of the judiciary;
- upholding democracy, freedom and the rule of law;
- maintaining public confidence in the profession;
- upholding the traditions of the profession;
- bringing the best expertise to bear;
- creating efficiencies;

<sup>51</sup> Ibid, p. 252

<sup>52</sup> *Finney v. Barreau du Québec*, 2004 SCC 36

<sup>53</sup> *Law Society of New Brunswick v. FCT Insurance Company*, 2009 NBCA 22 (CanLII)

<sup>54</sup> Devlin, p. 254

<sup>55</sup> Devlin, Richard & Porter Heffernan. “The End(s) of Self-Regulation?” (2007) 45 *Alta L Rev* 169, p. 4

<sup>56</sup> Ibid, p.23



- maintaining higher practice standards; and
- demonstrating commitment to the public good.<sup>57</sup>

Devlin then challenges these arguments with those contrary to maintaining self-regulation:

- creating a conflict of interest – one organization cannot effectively engage in representation and regulation ( an issue that does not pertain to the Society);
- maintaining a monopoly/market control through limiting the supply of legal services;
- independence – but from whom?;
- maintaining an undemocratic regime – the demand for self-regulation comes from lawyers, not the public;
- creating the ‘protection racket’ – lawyers protect lawyers, as evidenced by a frequent failure to adhere to the duty to report misconduct;
- having a reactive and inefficient institutional culture – law societies are often under-resourced and unable to be proactive in dealing with conduct matters;
- the psychological critique – self-governance only serves to enhance the psychic esteem of the profession; and
- engaging in nothing more than a public relations exercise – the regime creates the appearance of being responsible and accountable but this does not reflect reality.<sup>58</sup>

Devlin’s recommendations are thought-provoking. He recommends a hybrid approach that encompasses a ‘pyramid of regulatory controls’:

*... the only viable strategy is to develop a hybrid and nuanced constellation of civil society/market/state based regulatory instruments that can be synergistically deployed (in an increasingly intensified way from cooperation to coercion) in a contextually sensitive manner.<sup>59</sup>*

His specific recommendations include:

- i) splitting the complaints process into one arm for dealing proactively and quickly with quality of service complaints, and another arm focused on misconduct (as a number of jurisdictions have now done);
- ii) creating an independent body to oversee the operation of some or all regulatory functions; and
- iii) having a greater and more meaningful role for public representatives and avoid the ‘tokenism’ effect.<sup>60</sup>

Devlin concludes by saying:

*Self-regulation might have some virtues that help it to qualify as a public good. However, its virtues are not unqualified and it needs to be located in the context of other competing public goods, for example, guarding against conflict of interest, access to justice, the protection and promotion of consumer interests and the promotion of competition.<sup>61</sup>*

While some may dismiss these and other arguments as ill-informed, unrealistic, impractical or nothing more than academic rhetoric, in later sections of this paper, the reader will see that the new models of regulation have developed, to address many of the criticisms leveled at self-regulation captured above. In

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<sup>57</sup> ibid

<sup>58</sup> Ibid, pp. 29-34

<sup>59</sup> Ibid, pp. 34-44

<sup>60</sup> Ibid, p. 46

<sup>61</sup> Ibid

some ways, Devlin accurately foretells the future. This critique therefore can play an important role in our thinking about a new regulatory model.

Prof. Devlin is not alone. Another Canadian academic, Paul Paton (who delivered the Wickwire Lecture in 2011), expressed the dilemma facing self-regulation well in his article, “Between a Rock and a Hard Place: The Future of Self- Regulation – Canada between the United States and the English/Australian Experience,” when he suggested:

*Despite the important values underlying self-regulation, the assertion of such claims by the legal profession ought not to simply immunize the profession from scrutiny of its exercise of self-regulatory authority. Nor should it shelter the profession from consideration of whether that self-regulation should continue. The key question is whether the public interest is best served by continued self-regulation of the legal profession, and whether freedom from external accountability simply “serves the profession at the expense of the public”.*<sup>62</sup>

## 2.8 Summary of the evolution of regulation of the profession

In this section, we have explored a number of themes and trends respecting the evolution of regulation of the profession. These will hopefully help a reader understand some of the building blocks that should be retained and what else might be required in any new regulatory model:

- i) the need to support the independence of the legal profession;
- ii) ensuring that regulation of the profession is demonstrably conducted in the public interest;
- iii) a move away from a ‘command and control’ model of regulation;
- iv) understanding the benefits of ‘collective’ or modified self-regulation with a role for others in regulation;
- v) ensuring a high level of transparency and public accountability;
- vi) regulating in a way that influences behavior and does not just require compliance with rules;
- vii) the benefits of a ‘light touch’ or a simplified regulatory model;
- viii) the emergence of outcomes-focused regulation;
- ix) the need to avoid ‘defensive self-regulation’;
- x) the importance of improving ethical awareness by lawyers, and having a means for ethical assessment;
- xi) the benefits of reducing regulatory burdens;
- xii) the benefits of effective risk identification, assessment and management; and
- xiii) the importance of listening to and being able to address the critics of self-regulation.

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<sup>62</sup> Paton, Paul D. “Between a Rock and a Hard Place: The Future of Self-Regulation – Canada between the United States and the English/Australian Experience” (2008) *Journal of the Professional Lawyer* 88 (Paton, Between a Rock)

### 3.0 CURRENT TRADITIONAL REGULATORY MODELS

Self-regulatory models in common law jurisdictions in Canada and Australia evolved from the English model under which, traditionally, a law society exercises authority delegated from government and governs admissions, standards, conduct and enforcement of professional discipline. In other words, regulation addresses the beginning, middle and end of a lawyer's regulatory life. This differs from the approach familiar to U.S. lawyers where, under U.S. Constitutional doctrine, the courts have inherent and primary regulatory power over lawyers, admission to the Bar is a judicial function and lawyer discipline is done by the courts or under judicial supervision.

However, although the regulation of the profession in the United States differs in structure and form from regulation in Canada, questions about the fundamental relationship between regulation of the profession and the public interest are ones engaged deeply across both jurisdictions.<sup>63</sup>

Should government delegate self-regulatory authority to a profession whose response to significant changes has been perceived as an effort to retrench? How is the public interest being served? What institutional change is necessary? Will such change threaten or enhance the traditional self-regulatory authority of the legal profession?<sup>64</sup>

Readers of this paper will be very familiar with the model of regulation currently used in Nova Scotia and elsewhere in Canada. They need not be described in detail. However, in Appendix 3, a brief description of the elements of the legal regulatory models used in Canada and the United States are outlined, in order to make the information available to one who seeks ready access to it. It should be noted that the American system for regulation of lawyers is very unique, and as such, does not transport well into the Commonwealth models, old and new, for regulation of lawyers. Despite this, there has been significant academic and creative thinking in this area, which is worthy of some exploration.

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<sup>63</sup> Interview with Prof. Laurel Terry, October 7, 2013

<sup>64</sup> Based on Paton, *ibid*, p. 94

## 4.0 THE FUTURE OF THE LEGAL PROFESSION AND IMPACT ON REGULATION

The legal profession is in the midst of a period of dramatic and profound change. Are we moving into an epoch of chaos, ‘creative destruction’<sup>65</sup> or reconstruction in the legal profession? Will changes taking place in the legal profession in other parts of the world really impact lawyers in small, remote Nova Scotia? Should we wait for the changes to come to us, or boldly go forward and be proactive; i.e., do we prepare to ride the ‘tsunami of change’ or let it wash over us and hope for the best?

Having examined themes and theories of self-regulation, considered the critics of self-regulation, considered the current, traditional models of self-regulation and what they have and have not been able to achieve in the public interest, we move now to the next critical step in Council’s analysis – is there evidence that demonstrates a need to transform regulation of the profession? What are the risks and opportunities looming ahead? Is our current regulatory regime equipped to protect the public and support the profession in the face of emerging changes and trends in the practice of law? If we decide to embark on a transformational process, what do we need to understand about the future of the practice of law in order to design the best, most robust and most agile regulatory regime possible?

As we consider how to approach transforming regulation, a question needs to be addressed: is Council prepared to facilitate change, or maintain stability? Are you prepared to approach this task by maintaining the existing regulatory structure with some changes, or by changing the structure altogether? Does the future of the legal profession require that we truly transform how we regulate, and act as a change agent, or should we simply revise the existing structure and be more of a passenger than a driver? What will best serve the public interest?

There has been a great deal written about the future of the legal profession. Richard Susskind (*Tomorrow’s Lawyers: An Introduction to your Future*<sup>66</sup>), Jordan Furlong and Richard Devlin, who began examining this some years ago, have seen many of their predictions come true. Much current thinking about the future is founded on current facts and evidence, and trends emerging around the world. The trends summarized in this section are not ‘futuristic’ but are grounded in reality, and must be factored into any consideration of a new regulatory regime. For purposes of this research, particular attention has been paid to on the innovative and well-supported thinking by Furlong and Devlin.

What follows is a non-exhaustive list of current trends that are impacting, or are anticipated to impact, the practice of law and regulation of the profession. Each represents both risks and opportunities, and will be explored in more detail below:

1. technology, including access to legal information and products online, virtual law practice, growth in non-lawyer provision of legal services, products and information;
2. unbundling of legal services and specialization; client empowerment, expectations and demands for increased value at reduced cost;
3. changes in law firm structure and ownership;
4. regulation of lawyers vs. law firms vs. legal services/service providers;
5. growth of corporate and in-house counsel;
6. globalization and evolution of the legal services market;
7. membership demographics and the aging Bar in Nova Scotia; and
8. access to justice.

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<sup>65</sup> McGrath, Rita. “Creative Destruction Visits the Legal Profession” Harvard Business Review Blog Network, Jan, 15, 2013. [Blogs.hbr.org/2013/01/creative-destruction-visits](https://blogs.hbr.org/2013/01/creative-destruction-visits).

<sup>66</sup> Oxford University Press, 2012

The goal in this section is not to explore each of these trends in detail, but rather to highlight what impact each trend is having or is likely to have on regulation of the legal profession.

#### **4.1 Technology and access to legal information and products online, virtual law practice, and growth in non-lawyer provision of legal services, products and information**

The CBA Legal Futures Initiative produced a report in June 2013 that provides an excellent overview of many of the trends listed above. The work of the CBA in this regard should be carefully considered as Council analyzes what law societies should be aware of in any future regulatory design. With respect to the impact of new technology, the report states:

*The rapid growth in innovation and adoption of new technologies may play a transformative role in helping the legal industry in Canada develop new forms of service delivery, knowledge development and management. For example, the future could see the development of a full-blown, technology-enabled legal marketplace, including virtual law firms. The growth of artificial intelligence (AI) could replace lawyers for many tasks such as “assisted discovery” and eventually even advice, at the same time saving clients both time and money.*

*The growth of electronic communication, including social networking, will not only change how interactions may take place in the future, but also the expectations of a new generation of clients and lawyers on how business should be conducted and how services should be delivered – quickly, directly, and, in many cases, online. New forms of online competition already exist and more are likely on the way.<sup>67</sup>*

The rapid growth in innovation and technology has played and is playing a transformative role in the legal profession, and that most of the future predictions noted above are already taking place in Europe and elsewhere. Ted Schneyer, in his article “The Future Structure and Regulation of Law Practice,” written in 2002, highlighted changes already taking place over 10 years ago as a result of technology:

*First, technological advances are making a vast amount of legal information available to the public with little or no intermediation by lawyers. Coupled with the sheer expense of legal services, these advances may have dramatic implications: more pro se representation, more ‘unbundling’ of traditional legal services, greater corporate reliance on non-lawyers such as human relations experts or environmental engineers for regulatory compliance advice, and more Internet exchanges between lawyers and advice-seekers that may or may not trigger all the ethical duties that traditional lawyer-client relationships entail. Technology is also enabling lawyers (and clients) to be ‘virtually’ anywhere. As a result, many lawyers are pressing for authority to practice beyond the jurisdiction in which they are licensed and many are exceeding their current authority, usually with impunity.<sup>68</sup>*

The well-known Canadian legal futurist, Jordan Furlong, examined the five catalysts at work in the Canadian legal services marketplace in 2010, and spoke of the impact on the profession of better-informed clients:

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<sup>67</sup> Canadian Bar Association Legal Futures Initiative Report (June 2013), p. 5 (Futures Initiative), <http://www.cbafutures.org/>

<sup>68</sup> Schneyer, Ted. “Thoughts on the Compatibility of Recent UK and Australian Reforms with US Traditions in Regulating Law Practice” (2009) *Journal of the Professional Lawyer* 13, p. 522-23 (Thoughts on Compatibility)

*Consumer clients, meanwhile, thanks to Google, Facebook and other advances, can tap into an unprecedented collection of knowledge and personal experiences about the legal system, and now often approach their lawyers with basic legal information already in hand ... . The internet has also largely devalued legal information and knowledge, which is now widely and cheaply disseminated.<sup>69</sup>*

Furlong goes on to discuss the ‘widespread automation of legal services’ and the impact on the profession:

*Most lawyers who draft agreements produce documents, paper a transaction or otherwise engage in content- or knowledge-focused tasks work for global firms servicing multinational clients or high-volume bulk-deliver firms. This type of work, which used to constitute the majority of many lawyers’ offerings, has largely been automated. Even the most complicated tasks have been template, flowcharted, and relegated to software. Lawyers in this decade no longer try to do what machines can do better, faster and cheaper. Law firms that sell this kind of work make extensive use of this technology – it is a tool, not a revenue source.<sup>70</sup>*

Furlong lists some of the many online tools now available to the public and clients:

*Title insurance policies and do-it-yourself will kits, innovations dating from the end of the 1990s, can both reasonably be called legal services and are unremarkable features of the marketplace today. They have recently been joined by online divorce form generators and the earliest iterations of intelligent legal document assembly programs. Legal knowledge companies have developed templates that allow users to create customized legal documents themselves, with no intervention by a lawyer. These interactive programs are perhaps designed in part by lawyers, but rarely are they directly administered by lawyers, and in any event, they usually compete with lawyers for client business. The scope and sophistication of these programs will explode in the years to come – clients will come to use them more and to rely on them more.<sup>71</sup>*

According to Susan Hackett, with Legal Executive Leadership LLC and former corporate counsel, the Internet has given clients many alternatives to traditional legal services and lawyers. Lawyers often argue defensively that online services are of poor quality, but this is not usually the case, particularly where not all lawyers provide stellar service themselves. When lawyers draft new documents, they usually pull from the last few such documents they drafted. An online service can draft a new document from the last 1000 drafted (see Practical Law Co.)<sup>72</sup>, and the client only needs to pay the lawyer to review the online-generated document. An upcoming company, Neota Logic<sup>73</sup>, collects and analyzes data from firms to produce a document with the highest probability of success. Again, a lawyer need only be paid to review the final document.<sup>74</sup>

During a presentation at the IBA Conference held at Harvard Law School on October 9, 2013, on “The Future of the Legal Profession,” Prof. David Wilkins spoke of the ‘decrease in information asymmetry between buyers and sellers’ in the legal market: due to client demands, competition between firms has shifted from the value of reputation and credentials of individuals, to ‘value’ as measured by ‘metrics’. The unit of analysis for value has moved from firms to ‘networks’, i.e., collections of skills and products that meet client needs. As an example, Wilkins referred to the new model of ‘medical tourism’, where

<sup>69</sup> Furlong, Jordan. “Transformation: Five Catalysts at Work in the Canadian Legal Services Marketplace”, 2010 (Semi-annual Conference Federation of Law Societies of Canada, 19 March 2010), (2010) *Fordham Law Review* 7, p. 3 (Five Catalysts)

<sup>70</sup> *Ibid*, p. 4

<sup>71</sup> *Ibid*, p. 7

<sup>72</sup> <http://uk.practicallaw.com>

<sup>73</sup> <http://neotalogic.com>

<sup>74</sup> Interview with Susan Hackett, Chief Executive and Chief Legal Officer, *Legal Executive Leadership* (10 July 2013)

people use the Internet to research where the best surgeons in a particular field are located, with the lowest incidence of malpractice, and who offer their services at the lowest prices, and then travel to Bangalore or other remote locations to obtain the best service at the best price. This kind of ‘buying smart’ is moving into the legal profession. Hence, we see the move toward ‘value/output billing’ as opposed to hourly billing. Further, lawyers no longer control legal knowledge and information, leading to ‘democratized access’ to such information by the public.

There are many more examples of the impact of technology on the profession, which present challenges and opportunities for regulation. No longer can we rely on the fact of a bricks-and-mortar law firm when we conduct an audit or practice review – these processes need to be designed to deal with virtual law firms, where client files and information are stored solely electronically and in ‘the cloud’ (which is usually actually a basement bunker). New businesses have been developed solely around the provision of legal information and services, including document drafting, fully online.<sup>75</sup> With this enhancement to access to legal information and, arguably ‘justice’, should a regulator respond with paranoia about the erosion of the role of lawyers, or help lawyers embrace the technology wave, be creative and create opportunities for new business structures that support and encourage these new ways of doing business? In the face of increased use of technology in the legal profession, how can we help support and maintain relationships, between the Society and lawyers, between lawyers and clients, which will always be at the heart of the legal profession?

As to how we, as the regulator, can help the legal profession embrace the impact of technology and understand the new role of lawyers in this technology era, this will be discussed later when we look at new models of regulation.

#### **4.2 Unbundling of legal services and specialization; client empowerment, expectations and demands for increased value at reduced cost**

The CBA Futures Initiative Report and others speak of the trend toward ‘disaggregation’ of legal information and services, a process by which ‘clients become better informed of both the availability and complexity of products and services’.<sup>76</sup> Lawyers no longer are the sole keepers of this information, and are no longer valued, with the exception of certain highly specialized areas of law, as the only source of this information. “Clients will undertake themselves those services with which they are more comfortable. They will seek out professional services where that is a more efficient option or where the service is outside their own knowledge base.”<sup>77</sup>

This trend has led to the unbundling of legal services, which Council supported when it approved an amendment to the *Code of Professional Conduct* earlier this year to formalize rules relating to, and to encourage unbundling. Unbundling has in turn led to a trend toward greater specialization among the profession. It has also led to growth in delegation of tasks traditionally carried out by lawyers to non-lawyers, as non-lawyers become more skilled and adept at providing certain legal information and services more efficiently and at lower cost.

In her paper, “Trends in Global and Canadian Lawyer Regulation,” Prof. Laurel Terry examines the impact of this trend in relation to ‘what and whom’ should be regulated, and begins to tie in the impact of the trends toward disaggregation and technology:

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<sup>75</sup> Ibid

<sup>76</sup> Futures Initiative, p. 11

<sup>77</sup> Ibid, p. 11

*This question of who – or what – is regulated is going to be increasingly important in the future. Historically, this question was not asked frequently because there was a more perfect overlap between lawyers and legal services. Legal services were what lawyers provided and if you wanted legal services, you went to a lawyer. Today, however, there is much less overlap between services and providers because lawyers no longer dominate the legal services market the way they once did. Given technology and market developments, the issue of who or what is regulated is one that many regulators have faced, or will face, regardless of their location. Things that look a lot like legal services are being offered by paralegals, by software providers such as Intuit (Willmaker), by internet sites such as LegalZoom, and by publicly traded law firms such as Australia’s Slater & Gordon. Regulators now face the question of whether to regulate these providers who are offering things that look very much like legal services.<sup>78</sup>*

Schneyer discusses the impact on the profession of the specialization trend, and expresses concern about the resulting ‘fragmentation’ of the profession as a result, and the pressure this creates to narrow the ban on the unauthorized practice of law.<sup>79</sup> He predicts in his 2002 article, quite accurately, that “... one might expect mounting interest in forming MDPs, ‘strategic alliances’ with other professional service firms, and ancillary businesses – i.e. law firm affiliates in which both lawyers and non-lawyers offer law-related services, such as lobbying, and in which the nonlawyer providers may hold ownership interests”.<sup>80</sup> Schneyer predicts that ‘specialization may also affect the distribution of regulatory authority,’ whereby legislatures and agencies may “play an increasing role in overseeing practice in specialized fields of administrative practice.”<sup>81</sup> As we have seen, this has come to pass.

Furlong considers these trends as a significant catalyst toward a new, more specialized role for lawyers:

*Lawyers are just one of many providers of legal services, and they no longer provide the great majority of such services. Lawyers are the premier providers of advocacy, advising clients in online dispute-resolution forums and in trials (which are held in both traditional public and new privately run court systems). They also specialize in counsel: offering advice, analysis and judgment on significant decisions in the life of a personal or corporate client. While the volume of this work is nowhere near what lawyers once handled, it remains lucrative and in demand. Not only that, but lawyers have developed preventative law practices, providing holistic legal-health services that anticipate and avoid clients’ legal problems and thereby tapping a vast and previously latent market.<sup>82</sup>*

#### **4.3 Changes in law firm structure and ownership**

Law firms in Canada are still primarily structured in traditional ways, with partnerships models and no non-lawyer ownership. Among many of their corporate clients, there is an increasing trend toward insourcing their legal needs through in-house and corporate counsel. According to the CBA Futures Report:

*In-house counsel form an industry within the industry. While typically lawyers work in a company’s legal department, more and more lawyers are using their legal skills to work in other parts of a company’s operations as well.<sup>83</sup>*

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<sup>78</sup> Terry, Laurel S. “The Future Regulation of the Legal Profession” The Impact of Treating the Legal Profession as ‘Service Providers’ “ (2008) 2008 Journal of the Professional Lawyer 189, p. 164

<sup>79</sup> Thoughts on Compatibility, p. 523

<sup>80</sup> Ibid

<sup>81</sup> Ibid, p. 524

<sup>82</sup> Five Catalysts, p. 4

<sup>83</sup> Futures Initiative, p. 15



However, the CBA Futures Report also identifies the increasing pressure on firms from a number of sources to consider new law firm structures and arrangements:

*With increased pressure from clients and competitors, managers of law firms have been forced to continually seek greater economies and efficiencies in their operations. In some segments of the legal services market, more attention is being paid to project management and client relationship management. Competitive pressures may cause some firms to consider new structural arrangements. Non-lawyer ownership is still rare in Canada (although permitted in Ontario for multi-disciplinary practices (MDP) as long as lawyers maintain control), but demand for new capital and the increased need to manage financial and other risks may create interest in altering existing regulation. The build-up of non-lawyer ownership, management, and participation outside of Canada may provide additional pressure for change in this area.<sup>84</sup>*

These mounting pressures on law firms to change how they operate were recently highlighted in the Globallegalpost.com blog on August 8, 2013:

*While legal expertise is still highly valued, legal teams today and, by extension, law firms are experiencing unprecedented pressure, forcing them to evolve quickly from old ways of working.*

The blog goes on to list three key pressures as the ‘legal industry’s new reality’:

- global regulatory uncertainty and change,
- cost pressures, and
- technology/data proliferation.

As we will see in the next section on new regulatory models, the Legal Services Board and the Solicitors’ Regulatory Authority (SRA), and Australia have embraced alternate business structures (ABS), incorporated legal practices (ILPs) and multidisciplinary practice (MDPs) as a means to meet the challenge of providing legal services in this ‘new reality’ and doing so cost-effectively, efficiently and in a manner that enhances access to justice. Rather than adopting the North American approach of protecting the monopoly of legal services provided by lawyers, these countries have emerged as leaders in responding to the global trends identified above, and presenting legal service providers with opportunities rather than barriers.

In a presentation in June 2013, Prof. Devlin examined and drew definitive links between ABS and their ability to enhance access to justice. He refers to changes in the economic model for delivery of legal services, represented by ABS, as a means through ‘increased investments and enhanced technology’ to provide legal services more efficiently, effectively and cheaply, “thereby partially resolving some aspects of the access to justice problem.”<sup>85</sup>

Devlin expresses the view that law societies play a key role in enhancing access to justice, and he makes a series of recommendations designed to ‘foster a reconstruction of the model of delivery of legal services’:

*... because the legal profession in Canada is self-regulating we need to put particular pressure on the law societies to take the lead in responding to the challenge of access to justice. The law societies are the gatekeepers of the legal profession; they are the key pressure point in the system for the demand and supply of legal services; they are the guardians of the normativity of the profession. As a*

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<sup>84</sup> Ibid, p. 17

<sup>85</sup> Devlin, Richard. “End of an Era(Error)?: Access to Justice and Alternative Business Structures” (2013) [unpublished], p.2

*consequence I have suggested that the law societies in Canada should pursue a variety of initiatives that will help foster a reconstruction of the model of the delivery of legal services including:*

- *An expanded role for paralegals;*
- *Mandatory pro bono;*
- *Provision of brokering services;*
- *Mandatory ethical infrastructures;*
- *Financial transparency in lawyers' incomes; and*
- *Enabling the growth of alternate business structures.*<sup>86</sup>

Devlin summarizes the arguments in favour of ABS and the position of their critics. He notes that recent research in Australia 'vindicates' the supporters of ABS, because "Complaints against law firms have gone down, and small law businesses appear to be prospering. Much of the fear that MDPs would threaten law firms and drastically alter the way legal services were provided has abated."<sup>87</sup> In his paper, he refers to the support for ABS that evolved in England under the Legal Services Board, and the 2007 *Legal Services Act*, and the position of the Board that "The potential benefits to consumers from a liberalized legal services market-place include better value, improved information, increased choice, greater innovation, more flexible service delivery and new service combinations."<sup>88</sup>

Furlong's recent blog post on "The Evolution of the Legal Services Market – Stage 2" affirms the advent of ABS in England and Australia has not seen the sky fall on lawyers and is not likely to in the future:

*The most important development of this period [2008 to 2016 – the period of 'creative destruction'], however, is the arrival in 2012 of Alternative Business Structures: non-lawyer ownership and capital in legal enterprises in England & Wales (building upon Australia's trailblazing efforts a decade earlier). Starting with the consumer market, but eventually spreading to corporate and institutional work as well, new participants find willing buyers for their products and services. This development, while spawning the usual troubles of any startup industry, does not produce the widespread disastrous impact on professionalism and the public interest that some had predicted. The longstanding presumption that only lawyers could be trusted to offer legal services is called into questions, and officials in other jurisdictions start considering more closely the possibilities of regulatory reform to open the market.*<sup>89</sup>

But the light has gone on in Canada over the past three years. ABSs are now being taken seriously here as a means to enhance access to justice, and create more creative and competitive means for delivery of legal services in the public interest. That being said, it is important to note that there are no studies measuring the impact of ABS on reducing the costs of legal services and enhancing access to justice. There are those who believe that at the present time, the 'profit motive' dominates the new ABS models somewhat more than does a desire to increase access to justice. This is most likely a reflection of the fact that to date, only a few of the several hundred law firms and entities that have been licensed as ABS have targeted the consumer market, but those that have are making legal services more readily available through in person and online delivery. Overall, the most one can say at this point is that the jury is still out on the impact of ABS, as they are structured in England, on access to legal services.

In 2012, the LSUC created the Alternative Business Structures Working Group to study and consider whether there are any new legal service delivery models that should be considered. It held a symposium

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<sup>86</sup> Ibid, p. 10

<sup>87</sup> Ibid, p. 26

<sup>88</sup> Ibid, p. 44

<sup>89</sup> Furlong, Jordan. "The Evolution of the Legal Services Market" *Law21* (November 2012) online: *Law21* <<http://www.law21.ca/>>

on ABS during the first week of October, to which we were invited. The Working Group's final report is scheduled to be completed in January 2014, and referred to Convocation in the spring of 2014, for this subject has become a key priority for the LSUC.

The Law Society of British Columbia's Task Force on Legal Service Providers produced a report in October 2011 suggesting further study and a 'wait and see' approach with regard to ABSs and how the experience unfolds in England. This Task Force has been examining the future of regulation of the profession and who is now providing legal services. While the rules with respect to paralegals were relaxed, they still require that paralegals work under direct supervision of a lawyer. The Task Force is still grappling with whether the Law Society should regulate lawyers or legal services and, if the latter, should the Law Society be the regulator of legal services?

We and the Law Society of Manitoba have now embarked on rethinking and possibly transforming our regulatory structures. In the process, we will be considering the role of lawyers and non-lawyers, and new models for delivery of legal services.

In his September 25, 2013 Law 21 blog, Jordan Furlong wrote "ABS in Canada? We might be closer than you think," where he reflects on these recent initiatives in Canada, and concludes by saying:

*... the issues that these four law societies are investigating go beyond the relatively narrow topic of ABSs. They're really looking into whether and to what extent legal services regulation in this country requires a serious reconsideration, and maybe even a major overhaul. These concerns, in turn, are prompted by the very real crisis in access to legal services in Canada, and by a sense that we may need to fundamentally rethinking how we define "the best interests of the public" in the 21<sup>st</sup> century. ... Each of these four law societies (and, I'm sure, others across Canada) recognize that we're entering a crucial period on the evolution of the legal market, and that traditional models of legal services regulation cannot and will not pass through this period unchanged. Our law societies are asking the right questions, and I'm optimistic that they'll come up with good answers. So this would be the worst possible time for lawyers to again circle the wagons, as we've done so often in the past, demanding the continued ring-fencing of our traditional protected territory. Forces beyond the control of lawyers are now driving this market.<sup>90</sup>*

Prof. Adrian Evans, Associate Professor and Associate Dean with the Faculty of Law at Monash University in Melbourne, Australia, provided his perspective on the emergence of new business models in that country, with a warning about the need to maintain ethical infrastructures within these new models:

*I am inclined to think that the whole of ABS, brokering, LPA and all varieties of online service delivery are more or less inevitable, but it is not inevitable that any law society will tackle ethical infrastructure which mandates ethical testing, although this is a key plank in the survival of professional identity.<sup>91</sup>*

In terms of what is happening elsewhere in the world with regard to ABS, it is clear that England is leading the way and beginning to have an impact on other European countries. In a recently released paper, "English Alternative Business Structures and the European Single Market" by Jakob Weberstaedt, his abstract states:

*English Alternate Business Structures (ABS) are likely to put the European legal framework on lawyer mobility and cross-border provision of legal services to its first serious test. Continental European bars are defending a reading of the applicable European Directives which would allow*

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<sup>90</sup> Furlong, Jordan. "ABS in Canada? We Might be Closer than you Think" : Law 21 blog September 2013

<sup>91</sup> Email consultation with Prof. Adrian Evans, September 26, 2013

*them to keep English ABS out of their markets. Whether the European Court of Justice (ECJ) will agree with this protectionist interpretation of the applicable European rules remains to be seen. This paper challenges the legal arguments in favour of protectionism and argues that it will be very difficult for Continental European bars to keep English ABS out of their markets.”<sup>92</sup>*

At the International Bar Association Conference in Boston, October 6 to 11, 2013, which I attended, there was significant discussion throughout the week of the advent of ABSs in the U.K., and strong reaction to this new reality on all sides. On one hand, ABS owners were present and some emphasized that their decision to create an ABS was not related to obtaining external sources of capital but rather, to provide enhanced client service. For example, an ABS owner mentioned later in this paper, Lucy Scott-Moncreiff, with Scott-Moncreiff & Associates Ltd. in the U.K., told me this:

*The concept of my virtual firm is fairly simple. It is like a traditional firm, except all the lawyers are self-employed and they all work either from home or from offices that they rent themselves. This combination of factors allows us to keep the overhead much lower than in a traditional firm, which means that we are able to pay our self-employed consultants much better than would be the case in a traditional firm.*

*In law firms in England and Wales, the general rule is that the lawyers get paid about a third of their fee income. In my firm they get paid 70%.*

*Most of the firm's work is still legal aid, so this makes a big difference to the quality of the lawyers that we have in the firm. In many firms the work is mainly done by younger and cheaper lawyers or paralegals, but in my firm we have senior solicitors doing this work because they can make a reasonable, if not generous, living.*

*This structure also allows us to expand very easily when new people want to join us; we don't have to find them rooms or office equipment or secretaries, nor do we pay them until they start billing.*

*Our ethos is that of a traditional firm – we foster comradeship and collaboration, we provide unit meetings and supervisors, we carry out file reviews and annual appraisals and so on.*

*What we have discovered is that we can provide a way of working that suits people who do not want to be business people, do not want to be bosses, do not want to be supervisors but also do not want to be employees or associates – they just want to do law.*

*We spare them having to keep up-to-date with all regulatory and other changes, because we keep our office manual up-to-date, and so long as they comply with the provisions of the office manual, they will be compliant with the regulator.*

*I converted the firm to an ABS earlier this year so that my practice manager, who is not legally qualified, could become a director, and so that the other members of the firm, the consultants and staff, could share in the success of the firm by buying shares.<sup>93</sup>*

On the other hand, members of the Law Societies of Norway, Sweden and Denmark, as well as senior Bar leaders from Germany and France, expressed the strong view that ABSs ‘erode’ the traditional

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<sup>92</sup> Webersteadt, Jakob. “English Alternative Business Structures and the European Single Market” 2013. Webersteadt is a PhD candidate at Humboldt University in Berlin, and a Research Assistant at the Bucerius Centre on the Legal Profession in Hamburg.

<sup>93</sup> Email from Lucy Scott-Moncreiff, October 9, 2013

professional values of the legal profession, and by allowing external investment, create inherent conflicts of interest, and further damage the reputation of the legal profession.

During a half-day IBA panel on “Does Non-Lawyer Ownership of Law Firms Help or Hinder Client Service, Business Performance or Competitiveness?” conducted on October 7, 2013, it was noted that clients now have increased bargaining power, and are expecting more for less, thereby exerting considerable pricing pressure on firms. A study has shown that billable hours have declined an average of 100 hours per year for lawyers in larger law firms across Europe. This is creating the impetus for new and more efficient business models. MDPs and ABSs on their own will not address this problem: what still matters is providing high quality service and reduced rates, just like any other business. Without regulations permitting ABS and MDP, law firms will commoditize and unbundle services, implement electronic document creation systems, and take steps to remain viable businesses anyway. One panelist suggested that if regulators fail to create an appropriate regulatory structure for ABSs, firms will begin to circumvent the rules in order to give clients what they want, for example through outsourcing aspects of the litigation process to external process providers, who have been shown to decrease litigation costs to clients by up to 30 per cent.

Jurisdictions that refuse to permit ABS are ‘hiding behind rules they believe protect the public’ but which have not demonstrated that they do. Des Hudson, the CEO of the Law Society of England and Wales, stressed that the issue is not who owns a firm, but whether the products they offer are of high quality – ABSs are bound by the same rules as traditional firms. He admitted that there are not many lessons to be learned from their new regime yet, given it is early days, but what they have seen thus far is that having ‘external’ management is making it possible for law firms to be more professionally managed. He added that “lawyers don’t have a monopoly on ethics” and there is much to be learned from other professions.

#### **4.4 Regulation of lawyers vs. law firms vs. legal services/service providers**

The conversation and debate about moving from solely regulating individuals to the regulation of law firms has been evolving and gaining considerable momentum. In 2006, the Society prepared a “Discussion Paper on Regulation of Law Firms,” and constituted a Law Firm Regulation Task Force. The work of this Task Force gave rise to amendments to the *Legal Profession Act* and regulations to permit the regulation of law firms as “members of the Society”.<sup>94</sup> We were the first jurisdiction in Canada to do so. In a 2009 speech by Gordon Turriff QC, Past President of the Law Society of British Columbia, he said:

*The Law Society regulates lawyers, not lawyers and firms, even though there are roughly 3,400 firms of lawyers in the province. As others here have pointed out, there may be a public interest in regulating firms, because firms have cultures and ways of doing things that firm members are expected to respect, and the firms, therefore, can influence lawyer conduct. We are exploring means by which firms can be drawn under the regulatory umbrella.*<sup>95</sup>

In the seminal paper, “Regulating Law Firms in Canada,”<sup>96</sup> Prof. Adam Dodek states that in carrying out our statutory mandate of protection of the public, law societies have for the past two centuries focused only on the conduct of individual lawyers, as opposed to law firms. This has been based, in part, on the fact that the ‘traditional model of the delivery of legal services then was the sole lawyer in private

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<sup>94</sup> *Legal Profession Act*, S.N.S. 2004, c 28, as amended by S.N.S. 2010, c 56. See in particular s. 27, “In this Part and Part IV, unless otherwise indicated, “member of the Society” includes a law firm.”

<sup>95</sup> Turriff, Gordon. “Self-Governance as a Necessary Condition of Constitutionally Mandated Lawyer Independence in British Columbia”, speech delivered at the Conference of Regulatory Officers in Perth, Australia, October 2009.

<sup>96</sup> Dodek, Adam. “Regulating Law Firms in Canada: New Approaches to Regulation”, January 25, 2012.

practice.’ As we have seen from the previous sections of this paper, that model has dramatically changed, but again, law societies have been slow to catch up with that change.

According to statistics from the Federation of Law Societies from 2007, at that time almost half of all Canadian lawyers practised in law firms with more than ten lawyers.<sup>97</sup> Dodek maintains:

*Law Societies should regulate law firms. They should do so primarily on the basis of ensuring public confidence in self-regulation and respect for the Rule of Law and only secondarily out of concerns regarding public protection. The proper question is not why should law firms be regulated but why do they largely escape Law Society regulation? It is widely recognized that law firms have their own culture. It is contested whether this culture strengthens or weakens ethical conduct of the firm’s constituent lawyers .... The absence of law firm regulation creates a problem of legitimacy for Law Societies mandated to regulate the practice of law in the public interest ... . . . the failure to regulate law firms may threaten self-regulation of the legal profession in Canada.*<sup>98</sup>

What we now see emerging globally is the trend toward regulation of legal entities (ABS, MDP, ILP) and legal services (Law Society of Upper Canada regulation of paralegals). During my interviews in England, there remained a range of opinions regarding whether the regulator of lawyers should expand to regulation of legal services, but there was no doubt that the regulation of lawyers should include law firms and legal entities. The solution to this debate lies in how Council answers the question of what the role is of a law society in the current and emerging legal services marketplace, and whether we wish to be rowing or steering, driving or a passenger, when it comes to public protection in the provision of legal services.

In terms of other legal service providers, many believe that the decision of the LSUC to regulate paralegals in 2007 opened the door to the concept that non-lawyers should be able to provide legal information and services under the right circumstances. A recent review of paralegal regulation described it as an unqualified success.<sup>99</sup>

#### **4.5 Growth of corporate and in-house counsel**

*The crisis we face is not one that can be paused while we spend ten years examining our professional navels; the crisis we face is the relevance of the legal professionals to clients. No one suggests we should throw away professional standards, but regulations developed when most legal services were local and ‘tribunal’ in nature, when the fastest and surest means of communication was by saddlebag on horseback, and when lawyers played well-defined, exclusive and revered roles as interpreters of the law, may not create a meaningful foundation for offering professional services today.*

*The ‘new normal’ business model of value-based legal practice challenges the traditional legal service business model (for both firms and departments), as well as how lawyers themselves will engage with their clients to serve their needs. With a focus on moving away from billable hour myopia and pyramid-shaped law firms with hugely inefficient staffing and business models, clients – led by their in-house counsel legal staff – are looking to apply business precepts for service delivery to the practice of law. This means asking outside lawyers to partner or team with*

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<sup>97</sup> Ibid, p. 3

<sup>98</sup> Ibid, p. 4

<sup>99</sup> <http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147488010>

*in-house staff and other providers, as well as forcing law firms to understand and better predict their cost of service, commoditize or routinize work that is repetitive to each matter, deploy disaggregation/unbundling/Lean Six Sigma assessment of staffing and process efficiencies, engage in knowledge-sharing and collaboration, actively assess data in addition to their legal judgment in determining the best course to pursue, and join their inside peers in having ‘skin in the game’ in the provision of services.*<sup>100</sup>

With apologies for the length of this quote, Susan Hackett has succinctly expressed the impact that the ‘new normal’ and changes in the legal services marketplace, led in part by in-house and corporate counsel, are having on the profession. Hackett devotes considerable space in her article, “Corporate Counsel and the Evolution of Practical Ethical Navigation,” to her proposition that not only are corporate counsel leading the way in many changes to law firm structure and the provision of legal services, but they are also leading the way in terms of ethical navigation and helping lawyers gain clarity around issues of loyalty, independence, conflicts, etc.

The Globallegalpost.com piece referred to earlier notes, “Corporate legal departments are not only seeking alternative fee arrangements, but also being more selective about the work being sent to outside counsel, so as to keep costs down without degrading quality. As a result, law firms are re-examining their business models to better demonstrate their price for value.”

Corporate counsel are already engaged in outcomes-focused work and risk identification and management. They have broken ground by creating ethical infrastructures within their corporations, and developing processes designed to minimize risk, particularly in the post-Enron and Sarbanes-Oxley era. As a result, corporate counsel are leading the way toward many of the new ways in which we could transform regulation and the manner in which law firms operate in future.

In an article by Ray Worthy Campbell, titled “Rethinking Regulation and Innovation in the U.S. Legal Services Marketplace,” he reflects on the change in the legal services marketplace as a result of the growth in in-house counsel, and states:

*On the corporate side, the rise of the general counsel has changed everything. Once upon a time, corporate General Counsel were peripheral players in the providing of legal services to corporations. Today, senior lawyers happily leave major firm partnerships to join a General Counsel’s office, where the pay can be at least equal and the job satisfaction higher. If they are ‘wise counselors’ advising major corporations today about their social as well as legal obligations, they almost certainly will be found in the General Counsel’s office. The purchaser of legal services on the corporate side almost always is a lawyer herself, a point of some importance. Corporate clients are also repeat players, and so anticipate and plan legal costs. Often global in scope, major corporations can access legal providers outside the United States.*<sup>101</sup>

#### **4.6 Globalization and evolution of the legal services market**

Furlong maintains that:

*The next 20 years will overturn much of what lawyers today still take for granted and will, for the first time in centuries, give rise to a legal services marketplace in which lawyers are not the*

<sup>100</sup> Hackett, Susan. “Corporate Counsel and the Evolution of Practical Ethical Navigation: An Overview of the Changing Dynamics of Professional Responsibility in In-house Practice” (2012) 25:2 Geo J Legal Ethics 317, at p. 14

<sup>101</sup> Campbell, Ray Worthy. “Rethinking Regulation and Innovation in the U.S. Legal Services Market” (2012) 9:1 New York University Journal of Law and Business 1, pp. 33-34

*dominant providers. The profession's regulators will be swept up in this hurricane and will face challenges of their own.*<sup>102</sup>

Furlong goes on to predict various changes in the legal services marketplace in the next 15 years – remember, most of what Furlong predicted over the past ten years has come to fruition! In addition to there being new roles for lawyers, and the widespread automation of legal services, there will be a proliferation of non-lawyer service providers, client empowerment will lead to a demand for pricing levels that drive increased lawyer efficiency, and new law firm models will develop as traditional law firms abandon the idea of partnership and operate as corporate entities. Furthermore, “*The bigger impact of globalization is in the rise of firms outside North America and Great Britain that vie for clients worldwide. The gradual deregulation of India’s legal profession, the growing centrality of the Chinese economy, and the continued rise of Brazil as a regional champion have all powered the development of non-Western firms up the international rankings.*”<sup>103</sup>

The CBA Futures Report supports Furlong’s contention about pricing changes, and adds, “Clients are expecting greater transparency and predictability for pricing of services.”<sup>104</sup> It notes that currently, there is ‘growing demand from clients for lower prices’ generally, and it is time to recognize the slow death of the billable hour.<sup>105</sup>

Prof. Terry does an excellent analysis of the impact of globalization on the profession in her previously cited paper, “Trends in Global and Canadian Lawyer Regulation.” She says to understand the new regulatory trends, one needs to understand the impact of globalization:

*This information is useful because the advent of globalization has meant that it is easier for ideas to travel and for developments that take place in one country to be discussed and debated in other countries.*<sup>106</sup>

She references the 1998 and 2010 World Trade Organization reports on legal services, which summarized the impacts of globalization on the profession:

*... the legal services sector had experienced continuous growth as a consequence of the rise in international trade and of the emergence of new fields of practice, in particular in the area of business law. This trend has further continued over the last decade, and brought about sizable growth to the legal services sector.*<sup>107</sup>

Terry notes that Canadian firms are beginning to merge with international firms, such as the Ogilvy Renault LLP and MacLeod Dixon merger with Norton Rose Fulbright LLP, which in turn will “significantly expand the global reach of Canadian law offices.”<sup>108</sup> Transatlantic mergers such as these create “heightened awareness of regulatory developments in other countries.”<sup>109</sup>

I confirmed this when I spoke with Jonathan Ody, Head of Compliance with Norton Rose Fulbright LLP in London, England in July 2013. I asked Mr. Ody how Norton Rose was handling mergers with firms in countries where the regulatory regime and risk management structures were very different, and how they avoid ‘contamination’ or ‘group contagion’ from firms in other countries with different regulatory

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<sup>102</sup> Five Catalysts, p. 3

<sup>103</sup> Ibid, pp. 4-5

<sup>104</sup> Futures Initiative, p. 21

<sup>105</sup> Ibid, p. 22

<sup>106</sup> Terry, Laurel S. “Trends in Global and Canadian Lawyer Regulation” (2013) 76 Sask L Rev 145, p. 146

<sup>107</sup> Ibid, p. 146

<sup>108</sup> Ibid, p. 147

<sup>109</sup> Ibid



regimes that do not meet the compliance standards in England, such as the U.S. and South Africa. He stated that during the due diligence process, it is made clear that over time, firms in other countries hoping to merge with Norton Rose Fulbright LLP will be expected to adhere to the standards expected by head office in London, and efforts are made through their compliance department to bring the other firms along. He said that Norton Rose Fulbright LLP has its own high standards, reputation and brand, internal risk and compliance regimes that go far beyond those required by any regulator, and their internal controls and systems are sound practices for any business. What was clear, however, is that more than the regulators in England, Norton Rose Fulbright LLP as a global law firm is impacting how law is practised around the world. Canadian firms are beginning to jump on this bandwagon.

Terry points to another important global trend impacting the legal profession, that being the impact of Canada's demographic makeup and the projected shift in the global economy toward the BRICS countries of Brazil, Russia, India, China and South Africa. She cites statistics that show a significant growth in Canada's foreign-born population, and its likely impact.

*Consider what this data means for Canadian small businesses in an era of technology and globalization and in a time when the global economy is predicted to shift toward the BRICS economies. Given current technology, one need not be a multinational business to take advantage of business connections and opportunities elsewhere in the world. Many small businesses are likely to have suppliers elsewhere in the world or to sell their goods or services elsewhere in the world. Moreover, it is increasingly likely that private individuals will have contact with other countries' legal systems, likely through family law or inheritance matters. The increased diversity of Canada's foreign-born population means that Canada will be well-situated to take advantage of this global economic shift towards the BRICS economies. For all these reasons, I am convinced that Globalization trends that affect lawyers elsewhere in the world will also affect Canada lawyers and clients, regardless of the size of the community in which they live.<sup>110</sup>*

In his article "Regulation of the Legal Profession in the United States and the Future of Global Law Practice," Anthony Davis recognizes the growing impact of the regulatory systems in Australia and England on law firms in the U.S., which is relevant to law firms in Canada. In reflecting on the Solicitors Regulatory Authority (SRA) regime in England, and the changes it has brought about for lawyers and firms of all sizes including the advent of ABS, he notes:

*The idea of 'one-stop' shopping is not just about putting legal services for individuals in supermarkets, it's also about simplifying, speeding up and reducing the expense to clients in highly complex matters. Most of that work is, and will continue to be done by large firms and entities, not solo or small firm practitioners. And it is those firms – and their corporate clients – that are going to watch what their English competitors can do and that will be prevented from providing (or, from the clients' perspective, from receiving) those same cost-efficient and client-driven services, so long as the present regulatory scheme remains in place in the US. It is also vital to understand that this is not just about law firms in New York and Los Angeles. It is about the large local and regional firms operating in every significant city and state in the United States – being placed at a growing global competitive disadvantage. And this is coming about because our current structure of lawyer regulation is an outmoded and often client hostile foundation on which to regulate lawyers, or at the very least large law firms serving sophisticated clients.<sup>111</sup>*

Paul Paton analyzes the impact of MDPs in England, Australia and Canada on the U.S., and the tentative efforts of the ABA as part of the Ethics 20/20 initiative to broaden the Model Code of Conduct to permit

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<sup>110</sup> Ibid, pp. 150-51

<sup>111</sup> Davis, Anthony E. "Regulation of the Legal Profession in the US and the Future of Global Law Practice" (2009) *The Professional Lawyer* Vol.19, No. 2, p.8

MDPs.<sup>112</sup> In this article, he refers to the December 2009 Law Society of Upper Canada Governance Task Force conclusion that,

*... there is now a worldwide market for legal services, driven by clients seeking to operate globally... clients are looking for lawyers who are tapped in to the global market and are able to provide seamless service... the legal profession is facing increasing competition from other service providers... the business structure of the profession in shifting ... and the profession's ability to maintain self-regulation has been eroded.*<sup>113</sup>

Paton notes that of concern to David Clementi, whose report in 2004 in England<sup>114</sup> provided the foundation for the new *Legal Services Act 2007* and the subsequent new regulatory regime in that country, was the impact of globalization, both in terms of marketplace competition in the legal profession, and the need to ensure harmonization of domestic regulatory regimes with international obligations, such as the General Agreement on Trade in Services (GATS). Paton notes that GATS requirements included "... the direction that domestic regulation should be based on objective and transparent criteria, not more burdensome than necessary and, in relation to licensing procedures, not in themselves a restriction on the supply of the service."<sup>115</sup> In this way, Paton identifies the need for local regulators to be aware of and in compliance with international agreements and standards when considering new regulatory regimes.

Paton concludes with the warning that the debates about MDPs that have taken place to date have been diverted by the concept of "core values" and the need to hold on to the core values of the profession, which is not supported by a watering down of these values through MDPs. This debate needs to change in the public interest:

*This time, however, the opportunities presented by alternate business structures such as the MDP, and the economic threats coming not from accounting firms but from globalization of legal services and law firms in England and Australia means that the subtext – and likely the outcome – will be different. Further, from an access to justice perspective, permitting alternate delivery structures such as MDPs will have a far broader impact on ordinary citizens' ability to purchase legal services than the Big Five accounting firm initiatives about the ABA, CBA and regulators were so concerned a decade ago. There is also a greater public risk if the bar fails to appropriately and credibly consider the public interest in assessing the merits of MDPs and to act accordingly: attracting a legislative response that not only implements rules with which the profession itself is not satisfied, but using that to justify further encroachments on lawyer self-regulation.*<sup>116</sup>

Paton notes that globalization of the profession presents opportunities:

*Current economic challenges and the changed global legal environment present the opportunity for the profession in North America to once again consider the MDP, economic self-interests of the profession, a consumer welfare perspective, and how these forces might align ... reaffirming that lawyers' ethical identities and professional values transcend models of business delivery, and ensuring that both the profession and the public recognize that in an era of increased globalization, is a daunting task but one that will be fundamental to both this next MDP debate, and the future of the profession as a whole.*<sup>117</sup>

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<sup>112</sup> Paton, Paul D. "Multi-disciplinary Practice Redux: Globalization, Core Values and Reviving the MDP Debate in America" 78 *Fordham L Rev* 2193 (2010) (MDP Redux)

<sup>113</sup> *Ibid*, pp 2194-2195

<sup>114</sup> Clementi, David. "Review of the Regulatory Framework for Legal Services in England and Wales, Final Report" December 2004

<sup>115</sup> MDP Redux, p. 2238

<sup>116</sup> *Ibid*, pp. 2242-43

<sup>117</sup> *Ibid*, pp. 2243-44

## 4.7 Membership demographics and the aging Bar in Nova Scotia

Refer to Appendix 4 for the September 2013 report to Council prepared by Glen Greencorn, the Society's Director of Finance and Administration. It sets out an analysis of the demographic trends impacting the Society and its governance, including an aging Bar, new risks and a stagnant membership number.

## 4.8 Access to justice

Throughout this research it became clear that Council's two strategic goals of transforming regulation and enhancing access to justice are, in fact, closely intertwined. There is strong opinion, if not clear evidence, from Australia and England that regulatory regimes that support ABSs will enhance access to justice through creativity, efficiency and lower costs in the provision of legal services. Many suggested to me during the interviews in England, that the key concern should be access to affordable legal services, rather than justice, and that the legal regulator has much more control over the former than the latter. Access to justice requires having control at multiple levels in the administration of justice, and some in the SRA maintain that while the regulator has a role to play, all stakeholders in the system of the administration of justice, such as the government and the judiciary, have to committed to the same goals in order for there to be significant improvement to access to justice.

A great deal has been evolving over the past two to three years respecting the role of the courts, the government and law societies in access to justice, including various symposia, conferences, and *pro bono* initiatives.<sup>118</sup> Council itself is grappling with how to achieve realizable goals and successes in its own access to justice work plan

In his recent presentation at a CBA conference in Vancouver in April 2013, Prof. Devlin touches on this concept and the role law societies should play in attempting to address the problems with access to justice:

*However, there can be little doubt that when we take off our rose coloured glasses the reality is that the majority of lawyers are in the business of using their substantive knowledge and skills to provide competent and quality service to fee paying clients. It is essentially a contractualist vision of what is being increasingly called "the legal services industry". That's the dominant structure, that's the governing model, that's the motivating vision. Such a vision of the legal profession, of necessity, makes access to justice a secondary or marginal issue. It turns our gaze away from the structural determinants of access to justice. I want to suggest that we need a different vision for the legal profession – public interest vocationalism. And if we embrace that vision, we will naturally find ourselves restructuring these determinants and improving access to justice.<sup>119</sup>*

Devlin goes on to explain his concept of 'public interest vocationalism', which can be very briefly summarized as having lawyers develop an ethical identity, and that a constituent element of that ethical identity is a commitment to enhance access to justice. This requires the construction of an alternate vision of the role of lawyers in their communities, something beyond the provision of good quality of service for fees. This is very similar to the approach put forward in the Report of the Action Committee on Access to Justice in Civil and Family Matters, which calls for extensive lawyer training on access to justice as a component of both law schools and continuing legal education.

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<sup>118</sup> See Report of the Action Committee on Access to Justice in Civil and Family Matters, Oct. 2013, <http://ccct-cctj.ca/reports-from-the-national-action-committee-on-access-to-justice-in-civil-and-family-matters/> and Equal Justice - Balancing the Scales, <http://www.cba.org/CBA/equaljustice/main/>

<sup>119</sup> Devlin, Richard. "Public Interest Vocationalism and The Structural Determinants of Access to Justice", presentation to Canadian Bar Association Conference in Vancouver, BC April 27, 2013, [unpublished]

At the recent IBA Conference, significant attention was devoted to the crisis in access to justice globally and how it relates to regulators. Bruce Beveridge, the CEO with the Law Society of Scotland, referred to the global decrease in funding for legal aid, the rising costs of litigation, closures of Courts in rural areas impacting the stability of communities, and the increase in self-represented individuals creating problems and delays in court proceedings. While *pro bono* initiatives are critical, some governments have now taken to mandating *pro bono* services as a means to offset the pain of reduced government funding – this is seen as an inappropriate downloading of responsibility from the government to the legal profession, and regulators must fight back. Wolfgang Emer with the German Bar Association reported that in response to legal aid reductions, some Bars have created volunteer legal advice projects in various communities, but this is inadequate to meet the needs of the public.

The Law Council of Australia reported interesting survey results showing that for every \$1 spent in legal aid by government, they save \$1.70 in legal and other support mechanisms for the public who have no legal representation – they are thereby making a case for government legal funding as an investment in justice. Horatio Neto of the Brazil Bar concluded that the State has a ‘social contract’ to provide a multi-level legal infrastructure which supports access to justice, in the same way that they have to provide roads and healthcare. Law societies have a critical role to play in engaging government in this dialogue.

As Council considers transforming regulation, we should consider how access to justice issues fit into our analysis of a best practices regulatory regime.

## 5.0 NEW REGULATORY MODELS – AN ENVIRONMENTAL SCAN

As is outlined in Part 1, legal regulation has been transformed in England and parts of Australia. Major changes have also taken place in New Zealand and are underway in Scotland, Ireland and the Netherlands. Details of the changes and what lies behind them, with the exception of England, are outlined in Appendix 5. A brief synopsis of them is provided below, after which the significant changes in England are discussed.

### 5.1 Australia

#### The emergence of co-regulation

Australia in general, and New South Wales (NSW) in particular, has led the world in transforming regulation of the legal profession since 1994. Over the past two decades, the Law Society of NSW and the NSW Bar Association have co-regulated the profession with the independently legislated Office of the Legal Services Commissioner (OLSC).

The 1993 Act authorized MDPs and the sharing of income between lawyers and non-lawyers. In 2001, legislation permitted the incorporation of legal practices, the sharing of income and the ability of lawyers and non-lawyers to deliver legal services together, without ownership restrictions. These new incorporated legal practices (ILPs), are required to have in place demonstrable, measureable ‘appropriate management systems’ (AMS).

The goal of this new approach to law firm regulation has been to help ILP leaders detect and avoid problems. Key to this has been risk profiling and practice review/audit programs, which fall under the purview of the OLSC.

Because ‘Appropriate Management Systems’ are not defined in the *Legal Profession Act*, the OLSC, after study, research and consultation, identified ten objectives for sound legal practice.<sup>120</sup> ILPs are required to conduct a self-assessment process focusing on the ten objectives, and to file this with the OLSC, which then reviews them for assessment of risk, compliance and non-compliance.

#### The impact on complaints

The OLSC is responsible for receiving complaints about legal practitioners in NSW. The purpose of the OLSC is to “reduce complaints against legal practitioners within a context of client protection and support for the rule of law and to increase professionalism.”<sup>121</sup>

The OLSC is responsible for the auditing ILPs for compliance with the *Legal Profession Act* (2004), and the regulations and rules of conduct, with the goal of educating firms towards compliance.

Studies of this new regulatory regime demonstrated early on a reduction in complaints relating to legal practitioners in ILPs, and increased rates of compliance with the objectives by ILPs. Details may be found in Appendix 4.

Paul Paton, commenting on the Australian regulatory regime, notes that it appropriately focuses on the public interest:

*Increasing public distrust of the legal profession and greater focus on the rights of the consumer in a market-based economy also prompted significant change in Australia. Reforms unfolding for*

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<sup>120</sup> [www.olsc.nsw.gov.au](http://www.olsc.nsw.gov.au)

<sup>121</sup> Gordon, Tahlia, Research and Project Manager, Office of the Legal Services Commission, New South Wales, Australia, presentation to the International Conference of Legal Regulators, September 2012 in London, England (Gordon ICLR presentation)

*over a decade have resulted in the effective end of self-regulation by the legal profession, replaced with a co-regulatory system that separates regulatory from representative functions and creates a series of more independent disciplinary agencies operating closer to government than to the profession. Because the legal profession is regulated at the state rather than the federal level, changes have not been entirely uniform, though they are broadly similar. Three states provide for an independent body to administer complaints against lawyers, while the Law Society retains some degree of authority to establish ethics rules and practice standards against which lawyer conduct will be judged. Significant lawyer involvement in the regulatory process is an important feature. The end result is a system more focused on regulating in the public interest.*<sup>122</sup>

## **5.2 New Zealand**

### **Voluntary membership**

The Law Society of New Zealand, structured much like the NSBS, operates under the *Lawyers and Conveyancers Act* (2006). It regulates all lawyers: however, membership in the Society is voluntary.

The Society is governed by a Council and managed by a Board, supported by an Executive Director.

### **Delegation of complaints handling**

The Society operates a Lawyers Complaints Service, which deals with complaints against lawyers, incorporated law firms, and non-lawyer employees of both. All lawyers are required to have their own procedures for handling complaints, and are required to advise clients about these procedures before starting work.<sup>123</sup>

The Lawyer Standards Committee handles investigations of complaints. The Committee can mediate, resolve or dismiss complaints, or refer matters to hearing before the New Zealand Lawyers and Conveyancers Disciplinary Tribunal.

If complainants or lawyers disagree with the decision of the Committee, they may request a review of it by the Legal Complaints Review Officer, who is appointed by the Minister of Justice and “provides independent oversight and review of the decisions made by the standards committees of the New Zealand Law Society ... the LCRO’s reviews are as informal and straight forward as possible, while giving proper consideration to the process of the review itself and the law.”

This model represents another co-regulatory regime, with involvement of the Minister of Justice in key aspects of the Society’s regulatory functions, in the interests of accountability.

## **5.3 Ireland**

### **In a state of uncertainty**

Solicitors in Ireland are accountable to the Law Society of Ireland, and the Courts through the Solicitors’ Disciplinary Tribunal, an independent statutory tribunal appointed by the President of the High Court to consider complaints of misconduct against lawyers. In addition, the Office of the Independent Adjudicator exists as “... an independent forum to which members of the public may apply if they are

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<sup>122</sup> Paton, *Between a Rock*, p. 104

<sup>123</sup> [www.lawsociety.org/nz/complaintsanddiscipline](http://www.lawsociety.org/nz/complaintsanddiscipline)

dissatisfied with the manner in which the Law Society of Ireland has dealt with any complaint made by or on behalf of any person against their solicitor.”<sup>124</sup>

Barristers are subject to regulation by the Courts<sup>125</sup> and are accountable to the Bar Council of Ireland, which in turn can direct charges to the Barristers’ Professional Conduct Tribunal, which decisions are appealable to the Barristers’ Professional Conduct Appeals Board.

Over the last several years, a series of events unfolded, not dissimilar to those that gave birth to the new regulatory regime in England, which led to recent calls for significant change in regulation of the profession. These were in part driven by the impact of the 2008 financial crisis, the collapse of the Irish banking system and requirements imposed on Ireland by the European funders that were supporting its economic revival.

The *Legal Services Regulation Bill* of 2011, as of July 2013 was pending before Parliament. In essence, it will replace the regulatory functions of the Law Society with a new, government-appointed regulator. There will be a Legal Services Ombudsman to oversee the handling by the Law Society and Bar Council of three classes of complaints: inadequate services, excessive fees and misconduct.

Not surprisingly, the proposed changes, from the government’s perspective, have been very positive: “It provides for greater transparency for legal costs and greater assistance and protection for consumers of legal services. It also provides an entirely independent dispute system to determine allegations of professional misconduct and a new system for legal costs adjudication where legal costs are in dispute.”<sup>126</sup> And “Legal reform is a chance to finally do the right thing for consumers.”<sup>127</sup>

On the other hand, this bill has raised the ire of the Law Society, which states the proposals risk undermining principles of democracy. According to the Society, “... the bill, as published, represents a real and dangerous threat to the continued existence of an independent legal profession in Ireland, with incalculable consequences for such fundamental democratic principles as the separation of powers, access to justice and the rule of law.”<sup>128</sup> The Law Society is calling for significant amendments to the bill, suggesting it will impinge on lawyer independence in its current form.

A public battle is ongoing. We will want to closely follow the progress of this bill as we monitor regulatory model developments around the world.<sup>129</sup>

## 5.4 Scotland

Regulation of the legal profession in Scotland is also undergoing change, but not to the same ‘enforced’ extent as in Ireland.

Lawyers in Scotland are divided into solicitors, advocates, solicitor-advocates, and conveyancing and executry practitioners, among others. The Law Society of Scotland is the professional body for solicitors. It governs through a Council made up of elected members as well as, more recently, non-solicitor

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<sup>124</sup> [www.independentadjudicator.ie](http://www.independentadjudicator.ie)

<sup>125</sup> Callaghan, Anthony P. & Christopher P. Fox. “Self-Regulation No Longer the Hallmark of the Irish Legal Profession”, *Irish Legal 100* (3 July 2012) online: *Irish Legal 100* (Callaghan & Fox)

<sup>126</sup> The Department of Justice and Equality: Speech by An Tanaiste at Regulating the Professions in Ireland conference, November 10, 2006

<sup>127</sup> Callaghan & Fox

<sup>128</sup> “Legal Services Bill proposes new regulator and more transparent fees”, *The Journal* May 10, 2011

<sup>129</sup> Recent personal contacts have suggested that the proposed reform in Ireland may not occur or it may be considerably less dramatic than originally proposed.

members. Its authority currently comes from the *Legal Services Act*, enacted in November 2010. This relatively new Act allows solicitors to form partnerships with non-solicitors, and to have outside investors (although a majority share in any such business has to remain with solicitors or other regulated professionals). The Act creates a tiered regulatory framework, similar to that in England, in which the Scottish Government is responsible for approving and licensing regulators, who in turn will regulate the licensed legal services providers.<sup>130</sup>

Complaints about any legal practitioners are handled by the Scottish Legal Complaints Commission, created in 2007. Like the Legal Ombudsperson in England, the SLCC deals with front-line complaints and delegates conduct concerns to the relevant professional body. The Commission also plays an oversight role with regard to the conduct of complaints by professional bodies.

## 5.5 Netherlands

The legal profession in the Netherlands is at present very similar to our own, although it operates under a civil law system. The Dutch Bar Association serves the hybrid role as both regulator and advocate for the profession. It describes itself as a ‘self-governing profession’, operating under government-enacted statute.

Over the past year or so, the Dutch Government has been attempting to launch a bill that will give government extensive authority over the conduct of lawyers, impact the rights of client privilege and create different regulators. The Netherlands Bar Association and the Federation of European Bars perceive the proposal as a serious threat to independence of the legal profession, as there will no longer be ‘truly independent oversight in the interests of the litigants.’<sup>131</sup> As previously noted, this sentiment is shared by the Law Societies of Norway, Sweden and Denmark.

President Van Win of the Dutch Bar, in responding to the government’s proposal, has said, “Whereas the three most important core values of ‘partiality, independence and confidentiality’ were more or less undisputed in 2006, these are at risk in 2012.”<sup>132</sup> He states that because the government intends to incorporate the supervision of lawyers into a central body, without lawyers, with members appointed by the Minister and State Secretary of Justice, this represents an unacceptable interference with independence of the legal profession. At present, this bill remains under discussion.<sup>133</sup>

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<sup>130</sup> [www.scotland.gov.uk](http://www.scotland.gov.uk) July 8, 2011

<sup>131</sup> [www.hq.org/bar-associations-netherlands.asp](http://www.hq.org/bar-associations-netherlands.asp)

<sup>132</sup> *Ibid*

<sup>133</sup> [www.overheid.nl](http://www.overheid.nl) July 30, 2013



## 6.0 OUTCOMES-FOCUSED AND RISK-BASED REGULATION – THE ENGLAND AND WALES MODEL

In this section, we will examine what Outcomes-Focused Regulation (OFR) means and the close link between this model and risk-based regulation. How this model has emerged and the early successes achieved by its adoption in England will be highlighted. Because a clear understanding of this model is key to the development of any new model in Nova Scotia, there is a focus on the lessons being learned in England, and how we can avoid similar problems if there was to be an implementation of a similar system here. Finally, there will be a consideration of the means by which England is attempting to measure the ability of this new model to protect consumer interests.

### 6.1 What is Outcomes-Focused Regulation (OFR) and how did it evolve in England?

The legal profession in England and Wales remains divided among barristers, solicitors and other providers of legal services, such as conveyancers. Each provider of legal services has its own regulator, which led to considerable challenges and dysfunction in the regulation of the legal profession up until the mid-2000s.<sup>134</sup>

The evolution of OFR in England and Wales took place over 20 years ago when it evolved from principles-based regulation, which was incorporated into regulation of the financial services industry in England and Wales in 1990. Julia Black explains this evolution:

*In general terms, Principles-based regulation means moving away from reliance on detailed, prescriptive rules and relying more on high-level, broadly stated rules of Principles to set the standards by which regulated firms must conduct themselves. However... there are a number of connected but distinct regulatory approaches working under the banner of “Principles-based regulation”, some of them suggesting potentially radical developments in the relationship between the FSA [UK Financial Services Authority] and the industry it regulates. At least three elements in the FSA’s current thinking can be identified:*

- *Broad-based standards in preference to detailed rules;*
- *Outcomes-based regulation;*
- *Increasing senior management responsibility*<sup>135</sup>

In March 2001, the Office of Fair Trading published a report titled “Competition in the Professions,” which recommended the removal of restrictions on competition and overly restrictive rules respecting the provision of legal services. In addition, as a result of serious problems with the Law Society’s complaints handling processes and a significant loss of public confidence, in 2003 the government appointed Sir David Clementi to carry out an independent review of the regulatory framework for legal services in England and Wales. The Clementi Report was published in December 2004, and set out a series of recommendations for radical reform of the regulation of legal services in England.

In October 2005, a white paper on “The Future of Legal Services: Putting Consumers First” was published, and fostered a series of debates that culminated in a new draft Legal Services Bill in May 2006. In July 2006, a Joint Committee published a report accepting the broad reform package, adding several recommendations for improvement. In October 2007, the new *Legal Services Act* received Royal Assent.

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<sup>134</sup> I am grateful to the Solicitors’ Regulation Authority staff, and their various presentations and reports, for the historic and organizational information below.

<sup>135</sup> Black, Julia, Martyn Hopper & Christa Band. “Making a Success of Principles-based regulation” (2007) *Law and Financial Markets Review* 191

The new Act was designed to support three key measures: to simplify the regulatory regime for lawyers and legal services; to significantly reform the complaints procedures in the public interest; and to increase competition through the approval of alternate business structures (ABS), with a goal of enhancing access to justice at reduced cost.

Under the *Legal Services Act*, the Legal Services Board (the Board) was created as an entity independent of both government and the legal profession, although accountable under statute to the Justice Ministry, to serve as the single, intermediary oversight body between approved regulators and the government. The Board also oversees the office of the Legal Ombudsman (LeO, discussed below). There are eight approved regulators of legal services, including the Law Society (which oversees the work of the Solicitors Regulation Authority or SRA), the Bar Standards Board, the Chartered Institute of Legal Executives, and five others.

The LSA is founded upon:

- i) eight Regulatory Objectives,
- ii) five Professional Principles,
- iii) six 'Reserved' Legal Activities, and
- iv) the provision that only authorized or exempt persons are permitted to carry out a reserved legal activity

The **eight Regulatory Objectives** under the Act are as follows:

- i) protecting and promoting the public interest;
- ii) supporting the constitutional principle of the rule of law;
- iii) improving access to justice;
- iv) protecting and promoting the interests of consumers;
- v) promoting competition in the provision of services within subsection (2);
- vi) encouraging an independent, strong, diverse and effective legal profession;
- vii) increasing public understanding of the citizen's legal rights and duties; and
- viii) promoting and maintaining adherence to the professional principles.

The **five Professional Principles** in the LSA are:

- i) authorized persons should act with independence and integrity;
- ii) authorized persons should maintain proper standards of work;
- iii) authorized persons should act in the best interests of their clients;
- iv) persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorized persons, should comply with their duty to the court to act with independence in the interests of justice; and
- v) affairs of clients should be kept confidential.

The six **Reserved Legal Activities** (those which may only be carried out by authorized persons under the LSA, or those exempt from authorization) are:

- i) exercise of rights of audience;
- ii) conduct of litigation;
- iii) reserved instrument activities, being certain activities concerning land registration and real property;
- iv) probate activities;

- v) notarial activities; and
- vi) administration of oaths.

The Board is supported by a **Legal Services Consumer Panel**, which is designed to provide advice to the Board about the interests of users of legal services. Its role is to carry out independent research, and scrutinize the Board's work on behalf of consumers.

The **Legal Ombudsman** is an independent, consumer-focused office established to resolve complaints about lawyers. It provides a 'single gateway' for all complaints against legal service providers, and funnels through to the approved regulators any lawyer conduct concerns. LeO has authority under the *Legal Services Act* to order a lawyer or firm to apologize, refund all or part of legal fees, return documents, and pay compensation for the provision of poor quality of service. It is authorized to enter into agreements with lawyers and firms respecting these corrective measures in the public interest, and to levy costs against firms in the event a complaint requires investigation and action.

The **Solicitors' Regulation Authority (SRA)** is the independent regulatory arm of the Law Society of England and Wales, established in January 2007 to regulate solicitors. Solicitors provide legal support and advice to clients directly. While the SRA is the regulatory arm of the Law Society, there are no rules governing this relationship, which has led to certain challenges. The SRA is currently the most evolved of the approved regulators in England. This is essential, because there are more than 120,000 solicitors in England, and only about 10,000 barristers, therefore transforming the regulation of solicitors was a key priority.

The **Bar Standards Board (BSB)** regulates barristers, independent of the Law Society and the SRA. A barrister is someone trained as a specialist in advocacy and advisory work. Historically and currently, barristers do not take instructions from clients directly but rather, are retained by solicitors when needed.

The **Legal Services Commission (LSC)** manages the legal aid scheme in England and Wales, and works in partnership with solicitors and not-for-profit entities to provide legal aid to clients in need. It is a non-departmental public body sponsored by the Ministry of Justice.

In terms of the complaints process, this is also a multi-layered process. Consumer, quality of service and fee-based complaints generally move first through the LeO office, described above. However, clients are also able to report complaints directly to regulators. LeO funnels conduct complaints (more serious matters) through to the regulators. The SRA investigates complaints against solicitors. These complaints may be referred to either the investigation department, or the Supervision Team, whose role is outlined below. Risk information from these two departments is continually fed to the Risk Management Team. Matters requiring hearing are referred to the legal team, and heard before the Solicitors' Disciplinary Tribunal. Appeals from those decisions are to the Court of Appeal. Complaints about barristers' conduct are referred from LeO to the Bar Standards Board for investigation, and hearings move on to the Barristers' Disciplinary Tribunal. The latter proceedings are controlled by the courts, rather than the regulator.

The SRA has adopted an outcomes-focused model of regulation, which is founded on strong risk identification and management procedures. OFR is a regulatory regime that focuses on high level principles and outcomes that drive the provision of legal services for clients, as compared with our traditional proscriptive, rules-based regulatory regime.

## 6.2 Outcomes-Focused Regulation as a regulatory norm

As the foundation of its OFR regime, the SRA has adopted **Ten Mandatory Principles** to which all solicitors must adhere, and which underpin all requirements in the SRA *Code of Conduct* or Handbook. Solicitors must:

1. uphold the rule of law and the proper administration of justice;
2. act with integrity;
3. not allow their independence to be compromised;
4. act in the best interests of each client;
5. provide a proper standard of service to their clients;
6. behave in a way that maintains the trust the public places in them and in the provision of legal services;
7. comply with their legal and regulatory obligations and deal with their regulators and ombudsmen in an open, timely and cooperative manner;
8. run their business or carry out their role in the business effectively and in accordance with proper governance and sound financial and risk management principles;
9. run their business or carry out their role in the business in a way that encourages equality of opportunity and respect for diversity; and
10. protect client money and assets.

The SRA *Code of Conduct* (Handbook) outlines the professional standards expected from all solicitors and law firms that it regulates. The Code is not proscriptive, but identifies ‘key behaviours’ as examples of how to achieve the outcomes listed above. They allow for flexibility in the way lawyers and firms provide legal services to clients, as long as they can demonstrate they are achieving the outcomes. For example, one outcome is that “clients are in a position to make informed decisions about the services they need, how their matter will be handled and the options available to them.” For a sole practitioner with a family law client, as compared to a global law firm with a multi-national corporate client, the way in which this outcome is achieved will likely be very different. By listing key indicators or behaviours associated with each outcome, this gives lawyers and firms, and the SRA a way (evidence) to measure whether the outcomes are being achieved.

Solicitors are also required to adhere to rules and regulations relating to such things as handling trust monies, how firms are required to liaise and interact with the SRA, and the discipline process. Having implemented the foundational Principles and Code of Conduct to support the OFR model, the SRA is now focused on simplifying its rules and regulations to be more principles-based as well.

A critical component of this OFR regime is risk identification and management, referred to as their **Regulatory Risk Framework**. This framework is based on a cyclical process that can be described as follows:

- **Identify** – before acting, they identify risks based on a central risk index;
- **Assess** – they assess risks consistently and share these assessments across the SRA to foster understanding;
- **Evaluate** – they continually evaluate their effectiveness by monitoring changing outcomes;
- **Control** – they control unacceptable risk levels through regulatory tools;
- **Monitor** – they monitor risk levels against their tolerance to direct control activities; and
- **Learn and adapt** – they learn and adapt their tolerance, resource levels and approach to controlling risks.

It is important to understand the inter-relationship between the Regulatory Objectives (ROs), Outcomes and Risks. This is best described in the report entitled the “Regulatory Risk Framework” published by the SRA in 2012:

*The SRA defines desired regulatory outcomes by identifying what we expect to observe when the market operates in line with the intent of the [eight] regulatory objectives [set out in the LSA]. This process provides us with a practical articulation of the characteristics or results that we should be seeking to achieve through our regulation.*

*By adopting an outcomes-focused approach, we are able to encourage innovation within the market, regulating a broader range of business structures who bring new approaches to the provision of legal services, as well as providing greater freedom to those we already regulate.*

*As an outcomes-focused regulator we evaluate the impact of our regulatory activity on firms, consumers or legal services and the public and adapt our approach to continuously improve our delivery.*

*Day-to-day regulatory activities are guided by a risk-based approach to regulation, focusing attention and activity upon issues, firms and potential risks that pose the greatest threat to the objectives.<sup>136</sup>*

The SRA states that in order to achieve this approach, it requires:

1. A clear view of what the risks are relating to the ROs and the SRA’s exposure to those risks;
2. To be able to demonstrate where its most significant risks lie, what mitigating activities the SRA is taking to address them, and that these actions are both proportionate and effective; and
3. Clear governance arrangements in place to ensure that risks are escalated as appropriate, and that there is accountability for the effective management of risk.<sup>137</sup>

**Proportionality** is an essential component of the SRA’s OFR and risk-based regulatory regime. It is the foundation for the drive to simplify the regulatory burden on lawyers (which we discussed in the first section of this paper), to eliminate the one-size-fits-all approach to regulation and to focus resources and regulatory compliance tools on areas where the greatest risks to the public and consumers lie. In identifying risks, the SRA considers its ‘regulatory risk appetite’ as part of this proportionality assessment: which risks can be tolerated or are acceptable, and which require a diversion of resources in both a proactive and reactive manner?

The SRA therefore developed a **Regulatory Risk Index**, grouping risks into the following six categories:

- i) Firm viability and structure – risks arising from firm instability due to events relating to its financial viability and/or structural composition;
- ii) Fraud and dishonesty – risks that a firm or individual becomes involved in fraud or dishonesty;
- iii) Firm operational risks – risks arising from the inadequacy of firm’s policies, processes, people or systems;
- iv) Competence, fitness and propriety – risk that individuals lack skills, knowledge or behaviors, fitness or propriety;
- v) Market risks – those arising from or affecting the operation of the legal services market; and

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<sup>136</sup> Solicitors Regulation Authority “Regulatory Risk Framework” report, [www.sra.org.uk/riskframework](http://www.sra.org.uk/riskframework), p.5

<sup>137</sup> Ibid

- vi) External risks – risks arising from wider factors beyond the scope of the legal services market, such as economic, political or legal changes.<sup>138</sup>

Information and data about risk comes to the SRA in a variety of ways: through incoming reports from the regulated community, consumers and other agencies; from individuals and firms; and from the identification of market-wide or sector-specific risks; for example, the recent decision by the government in England to reduce funding for legal aid services. All risk data is assessed according to materiality, weight, relevancy and tolerance.

*The SRA uses a process of risk aggregation to combine regulatory reports and information received across the organization with firm and individual assessments, to gauge our overall exposure to specific regulatory risks.*<sup>139</sup>

### 6.3 Risk monitoring

Risk monitoring is another key component of this regime. It is a way to protect the public better but at less cost and in a less intrusive way for firms. The monitoring takes place across the organization to ensure that risks are constantly reassessed in line with the SRA's tolerance, with escalated responses when and where appropriate. Identified risk tolerances provide thresholds against which consistent action can be taken across the SRA. Implementation of internal controls with respect to organizational decision-making is another key component. The SRA has carefully analyzed where and when decisions of any kind are made throughout the organization, the level of impact of those decisions, and the internal controls needed to ensure consistency and proportionality in decision-making. In this way and others, risk management concepts are embedded in terms of organizational structure and culture.

In 2013, the SRA began further fine-tuning its risk identification process by identifying **current, emerging and potential risks**.

**Current risks** are evidenced by widespread negative effects of the risk on the regulatory objectives, such as:

- financial difficulty,
- dishonest use of trust funds,
- lack of a diverse and representative profession, and
- failure to cooperate with the regulator.

**Emerging risks** are where the SRA has some evidence of a widespread negative effect that represents a growing concern, such as:

- a lack of succession planning by solicitors,
- poor standards of service, or
- inadequate financial controls for trust monies.

Finally, **potential risks** identify those where current trends suggest there are risks that have a potential to have a negative effect, such as abusive litigation, lack of due diligence over outsourcing arrangements, and lack of transparency in complex business structures. The SRA's Regulatory Risk Framework is reproduced in Appendix 6.

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<sup>138</sup> Ibid, p.8

<sup>139</sup> Ibid, p. 10

## 6.4 The creation of new ownership models – the Alternative Business Structure (ABS)

As noted earlier, the OFR and risk management regulatory regime is focused on public protection, as well as opening up competition in the legal services marketplace. The *Legal Services Act 2007* specifically contemplates the development and approval of ABS. In 2012, the SRA approved its first ABSs. As stated by Charles Plant, Chair of the SRA Board, in the SRA’s publication “OFR and Beyond”:

*We regulate in a time of unparalleled change. The public interest will benefit from the emergence of new ways of delivering legal services, as we are beginning to see both from those to whom we have awarded ABS licenses and the response of established firms.*<sup>140</sup>

ABSs allow non-lawyers to own and manage law firms and enable existing firms to accept external investment. The goal is to increase the quality, diversity and choice in legal services, increase capital investment, develop new approaches to law firm management, and reduce costs for consumers.<sup>141</sup> There are currently almost 200 approved ABSs in England. About 75 per cent of these represent traditional firms that have changed their ownership structure to include non-lawyer investment. Innovation and creativity in the development of new and unique business models has been slow to develop, in part because of the challenges facing such innovative structures when seeking approval from the SRA. The SRA is actively making changes to streamline and simplify the application process, and deal with the backlog of 100 applications. This ‘Red Tape Initiative’ also seeks to focus better on actual risks relating to ABS, which are supported by facts and evidence, rather than assumptions about risk. By regulating legal entities, the SRA regulates any entity within which even one lawyer is employed. If a legal services provider offers any one or more of the ‘reserved’ legal services set out in the Act, then the provider must be an authorized legal services provider.

ABSs in operation today include the global law firm of Slater Gordon, virtual law firms such as Lucy Scott Moncrieff (legal aid and consultations), Cooperative Legal Services (providing legal information and document creation services by non-lawyers), the Stobarts Group (Eddie Stobarts’ trucking, a national trucking and infrastructure business with its own in-house litigation law firm, Stobarts Barristers), and firms offering legal services and related services such as insurance, financial services, pharmacy and yogurt production.

In order to manage the unique risks associated with ABS, the SRA created ‘separate business rules’ that layer on top of the SRA principles and risk management regimes required of firms. These seek to address such issues as client confidentiality within an environment of information sharing between non-lawyers and lawyers.

There are approximately 11,000 regulated entities under the SRA regime, including sole practitioners, law firms and ABS. Key to the risk management regime has been the development of relationships and formal liaison between the SRA and each entity. At the foundation of the SRA’s regulatory regime is the goal of making law firms their own ‘compliance champions’, much like Australia, through the development of appropriate ethical and management infrastructures. For example, all entities are required to have their own complaints process, whereby they are the first entry point for quality of service complaints. This requires them to demonstrate to the SRA that they are willing and able to fairly and efficiently address client concerns of this nature. The LeO office reports a 30 per cent decrease in complaints through its office, likely as a result, in part, of firms handling more complaints themselves.

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<sup>140</sup> Solicitors Regulatory Authority “OFR and Beyond: The SRA’s vision for regulating legal services in the 21<sup>st</sup> century” 2012

<sup>141</sup> Solicitors Regulatory Authority, “Risk Outlook 2012: The SRA’s assessment of key risks to the regulatory objectives”, July 2013, p. 17

Another tool used to enhance entity compliance is the requirement that each entity have a Compliance Officer for Legal Practice (COLP) and Compliance Officer for Finance and Administration (COFA). The responsibilities of these officers are clearly laid out in the rules and regulations, and they are a means for ‘embedding the new practices and culture required to make risk-based OFR effective.’<sup>142</sup> Each member of the SRA Supervision Team is linked to the COLPs and COFAs for a number of firms, and has the responsibility for communicating regularly with them about their firms’ implementation of appropriate management policies and procedures, and management of risks and complaints.

The Supervision Team has a direct link to the Risk Management Team of the SRA. The Risk Team considers in its risk assessment such things as the number of non-lawyers employed within a firm, the rate of staff and lawyer turnover, the areas of law practised, the percentage of legal aid work done, financial vulnerability and instability indicators, whether the firm handles a large number of vulnerable clients (e.g., criminal, legal aid, immigration), and whether the nature of the practice is such that the lawyers are more likely to hold all or most of the power in a solicitor-client relationship because of the uniqueness of the area of law, skill or experience required, or client needs. These result in a risk rating for each entity. Those at the higher end of the scale are considered ‘high impact’, and require a closer level of scrutiny by the Supervision Team. There are about 200 high impact firms in England, about 2,000 medium impact firms, and more than 9,000 lower impact firms. Part of the measurement of risk impact is the extent of harm that a firm could potentially cause if it failed or engaged in misconduct. For this reason, the SRA focuses not on whether an entity is a sole practitioner or large firm, but rather on an evidence/fact-based assessment of where risks and impact of harm actually lie.

As noted earlier, the Risk Team also considers external and other risk factors, including changes in the legal services market structure (44% are sole practitioners, 41% have two to four partners, 27% of firms carry out at least 90% of their work in a single area of practice); mergers and consolidation, which are reshaping the legal services industry into a less fragmented one; commoditization and the shifting of less complex tasks to non-lawyers (there are over 300,000 paralegals in England); investment in technology to drive costs down and create efficiencies (or the failure to do so); and the challenges in obtaining professional indemnity insurance from a qualified provider.<sup>143</sup>

Also noted are trends impacting practice, such as consumer price awareness and expectations of more value at lower cost; consumer empowerment through legal service provider options and the ability to unbundle legal services; the importance to clients of firm branding; decreasing consumer confidence in lawyers overall; online consumers and the broad access to legal information and services online; and demographic shifts such as those we’ve seen in Nova Scotia – an aging population, and increased ethnic diversity.

In the Law Society Gazette posted September 23, 2013, the SRA announced it has begun a process of ‘intense engagement’ with about 55 firms identified as being at ‘high risk of financial instability’. It is noted that the SRA targets its resources ‘on the 5% of high-risk firms identified’, and that ‘engagement through supervision has been effective so far’ and has led to significant cost savings. The article goes on to say, “Encouraging struggling firms to seek insolvency advice and create contingency plans were essential in focusing attention on financial difficulties ... firms could be subject to further risks as they emerge from the downturn if they make overconfident investment decisions.”

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<sup>142</sup> Ibid

<sup>143</sup> Ibid, pp. 18-19



## 6.5 Lessons learned in England

Based on the series of interviews conducted in July 2013,<sup>144</sup> there was general consensus that OFR represents:

- a consumer-driven regulatory model;
- extensive Code of Conduct replaced with Ten Mandatory Principles;
- an objective to reduce ‘box ticking and form filing’ to give firms more freedom to focus on providing strong quality of service within their particular context (no more ‘one-size-fits-all’ regulation);
- development of clear regulatory objectives to assist lawyers in meeting objectives;
- allowing the regulator to focus on firm and fair regulation to help firms improve standards, and to focus disciplinary resources on those firms unwilling to comply with principles;
- development of comprehensive decision-making guides for all regulatory staff to ensure fairness, transparency and consistency in decision-making; and
- a means to encourage creativity in the provision of legal services (e.g., Alternate Business Structures).

In terms of whether OFR improves regulation in the public interest, there was a greater diversity of views, but I noted the following comments:

- OFR requires creation of intelligent authorization processes so that only fully authorized firms and individuals are deemed fit to provide legal services in the public interest.
- OFR requires enhanced supervision of firms by the regulator to proactively identify, de-escalate and address risks in the public interest.
- OFR requires ‘firm, proportionate, transparent enforcement’ to deal with those who will not or cannot comply with the principles, in the public interest.
- OFR requires clearly articulated, robust, relevant and evidence-based risk criteria that enable the regulator to focus resources on serious, materials risks, in the public interest.
- OFR provides a fair and accessible means for public complaints about lawyer service and conduct, with authority for early and meaningful resolution of complaints where appropriate.
- OFR enhances access to justice through the provision of legal services outside the traditional law firm structure, and the improvement in the quality of legal services provided to all consumers.

I asked each interviewee to describe their challenges in implementing OFR and a risk-based regulatory system, and was told:

- Layers of pre-existing legislation are not yet amended and create friction with the *Legal Services Act*, e.g., conveyancers legislation permits representation of vendor and purchaser, while the new LPA does not.
- There is a need to effect cultural change both within and outside the regulatory organization – staff is more comfortable with proscriptive rules and guidelines for compliance, and this is very difficult to change.
- There is a need to transform IT systems and infrastructure.

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<sup>144</sup> With various SRA staff, LeO, the Bar Standards Board, the Law Society and others

- There is a need to develop strong buy-in from lawyers and stakeholders as part of the new self-compliance regime.
- There is a need to adapt the regulation to new legal services business structures with the public interest at the forefront.
- In England’s case, it is still dealing with eight approved regulators of legal services – a single regulator would work far better.
- The SRA is still rolling out OFR; e.g., trust account rules are not yet in OFR format.
- It is important to help consumers understand how complaints are handled between Solicitors’ and Barristers’ regulators and the Legal Ombudsman Office.
- It is important to work with legal educators and trainers to transform the skills taught to match the OFR principles.
- Having adequate resources to be able to respond to all serious risks in the public interest is critical.
- Making OFR and risk management relevant to law firms of all sizes, including global and soles, is a challenge.
- The need to constantly identify potential and emerging risks as well as current ones, and adapt the risk framework accordingly, is another challenge.
- Developing effective outcomes measurement systems to provide evidence that consumer protection is being improved is key.<sup>145</sup>

## 6.6 England continues to measure success and impact

From the outset, the Legal Services Board has monitored and measured the effect and impact of the OFR regime, and the extent to which it adheres to the eight principles set out in the *Legal Services Act*. In October 2012, the Legal Services Board released “Market Impacts of the Legal Services Act 2007 – Baseline Report (Final) 2012.” In November 2012, the Legal Ombudsman released a research report on “Customer Satisfaction Surveys 2011-2012,” and in July 2013, the SRA released “Risk Outlook 2013 – The SRA’s assessment of key risks to the regulatory objectives.” These reports point to much progress, with continued room for improvement.

Significantly, however, earlier this year the Ministry of Justice issued a Call for Evidence respecting the success of the new regulatory regime in responding to consumer needs, complaints and opening up competition in the marketplace. The responses from the Legal Services Board, the Bar Standards Board, the Law Society and the SRA illustrate a degree of dysfunction and rifts within this new regulatory model. Some call for reverting to a system more akin to self-regulation, while others advocate for more dramatic change and reform. The responses make it clear that despite the best of intentions, the regime does not yet represent the optimal best practices regulatory model.

There are many critics of the OFR and risk-based regulation, but the benefits of aspects of it cannot be denied. There is evidence in the reports referenced above that demonstrates the positive impact it has had on how lawyers and law firms serve consumers, how they do business, how they manage risk, how they manage complaints and public expectations, and the extent to which they are accountable to a transparent and fair regulator. As compared with the pre-OFR regime, there is no doubt the public interest is being better served, but what is also clear is that the ‘house’ within which this dramatic renovation is taking place may crumble without significant attention to addressing the current dysfunction and barriers between the various ‘rooms’.

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<sup>145</sup> Rees, Victoria L. “Summary of Research and Interviews from London and Birmingham, England July 21-25, 2013” [unpublished]

## 7.0 Matters Council will want to consider

And so what is the possible take-away from this research, and the lessons being learned in England and Australia? Ultimately Council must determine if our ability, as the regulator of the legal profession, to truly serve the best interests of the public is hampered by our one-size-fits-all, prescriptive, reactive, rule-based regulatory regime. Our current system was developed when most lawyers practised as sole practitioners or in small firms; when the risks were simpler and easier to spot (who considered the complexities of a well-thought-out mortgage fraud scheme 20 years ago?); when clients had little or no access to legal information other than through a lawyer; and when the idea of a law firm in England opening an office in Texas (or U.S. lawyers having an office in Nova Scotia) was unheard of. The legal services marketplace has already undergone a significant evolution, and yet the way we regulate lawyers hasn't changed for decades.

The complexity of the new English regulatory regime is beyond what is needed in Nova Scotia; however, there are components of both the English and Australian systems that could work extremely well here.

Council will want to consider:

- expanding and clarifying 'regulatory objectives' along the lines set out in the *Legal Services Act*;
- moving to a principles-based approach to regulation, if not all the way to OFR;
- implementing a consistent, organizationally embedded risk-based approach to regulation;
- adopting a proactive approach with lawyers and law firms through education, engagement, the creation of an appropriate management systems-based approach, and the provision of tools and training to help firms of all sizes practise ethically and competently in the public interest and develop an embedded ethical infrastructure;
- allowing firms the room to establish appropriate management systems that suit the nature of their clientele and to demonstrate their effectiveness, then refocus our attention and resources on supporting sole practitioners and small firms in achieving appropriate management systems and avoiding problems (something none of the new regulatory models have yet achieved); and
- remaining focused on the public interest, but rather than protect lawyers' monopoly on legal services, by clearly developing new regulatory objectives, broaden lawyers' ability to work in ABSs, MDPs and virtual law firms, and expand the capacity for paralegals and non-lawyers to provide legal information and services, thereby reducing the costs of legal services and enhancing access to affordable justice.

We have the tools and the ability to create the best regulatory system for lawyers in the world. Are we ready for the challenge?

# Appendix 1: Summary of Risk Impact Assessments from the National Audit Office (UK)

BETTER REGULATION: MAKING GOOD USE OF REGULATORY IMPACT ASSESSMENTS

## Preparing Regulatory Impact Assessments - Checklist

### Key questions for policy makers and regulatory impact units when preparing a Regulatory Impact Assessment (RIA)

This Checklist sets out points which the National Audit Office have found deserve particular attention if good use is to be made of RIAs. It should be read with the guidance in the Cabinet Office document "Good Policy Making: A Guide to Regulatory Impact Assessment".

#### Getting started - the Initial RIA

**Start early** - the RIA should facilitate informed consideration of the options available for achieving the objectives of the envisaged regulation, and an Initial RIA should, wherever possible, be produced before decisions are made or there is a commitment to legislate. For EU legislation this should be in time to inform negotiations on the proposed Directive etc.

**Identify the objectives** - the problem and risks to be addressed, and the desired outcomes. This is necessary before the options can be considered.

**Plan the process** - project management principles and techniques provide a useful discipline which can help ensure that all aspects are planned for. In drawing up a timetable work back from any deadline for legislative implementation to allow enough time for each key stage, especially for consultation.

**Consult early** - with the Small Business Service and other policy makers having responsibility in relation to the industry or sector concerned, enforcement bodies and representative bodies, to obtain an informed view of risks, options and a broad indication of the likely costs and benefits concerned. This is not a substitute for effective consultation with the broader spectrum of those concerned later in the process, but should help with planning how effective consultation can be undertaken.

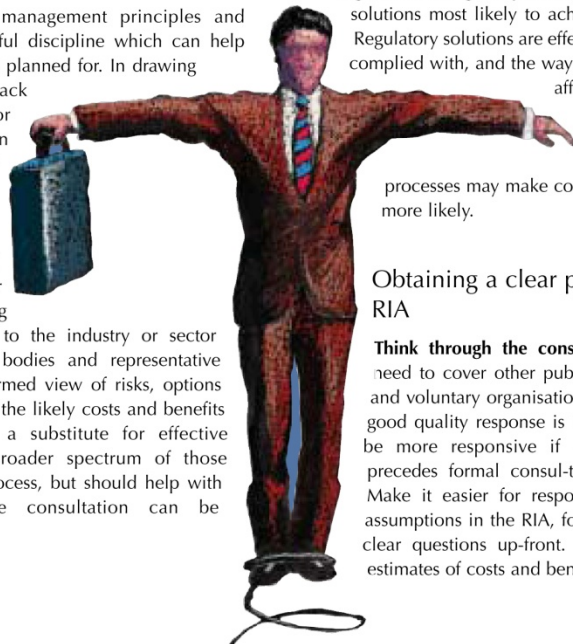
**Assess the risks being addressed** - identify how prevalent the problem to be addressed is, the gravity and nature of the consequences, and highlight areas where more information is needed.

**Identify a wide range of options** - including self-regulation and non-regulatory options. Where the broad policy direction is already determined the focus should be on options for implementing the desired solution most effectively.

**Consider compliance** - the level of compliance with existing regulation and good practice can indicate the types of solutions most likely to achieve the desired outcome. Regulatory solutions are effective only as far as they are complied with, and the way they are implemented can affect the extent as well as the costs of compliance. Adapting existing business or regulatory processes may make compliance easier and hence more likely.

#### Obtaining a clear picture - the Partial RIA

**Think through the consultation process** - it may need to cover other public sector bodies, charities and voluntary organisations as well as businesses. A good quality response is important and people may be more responsive if consultation on the RIA precedes formal consultation on draft legislation. Make it easier for respondents to respond to the assumptions in the RIA, for instance by asking a few clear questions up-front. Include questions on the estimates of costs and benefits in the RIA.



**Obtain representative views from small businesses, charities etc** - take advice from the Small Business Service on the "litmus test" and consider asking for their assistance. The test should involve small sufficient businesses, charities etc to be representative. Such bodies respond best to direct face to face or telephone interview when the impact of the regulatory proposal and options can be talked through and a clear view of the likely impact obtained. Focus groups may also be valuable. Sufficient businesses should be selected to be representative of different types of business or sectors. The findings from the test should be included in the RIA sent out for general consultation.

**Analyse separately how costs and benefits apply to different sectors and types of business** - including small businesses and consumers. A proposal that is proportionate overall may be disproportionate for some sectors, especially small businesses. Can the impact in these cases be mitigated?

**Place the RIA on the web** - as soon as it is prepared, so that it is readily accessible to those concerned and where appropriate link it to the relevant consultation document.

**Quantify costs and benefits appropriately** - so as to demonstrate that the preferred option is the most effective and is proportionate. Benefits should be quantified unless they are evidently overwhelming but this is often not easy and may necessitate surveys or sophisticated analytical techniques. Precise monetary values are not necessary - informed figures as to what is likely to happen to which people are, wherever they can be obtained.

**Keep an open mind on options** - quantify the costs and benefits of all practicable options, and be alert for ways of making compliance easier and more likely. Particular attention should be given to self-regulatory options as voluntary compliance can be more effective and less costly.

**Consider compliance in detail** - obtain a clear view of how those affected, including enforcement bodies, will comply with the proposal, perhaps by drafting and consulting on a skeleton of the step by step guide to compliance that will eventually be needed. This should feed into the estimation of costs and benefits. Consider and consult on what action will be needed to inform those affected about the proposal once it is implemented, including enforcement bodies.

## Pulling it together - the Final RIA

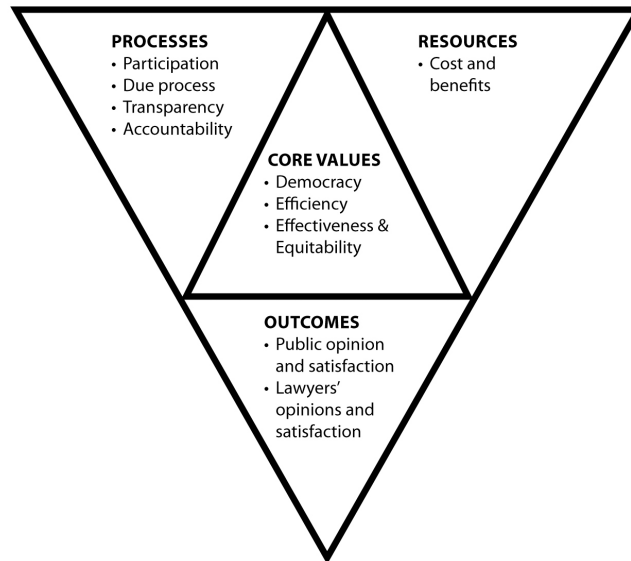
**Firm up on compliance and enforcement** - explain the steps being taken to ensure that those affected know what is expected of them and what guidance, seminars, publicity etc will be issued for this purpose. Set out the actions the enforcement body expects to take to secure the intended compliance rate.

**Summarise the results of consultation** - including response rates, responses from different sectors or types of business/body where these vary and how proposals have been modified to reflect significant concerns.

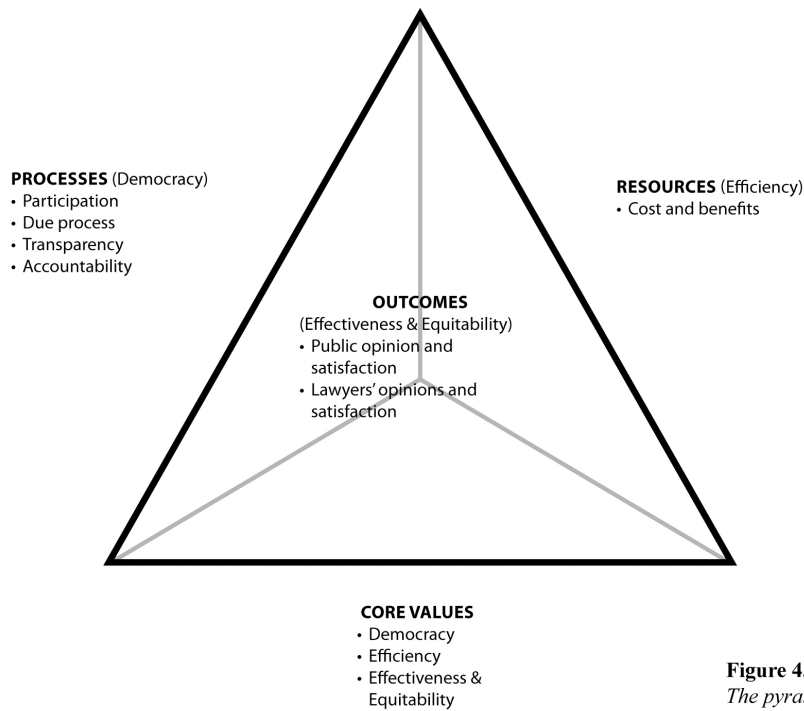
**Explain arrangements for any review** - including when any review will be carried out, how data will be collected, how compliance will be monitored and what expertise will need to be drawn upon, bearing in mind the importance of the review informing future legislation in the area.

## Appendix 2: Core Values Chart – Prof. Richard Devlin

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**Figure 3.**  
*Criteria for evaluating and comparing regulatory regimes*



**Figure 4.**  
*The pyramid structure provides an analytical starting point for regulatory assessment*

## Appendix 3: A description of legal regulation in Canada and the United States

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*North America is the common law world's last bastion of traditional lawyer self-regulation. In addition to their self-regulatory character, American and Canadian lawyer regulatory systems are also distinctive in their maintenance of a single, unified occupation of "lawyer", in their insulation of law firms from non-lawyer ownership, and in their near-exclusive regulatory focus on individual lawyers as opposed to law firms.<sup>146</sup>*

### CANADA

The current Canadian model for regulation of the legal profession is fairly homogenous, and represents 'self-governance' under legislative authority delegated by government. The authors of *Lawyers' Ethics and Professional Regulation* set out the basic tenants of self regulation in Canada<sup>147</sup>:

*... contemporary self regulation entails: the regulation of lawyers' accounts through detailed rules and enforcement practices such as audits; the operation of insurance assurance funds schemes to compensate clients who have suffered loss as a result of lawyer negligence or fraud; the maintenance of quality legal services through disciplinary sanctions, continuing education programs and practice review programs; and lawyer support services, in the form of practice and ethics advice, as well as initiatives for those with personal and substance abuse problems.*

In every province and territory law societies operate under statutes, which set out, in various formulations, the purposes of the law society.<sup>148</sup> Nova Scotia's statutory provision is quoted in the introduction to this paper. Amendments to these statutes require legislative approval. In most Canadian jurisdictions, the regulation-making function has been delegated to the elected Benchers or Council of the law society. Most law societies also have public representatives involved in their governance. In some jurisdictions, those public representatives are appointed by government, while in others (including Nova Scotia), they are appointed by Council or the Benchers.

The structure and operation of the law societies in the three territories is similar to the southern jurisdictions, but differs in that they operate almost entirely with volunteers and few of their lawyers are full time residents. Most of the lawyers who regularly practice in the territories hold membership in at least one other provincial Bar.

Variations to the model followed in most of Canada are found in Québec, where an independent entity called the Office des professions du Québec (ODP) holds responsibility for the effective operation of 44 professional orders (i.e., regulated professions) in the public interest and oversees and holds accountable those orders, including the Chambre des Notaires and the Barreau de Québec, to the standards set out in the *Professional Code*, RSQ, c. C-26. The ODP is a governmental agency that has the authority to recommend regulatory changes to the professional orders, and to set regulations establishing rules or standards with which the orders must comply. It also has investigatory powers that can be exercised in certain circumstances, such as when an order has failed to fulfil its obligations under the *Professional Code*.

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<sup>146</sup> Semple, Noel. *Core Values: Professionalism and Independence: Theories in Lawyer Regulation*. May 8, 2013. <http://ssrn.com/abstract=2262518>

<sup>147</sup> A. Wooley, R. Devlin, B. Cotter, and J. M. Law, *Lawyers' Ethics and Professional Regulation*, 2<sup>nd</sup> ed. (Markham: LexisNexis, 2012), p. 76

<sup>148</sup> For a review of the Canadian formulations see L.Terry, *Regulatory Objectives*, 2012, 80 *FORDHAM LAW REVIEW* at p 2753

At the September 2013 National Discipline Conference, representatives from the *Chambre* and the *Barreau* (Syndique) commented positively on the role played by the ODP in brainstorming policy matters and overseeing the manner in which all professions adhere to the *Professional Code*. Of particular benefit, they say, is having a cross-section of professionals on the Board, bringing a wide range of views and experiences to the manner in which professions are regulated. This cross-pollination of skills has added value to the ODP's work, and the guidance provided to the professions' regulatory bodies. These representatives did not report any concern with inappropriate interference by the ODP in the day-to-day regulatory responsibilities and decisions by the *Chambre* and the *Barreau*. They also reported what they perceived as increased public confidence in regulated professions. This has been extremely important in the current climate of distrust arising from allegations of political corruption, and complicity by lawyers in this corruption and the activities of gangs such as the Hells Angels.

The Law Society of British Columbia is in a unique position in Canada, as British Columbia appears to be the only province that provides its Ombudsperson with the legislative authority to investigate complaints against the Law Society itself. In other jurisdictions, if a member of the public wants to question the procedural fairness of action taken, or not taken, by a law society, the only recourse would be an application for judicial review to the province's superior court.

While it holds no actual authority over the regulatory conduct of the law societies, the Federation of Law Societies of Canada does act as an umbrella agency under which all jurisdictions are members. In *Lawyers' Ethics*, the authors note that:

*Even though, as a matter of constitutional law, the legal profession is regulated provincially, a type of national self regulation has emerged over the last two decades in the form of co-operative action through the Federation of Law Societies of Canada (FLSC). From an association of provincially empowered regulators, the FLSC has become the locus of a number of national initiatives designed to impart a type of "pan Canadian" regulation over Canada's lawyers in an increasingly national and international market-place. Beginning with the mobility protocol in the 1990s designed to facilitate movement between, and practice in more than one of, Canada's provincial jurisdictions, the FLSC has continued with further initiatives in the legal education, legal ethics, admission and discipline to build upon and strengthen the mobility initiative through the establishment of common standards and the harmonization of provincial and territorial rules.*<sup>149</sup>

In contrast to the law societies that require mandatory membership by lawyers wishing to practise law in Canada – and have as their mandate the public interest – is the Canadian Bar Association, which is:

*... the essential ally and advocate of all members of the legal profession; it is the voice for all members of the profession and its primary purpose is to serve its members; it is the premier provider of personal and professional development and support to all members of the legal profession; it promotes fair justice systems, facilitates effective law reform, promotes equality in the legal profession and is devoted to the elimination of discrimination; the CBA is a leading edge organization committed to enhancing the professional and commercial interests of a diverse membership and to protecting the independence of the judiciary and the Bar.*<sup>150</sup>

Membership in the CBA is not mandatory but most practising lawyers in Canada are members, as it provides regular access to valuable continuing legal education opportunities.

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<sup>149</sup> Ibid, p. 76

<sup>150</sup> : <http://www.cba.org/CBA/about/main/>



## USA

Despite what appear to be significant differences in the manner in which the legal profession is regulated in Canada and the U.S., as noted by Paton, from a structural perspective there are significant similarities. The structure in the U.S. is most succinctly described by Prof. Alan Palmiter, in his 2005 paper “Regulation of the US Legal Profession: A Story of Market Protection”<sup>151</sup>:

*Authority over the US legal profession has its source formally in the judicial branch, a reflection of the historic focus of legal practice in the courts. In turn, state courts (as well as federal courts) have delegated their regulatory authority to state bar committees and bar associations – that is, to professional organizations composed exclusively of lawyers. These regulators are referred to collectively as “bar associations”.*

*The US legal profession is thus subject primarily to self-regulation. (Sic) State bar associations are responsible for setting the standards for admission to legal practice, promulgating and enforcing rules of ethics that govern lawyer conduct, establishing areas of legal specialization, administering programs of continuing legal education, handling complaints by clients, and disciplining lawyers who violate bar rules or abuse client trust.*

*The state bar associations rely heavily on the American Bar Association as the accreditation body for US law schools and as the promulgator of model rules and standards dealing with lawyer professional conduct. The ABA, a national voluntary association of lawyers, thus constitutes the “visible hand” that steers the regulation of the US legal profession. No government body directly controls the activities or conduct of the ABA.<sup>152</sup>*

There is an important distinction, however. Bar association membership in some states is actually voluntary. In those states, the bar association serves more of a representative function than regulatory, with the result that the regulation of the legal profession in those jurisdictions, including admissions CLE, rules of ethics and discipline, is conducted by an office or committee of the state judiciary, which is composed of both lawyers and judges.<sup>153</sup> Lawyers are also subject to regulation under certain state and federal legislation, including those practising in the areas of patent law, tax, banking and securities law.

In terms of disciplinary functions, the procedures in this area vary greatly from one state to another, unlike Canada:

*In some states only the state supreme court is empowered to hear grievances, conduct investigations, hold hearings, and impose sanctions. In other states, the disciplinary function is delegated to the unitary bar association, with serious sanctions (such as disbarment or suspension) left to the state supreme court.<sup>154</sup>*

In addition, where lawyers in the U.S. practise before the courts and administrative tribunals, they are subject to the rules and procedures of that forum, and the instigation of disciplinary proceedings by that forum. Interestingly, “Besides courts, administrative agencies also have the power to sanction lawyers who appear before the agency.”<sup>155</sup>

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<sup>151</sup> Palmiter, Alan R. “Regulation of the US Legal Profession: A Story of Market Protection” (2005) presentation at Rome Congress,

p. 1

<sup>152</sup> Ibid

<sup>153</sup> Ibid, p. 18

<sup>154</sup> Ibid, p. 36

<sup>155</sup> Ibid, p. 39

Another significant distinction between Canada and the U.S. is that lawyers in the U.S. are not required in many states to have professional liability insurance. Only a few states mandate insurance coverage, and of those states that do not, a number do not require lawyers to advise their clients whether or not they carry insurance.

Prof. Palmiter critically sums up the status of ‘self-regulation’ in the U.S. as follows:

*Rather than employing ex post mechanisms to weed out unqualified practitioners, the profession has relied primarily on ex ante entry barriers and prescriptive rules of conduct. By most accounts, self-regulation has been designed largely to benefit the legal profession – particularly the profession’s elite. The history of self-regulation revolves around the profession’s responses to increased competition, both internal and external – not to public demands for greater competence, availability, or affordability of legal services.... Under pressure from courts and federal anti-trust regulators, parts of the edifice of self-regulation have crumbled.<sup>156</sup>*

At the International Legal Regulators’ Conference in London, England in September 2012, a senior representative of the San Francisco Bar described the role of state bar associations in the U.S. succinctly when he indicated that they prefer to “be the ambulance at the bottom of the hill, rather than the fence at the top.” In other words, regulation of the legal profession in the U.S. tends to be purely reactionary rather than proactive, and arguably focuses on the best interests of lawyers rather than the public.

In my interview with Prof. David Wilkins and Nicholas Robinson at Harvard on October 10, 2013, Prof. Wilkins commented on the huge resistance that exists within the American legal profession to change. Its system relies heavily on precedent, and “is all about tradition and looking backward rather than forward.” This, combined with fear of change, has led to paralysis. He acknowledged that without a crisis, there is little apparent impetus for change, but it is up to regulators to help lawyers see the future problems that await if regulators fail to see the trends and reshape regulation to respond to them in the public interest.

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<sup>156</sup> Ibid, p. 44

## **Appendix 4: NSBS membership demographics – Glen Greencorn**

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The following information is excerpted from a memo to Council dated September 26, 2013 prepared by Glen Greencorn, CMA, the Society's Director of Finance and Administration, setting out his analysis of data from the Annual Lawyer Reports filed by lawyers since 2006.

When the first Annual Lawyer (Member) Report was conducted in 2006, respondents were split among four roughly equal-sized quartiles to facilitate analysis. The breaks were based on years since the respondents' Bar admissions; 0-7 years, 8-16 years, 17-26 years, and 27+ years. Those four quartiles continue to be used for analysis.

Key among the findings this year is the continuing aging of the membership. In 2006, nearly one quarter (24.5%) of the total practising membership had been called to the Bar more than 27 years prior. In 2013, 29.6 per cent of the practising membership falls into that category. In 2006, just under half of all practising lawyers were 17 or more years at the Bar, compared to 52.8 per cent in 2013.

In the case of sole practitioners, in 2006, 41 per cent (109 of 266 sole practitioners) had been called to the Bar more than 27 years prior – by 2013, that percentage had grown to just over 51 per cent (148 of 288). The number of sole practitioners experienced its fourth consecutive year of growth. In 2008 and 2009, 239 lawyers identified as being "sole practitioners". That number grew to 248 in 2010, 249 in 2011, 263 in 2012, and 288 in 2013. Of particular note, the number of identified sole practitioners in the 0-7 year of call quartile grew from a low of 14 in 2010 to 30 in 2013 – an increase of 88 per cent over three years.

One trend that has appeared is the growth in the number of lawyers identifying their employment type as "government or public sector." From 2006 to 2013, the number of lawyers identifying their employment type in this way has grown by 18.2 per cent (from 417 to 493). While all quartiles showed an increase in this employment type, the most pronounced growth has occurred in the 0-7 year call quartile. That quartile has increased by 37.7 per cent (from 90 to 124).

As a concern about risk to clients and a potential risk to the Society, the Society began asking questions about lawyers' succession plans in 2007 and has refined those questions over the years. In 2013, 548 lawyers are operating in small firms (less than five) or as sole practitioners. While many of these lawyers have plans that address some requirements, roughly 28.5 per cent lack at least one of the considerations and 77 sole practitioners identified that they had no succession plan. Furthermore, sole practitioners were asked to identify another lawyer who would assume responsibility for their clients, files and office obligations. Of the 288 sole practitioners, 80 (27.8%) did not identify a lawyer.

### **AGING OF THE POPULATION**

In 2006, the total number of respondents was 1,785. In 2013, the total number of respondents was 1,871 – a net growth of 86 practising lawyers. The number of practising lawyers with more than 27 years at the Bar grew from 432 in 2006 to 557 in 2012 (a net growth of 125 lawyers and a growth rate of 28.9% over six years). In 2013, that number declined for the first time (by two, to 555). This quartile still comprises the largest segment of the practising population at 29.6 per cent.

The one apparent trend in employment type is the growth of government and public sector lawyers. Over the seven years the Society has been tracking this data, their number has risen from 417 in 2006 to 493 in 2013 – an increase of 76 or 18.2 per cent over the seven years. Additionally, it is the only employment type that has never declined year over year (the 493 reported in 2013 equals the number reported in 2012).

The number of sole practitioners had declined each year since from 2006 through 2008, was stagnant in 2009, increased by nine in 2010, increased by one in 2011 and jumped by 14 in 2012 and by 25 in 2013, to its current total of 288. In 2013, the number of sole practitioners in the 0-7 year quartile increased by a net of five (from 25 to 30). The same increase was experienced in 2012, while in 2011, the increase in that quartile was six. The number of sole practitioners in the 0-7 quartile in 2013 (30) is the largest number in that quartile since the Society began the Annual Lawyer Report.

The number of sole practitioners with more than 27 years at the Bar continues to comprise the largest percentage of sole practitioners. The percentage increased from 40.98% in 2006 to 44.36% in 2007, 46.44% in 2008, 49.0% in 2009, 50% in 2010, 51% in 2011 and 52.1% in 2012. Due to growth in the number of sole practitioners in the 0-7 quartile, it dipped slightly to 51.4% in 2013. In real numbers, the number of sole practitioners in the 27+ quartile has grown from 109 in 2006 to 148 in 2013.

## **RISK**

Five hundred and forty-eight (548) respondents are operating as sole practitioners or in firms of five or fewer lawyers. Those respondents were asked a series of questions about a documented succession plan dealing with current active clients, inactive files, long-term storage, and the winding down of their practice. While some lawyers addressed some of these requirements, roughly 28.5% lacked at least one of these considerations. Seventy-seven (26.7%) of all sole practitioners answered “no” to every succession plan question. Additionally, 80 (27.8%) sole practitioners did not identify another lawyer who would assume the responsibility for these responsibilities.

Of the 30 identified sole practitioners in the 0-7 quartile, 12 (40%) did not identify a lawyer who would assume responsibility for their practice. Additionally within this group, 10 (33.3%) answered no to all of the succession planning questions.

The Annual Lawyer Report required respondents to answer questions about computer use and access by others. In 2013, 1,841 respondents identified that they used a computer in their practice. In that group, 115 lawyers identified that their computer was accessible by individuals not associated with their practice and of those, only 91 had signed confidentiality agreements with those who have access.

On the issue of insurance protection for electronic files, 355 lawyers acknowledged they had such coverage, 486 lawyers stated that they had no coverage and 1,030 didn't know.

Other than the trend of an aging population, many of these trends found in Nova Scotia are oddly not playing out across the country, so we have some unique demographic issues to consider. As we see referenced in other sections of this paper, failure by sole practitioners to have a succession plan presents a significant risk in many jurisdictions, and a growing drain on regulator resources. The trend of a growing population of in-house and corporate counsel is being seen across North America, and this represents an interesting challenge for regulators in terms of remaining relevant.

## Appendix 5: Regulatory Changes in the Commonwealth and Beyond

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### AUSTRALIA

Australia in general, and New South Wales (NSW) in particular, has led the world in transforming regulation of the legal profession since 1994. Over the past two decades, the Law Society of NSW and the NSW Bar Association have co-regulated the profession with the independently legislated Office of the Legal Services Commissioner (OLSC), under the *Legal Profession Reform Act (NSW)* of 1993 and then the *Legal Profession Act 2004*.

The OLSC is responsible for receiving complaints about legal practitioners in NSW. The purpose of the OLSC is to “reduce complaints against legal practitioners within a context of client protection and support for the rule of law and to increase professionalism.”<sup>157</sup>

The 1993 Act authorized MDPs and the sharing of income between lawyers and non-lawyers. In July 2001, legislation (including that relating to the Australian Securities & Investments Commission) was amended to permit the incorporation of legal practices, the sharing of income, and the ability of lawyers and non-lawyers to deliver legal services together, without ownership restrictions. Of critical importance to these new incorporated legal practices (ILPs), was the requirement that an ILP have in place demonstrable, measureable ‘appropriate management systems’ (AMS):

*The statute imposed two new requirements for incorporated legal practices (ILPs). First, an ILP must appoint at least one ‘legal practitioner director’ to oversee the management of the ILP. Second, the ILP must implement and maintain “Appropriate Management Systems” (AMS) to enable the provision of legal services in accordance with the professional obligations of solicitors and the other obligations imposed under the Legal Profession Act. [2004]*<sup>158</sup>

ILPs currently comprise about 30% of the legal practices in NSW, the majority of which are located in Sydney. There are approximately 26,000 legal practitioners in NSW, with 18,000 in private practice, 2,900 in government and nearly 5,000 in corporate practice. Interestingly, 65% of ILPs are sole practitioners, and 30% are firms with two to seven partners. A number of large firms also operate as ILPs, and so ILPs do in fact cover a wide range of firm sizes and types of practice.<sup>159</sup> The Act provides that a failure by ILPs to implement and maintain AMS may give rise to a complaint of professional misconduct, with the potential result of “directors losing their practicing certificates and the legal practice going into liquidation.”<sup>160</sup> Additional responsibilities of the ILP legal practitioner-director include reporting professional misconduct of any director or legal practitioner, and to identify and report all legal and non-legal services provided by the ILP.

The goal of this new approach to law firm regulation, albeit limited to ILPs, has been to help ILP leaders detect and avoid problems, in the public interest. Key to this new approach has been the corresponding risk-profiling and practice review/audit program, which falls under the purview of the OLSC. The latter program focuses on educating ILPs to achieve compliance with AMS, with the hope that this will lead to a reduction in complaints. It also assists with risk identification and management.

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<sup>157</sup> Gordon, Tahlia, Research and Project Manager, Office of the Legal Services Commission, New South Wales, Australia, presentation to the International Conference of Legal Regulators, September 2012 in London, England (Gordon ICLR presentation)

<sup>158</sup> Fortney, Susan Saab & Tahlia Ruth Gordon. “Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation: (2013) St. Thomas L Rev [forthcoming] (Fortney and Gordon, Adopting)

<sup>159</sup> Gordon ICLR Presentation

<sup>160</sup> Fortney and Gordon, Adopting, p. 11

Interestingly, Appropriate Management Systems are not defined in the *Legal Profession Act*. This task was left to the OLSC, which after significant study, research and consultation, identified 10 objectives for sound legal practice.<sup>161</sup> ILPs are required to conduct a self-assessment process focusing on the 10 objectives, and to file this with the OLSC, which then reviews them for assessment of risk, compliance and non-compliance.

Risk identification and management continue to be cornerstones of the Australian regulatory regimes, but at this point, this relates only to incorporated legal practices (ILP). When the OLSC receives notice that a practice has incorporated, the ILP is required to complete a self-assessment designed to assist legal practitioner directors to address each of the 10 objectives that demonstrate that the ILP has appropriate management systems. Legal practitioner directors are required to rate the ILP's compliance with each of the 10 objectives along a compliance scale. This is then reviewed by the OLSC. This process is characterized as the 'systemitisation of ethical conduct', which, if followed, should result in the achievement of desired and clearly identified ethical outcomes.<sup>162</sup> (See Appendix 3 for the Ten Areas for Appropriate Management Systems). This is an important achievement in legal regulation, and focuses very much on regulation of law firms as opposed to individuals.

*In Australia, in particular, regulators have broadened their focus beyond reacting to client complaints to put in place measures to proactively engage law firms to promote the development of effective "ethical infrastructure" ... . Rather than dictate specific practices, the self-assessment process identifies ten broad areas of ethical concern (including, for example, negligence, communication and conflicts) and requires firms to evaluate themselves as to whether they have sufficient structures, policies and procedures in place in relation to each of these areas. The aim is not to be prescriptive, but rather, as put by the Australian regulators, to focus on 'education towards compliance'. The goal is to facilitate a learning process through which firms can improve their own practices.*<sup>163</sup>

The OLSC is responsible for the auditing ILPs for compliance with the *Legal Profession Act* (2004), and the regulations and rules of conduct, with the goal of educating firms towards compliance.

Studies of this new regulatory regime demonstrated early on a reduction in complaints relating to legal practitioners in ILPs, and increased rates of compliance with the objectives by ILPs. A follow-up study conducted in 2012 found that 85% of ILPs had reviewed their firm policies or procedures; 71% had revised their firm systems, policies or procedures to fit compliance objectives; 46% had adopted new systems, policies or procedures; and 6% had hired a consultant to assist the firm in developing new policies and procedures.<sup>164</sup> Some of the measurements in the self-assessments include reference to changes and improvements in ethical culture, leadership and conduct.

In their February 2013 paper, "Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation," Gordon and Fortney report the conclusions from researchers respecting the measureable impact of this new regulatory approach:

*In summary, we have shown that there is empirical evidence that the NSW legislation requiring ILPs to implement appropriate management systems combined with the NSW OLSC's self-assessment regime for encouraging firms to actually put this into practice may have made a*

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<sup>161</sup> [www.olsc.nsw.gov.au](http://www.olsc.nsw.gov.au)

<sup>162</sup> *Ibid*

<sup>163</sup> Salyzyn, Amy. "What if We Didn't Wait? Promoting Ethical Infrastructure in Canadian Law Firms" *Slaw* (25 July 2013) online: <http://www.slaw.ca/2013/07/25/what-if-we-didnt-wait-promoting-ethical-infrastructure-in-canadian-law-firms/>

<sup>164</sup> Gordon, ICLR presentation

*substantial difference to ethics management in firms as indicated by a dramatic lowering in complaints rates after self-assessment... We find, however, little evidence that the actual rating the firms gave themselves for their implementation of appropriate management systems makes a difference to complaints. It appears to be the learning and changes prompted by the process of self-assessment that makes a difference, not the actual (self-assessed) level of implementation of management systems.*<sup>165</sup>

Fortney and Gordon themselves conclude that:

*Beyond mechanistic compliance, lawyers may be eager to improve the firm's management systems, but need assistance in doing so. The challenge for regulators is to support practice leaders interested in developing management systems and fortifying their ethical infrastructure.*<sup>166</sup>

Paul Paton opines that the Australian regulatory regime, as it has evolved from a poor system, now appropriately focuses on the public interest, as compared with the system in the U.S.:

*Increasing public distrust of the legal profession and greater focus on the rights of the consumer in a market-based economy also prompted significant change in Australia. Reforms unfolding for over a decade have resulted in the effective end of self-regulation by the legal profession, replaced with a co-regulatory system that separates regulatory from representative functions and creates a series of more independent disciplinary agencies operating closer to government than to the profession. Because the legal profession is regulated at the state rather than the federal level, changes have not been entirely uniform, though they are broadly similar. Three states provide for an independent body to administer complaints against lawyers, while the Law Society retains some degree of authority to establish ethics rules and practice standards against which lawyer conduct will be judged. Significant lawyer involvement in the regulatory process is an important feature. The end result is a system more focused on regulating in the public interest.*<sup>167</sup>

However, ongoing regulatory reform in Australia continues to be in a state of flux with regard to achieving consistent regulatory reforms across all states. Recent elections have impacted the progress of the national legal regulation process that was unfolding, due to a lack of funding commitment for the new Office of the Legal Services Commissioner (OLSC).<sup>168</sup> The rules of professional conduct differ to one extent or another among the various states. Under the LPA, all states had to remove anti-competitive principles from their regulatory schemes. This was determined to be in the public interest. However, according to some in Australia, the ethical infrastructure within ILPs needs to include something that is not yet done in Australia: having processes for law firms to increase their partners' and employees' ownership of ethical complexity, through ethics assessment mechanisms. There are needed not so much to improve accountability to clients, but to ensure that that accountability does not undermine higher priorities to the courts, administration of justice and access to justice. Prof. Evans hypothesizes that "...to be decided in the next 2-3 months, is whether there is consensus emerging as to desirable common features of State-based regulation (centered on New South Wales and Victoria), with other States progressively adopting some or all of them."<sup>169</sup>

I had the opportunity at the IBA Conference to speak with a private practitioner in Queensland, Australia, about the impact the regulatory regime has had on her practice. In her view, while the system may be of

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<sup>165</sup> Fortney & Gordon, *Adopting*, p. 21

<sup>166</sup> *Ibid.*, p. 42

<sup>167</sup> Paton, *Between a Rock*, p. 104

<sup>168</sup> Interview with Steven Marks, Legal Services Commissioner, New South Wales, and Tahlia Gordon, Research and Projects Manager, Office of the Legal Services Commissioner, NSW, by Darrel Pink and Elaine Cumming (7 August 2013)

<sup>169</sup> Email consultation with Prof. Adrian Evans, September 26, 2013

value for those firms who are unable or unwilling to practice ethically, she felt it unfair that such an intrusive system is applied to firms who have never had any complaints against them or incidences of unethical conduct. She frankly did not see the point of AMS to an ethical small firm in rural Queensland.

Paton makes reference to the regulatory reforms in Australia as part of a “global tsunami against self-regulation,” which represents evidence of “widespread rejection of self-regulation as a defensible model of governance.” He states:

*... these reforms have been used to justify the prediction that Canada may ‘soon be the only country in the Commonwealth where the profession remains self-governing.’ At a minimum, developments in England and Australia point towards a separation of the regulatory and disciplinary functions of the legal regulator, and closer ties between government and those responsible for lawyer regulation.”*<sup>170</sup>

## NEW ZEALAND

The Law Society of New Zealand is structured very much the same as the NSBS. It operates under the *Lawyers and Conveyancers Act 2006*, which came into force on August 1, 2008. The LSNZ regulates all lawyers but significantly, membership in the Society is voluntary. The Society is governed by a Council and managed by a Board, supported by an Executive Director.

The LSNZ operates a Lawyers Complaints Service, which deals with complaints against lawyers, incorporated law firms, and non-lawyer employees of both. All lawyers are required to have their own procedures for handling complaints, and are required to advise clients about these procedures before starting work.<sup>171</sup>

The Lawyer Standards Committee handles investigations of complaints. The Committee is comprised of lawyers and non-lawyers. Investigations are carried out by a Legal Standards Officer, who then reports to the Committee. It is within the Committee’s authority to mediate, resolve or dismiss complaints, or refer matters to hearing before the New Zealand Lawyers and Conveyancers Disciplinary Tribunal. This tribunal is administered by the Tribunals Division of the Ministry of Justice. The chair and deputy-chair are appointed by the Governor-General on recommendation from the Minister, with at least 15 members appointed by the Law Society.<sup>172</sup>

If a complainant or lawyer disagrees with the decision of the Committee, they may request a review of the decision by the Legal Complaints Review Officer. The LCRO is not a practising lawyer, and is appointed by the Minister of Justice who administers the LCRO service. The website for the LCRO<sup>173</sup> states that the LCRO “provides independent oversight and review of the decisions made by the standards committees of the New Zealand Law Society and the New Zealand Society of Conveyancers ... the LCRO’s reviews are as informal and straight forward as possible, while giving proper consideration to the process of the review itself and the law.”

We therefore see in this model another interesting co-regulatory regime, with involvement of the Minister of Justice and Governor General in key aspects of the Society’s regulatory functions, in the interests of accountability.

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<sup>170</sup> Paton, *Between a Rock*, pp. 95-96

<sup>171</sup> [www.lawsociety.org/nz/complaintsanddiscipline](http://www.lawsociety.org/nz/complaintsanddiscipline)

<sup>172</sup> Ibid, sections on ‘Governance’, ‘Lawyer Standards Committee’, and ‘Other Bodies Involved in Resolution of Complaints’

<sup>173</sup> [www.justice.govt.nz/tribunals/legal-complaints-review-officer](http://www.justice.govt.nz/tribunals/legal-complaints-review-officer)



## IRELAND

The structure of the legal profession in Ireland is closely associated with but not identical to the structure in England. Lawyers are divided into Barristers and Solicitors, with different regulatory regimes for each. Solicitors in Ireland are accountable to the Law Society of Ireland, and to the courts through the Solicitors' Disciplinary Tribunal, which is managed and appointed by the President of the High Court. According to its website, "The Solicitors Disciplinary Tribunal is an independent statutory tribunal appointed by the President of the High Court to consider complaints of misconduct against lawyers. The Tribunal consists of 20 solicitor members and 10 lay members."<sup>174</sup> In addition, the Office of the Independent Adjudicator exists as "... an independent forum to which members of the public may apply if they are dissatisfied with the manner in which the Law Society of Ireland has dealt with any complaint made by or on behalf of any person against their solicitor."<sup>175</sup> In 2005, the OIA's responsibilities were expanded to include complaint about decisions by the Law Society with regard to Compensation Fund claims.

Barristers, on the other hand, are subject to regulation by the courts.<sup>176</sup> The Irish Bar falls under the leadership of the Attorney General, as legal advisor to the Government. They are accountable to the Bar Council of Ireland, which in turn can direct charges to the Barristers' Professional Conduct Tribunal, whose decisions are appealable to the Barristers' Professional Conduct Appeals Board. "Both these bodies are funded and appointed by Bar Council. Where the Bar Council determines a complaint to be sufficiently serious, or where the Barristers' Tribunal or Appeals Board so recommends, the complaint will be submitted to the Disciplinary Committee of the Benchers of the Honourable Society of the King's Inns."<sup>177</sup> The latter does not, however, have authority to suspend or disbar. "Only the 'Benchers', consisting of all Senior Counsel (senior advocates) and all Judges of the superior courts (the High Court and Supreme Court) may disbar or suspend based on the recommendation of the Disciplinary Committee."<sup>178</sup> It is noted on the website for the Bar Council of Ireland that:

*The role of non-lawyers in the Bar's complaints procedure was greatly expanded after changes to the Disciplinary Code of the Bar of Ireland were approved at a General Meeting of the Bar on 13 March 2006. The Tribunal is now composed of nine members, five of whom are not lawyers and four are barristers. Of the five non-lawyer members, one is nominated by the Irish Business and Employers Confederation (IBEC); another by the Irish Congress of Trade Unions; and the three remaining members are nominated by the Bar Council.*<sup>179</sup>

But all is not well for regulated professions in Ireland. A series of events has unfolded, not dissimilar to those that gave birth to the new regulatory regime in England, which have led to recent calls for significant change in regulation of the profession. The events providing momentum for change in Ireland have included:

- double-billing by solicitors involved in institutional abuse cases;
- a 2006 website launched by individuals calling themselves "the Victims of the Legal Profession";
- large misappropriations by two solicitors, and subsequent delay by the authorities in investigating these complaints;
- reduction in the capital in the Compensation Fund due to a high claims experience;
- costs of 100,000 pounds ordered against the Law Society resulting from an appeal;

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<sup>174</sup> [www.distrib.ie](http://www.distrib.ie)

<sup>175</sup> [www.independentadjudicator.ie](http://www.independentadjudicator.ie)

<sup>176</sup> Callaghan, Anthony P. & Christopher P. Fox. "Self-Regulation No Longer the Hallmark of the Irish Legal Profession", *Irish Legal 100* (3 July 2012) online: *Irish Legal 100* (Callaghan & Fox)

<sup>177</sup> *Ibid*

<sup>178</sup> *Ibid*

<sup>179</sup> [www.lawlibrary.ie](http://www.lawlibrary.ie)

- suggestions of conspiracies between solicitors and the authorities;
- failure of solicitors to pay law stamp revenues to the Revenue Commissioners;
- failure to implement recommendations to move to an electronic property conveyancing system;
- potential insolvency of the Solicitors Mutual Defence Fund (professional liability insurance), requiring funding by the Law Society in 2009 and further bailout in 2011;
- findings in 2011 by the National Competitiveness Council that legal services were ‘overpriced, unaccountable and archaic’;
- an independent review commenced in January 2013 of the salaries of senior executives with the Law Society (which has concluded in a May 2013 report that “the current governance structure and processes for managing reward in the Law Society are working well.”); and
- general dissatisfaction with regulated professions, as evidenced by findings from a review of the Irish Medical Organization (IMO) that remuneration for those senior executives were inappropriate.<sup>180</sup>

The *Legal Services Regulation Bill* of 2011, which as of July 2013 was pending before Parliament in Ireland, is summarized as follows:

*“... to provide for the regulation of the provision of legal services, to provide for the establishment of the Legal Services Regulatory Authority, to provide for the establishment of the Legal Practitioners Disciplinary tribunal to make determinations as to misconduct by legal practitioners, to provide for new structures in which legal practitioners may provide services together or with others, to provide for the establishment of a roll of practicing barristers, to provide for reform of the laws relating to the charging of costs by legal practitioners and the system of the assessment of costs relating to the provision of legal services, to provide for the manner of appointment of persons to be Senior Counsel, and to provide for related matters.”<sup>181</sup>*

The essence of this bill will be to replace the regulatory functions of the Law Society with a new, government-appointed regulator. The bill will create a Legal Services Ombudsman to oversee the handling by the Law Society and Bar Council of three classes of complaints: inadequate services, excessive fees and misconduct. The LSO will ‘provide a form of appeal for clients of solicitors and barristers who are dissatisfied with the outcome of a complaint made to the Law Society or Bar Council.’<sup>182</sup>

Some would say that this represents the ‘devil’ we in North America have feared – failure by a law society to govern in the public interest, resulting in a take-over of the legal profession by government. Advocates for the bill note the many ways it will modernize the Irish legal profession (removal of the requirement to wear wigs, for example), requiring the new authority to research and report on the unification of the professions of solicitors and barristers, and giving the public the ability to directly retain barristers without having to first retain a solicitor. Further, the bill mandates increased lay representation in governance.<sup>183</sup>

Not surprisingly, coverage of this from the government’s perspective has been very positive: “It provides for greater transparency for legal costs and greater assistance and protection for consumers of legal services. It also provides an entirely independent dispute system to determine allegations of professional misconduct and a new system for legal costs adjudication where legal costs are in dispute.”<sup>184</sup> And

<sup>180</sup> Wikipedia “Law Society of Ireland – Recent Developments” downloaded July 3, 2013

<sup>181</sup> The Irish Examiner, “No IMO-type situation at Law Society, says report.” May 25, 2013

<sup>182</sup> Ibid

<sup>183</sup> *Legal Services Regulation Bill 2011* (Number 58 of 2011 – Tithe an Oineachtais, p.1

<sup>184</sup> The Department of Justice and Equality: Speech by An Tanaiste at Regulating the Professions in Ireland conference, November 10, 2006

“Legal reform is a chance to finally do the right thing for consumers.”<sup>185</sup>

On the other hand, this bill has raised the ire of the Law Society, whose Director General agrees that reform is needed, but not at the risk of undermining principles of democracy. According to the Society, “... the bill, as published, represents a real and dangerous threat to the continued existence of an independent legal profession in Ireland, with incalculable consequences for such fundamental democratic principles as the separation of powers, access to justice and the rule of law.”<sup>186</sup> The Law Society is calling for significant amendments to the bill.

The response of the Bar Council to the proposed bill indicates it is in favour of reform, modernization of the profession, and enhanced means for delivery of legal services. It cautions, however, that no Regulatory Impact Assessment (RIA) was conducted before the bill was published, that the level of government control proposed will ‘run directly contrary to the core value of independence in the administration of justice,’ and the new authority will ‘introduce a new and enormous level of cost into the legal system.’ It states: “Direct regulation of the legal professions by an enormous quango is not an efficient or effective way to regulate. It is also inconsistent with the independence of the legal profession.”<sup>187</sup> Bar Council goes on to raise significant concerns with the bill’s proposal to allow ABSs and MDPs, on the basis that they will “damage rather than enhance competition in the delivery of legal services” and “undermine small solicitors firms up and down the country who rely on ready access to the ‘independent Bar in order to be able to compete on a level playing pitch with the large city firms.’”<sup>188</sup>

A public battle has since ensued, with the Minister responding on March 5, 2012 to the Bar Council Report, saying:

*... the Minister remains extremely disappointed at the Bar Council’s continued, misguided and misleading campaign against legal sector reform and, in essence, against any form of independent regulation of its own members. Having attempted to undermine the independent regulatory and disciplinary system to be established under the new Legal Services Regulatory Authority, the Bar Council continues to advocate the preservation of its exclusive reserve through the continuation of regulation of itself by itself – with utter disregard for the wider interests of its clients and the public at large.*<sup>189</sup>

Interestingly, these exchanges of strong views led to some compromise by the government in May of this year, whereby the Justice Minister Alan Shatter promised to “abandon plans which would see him gain the power to control the proposed new regulator for legal services.”<sup>190</sup> The article in *The Journal* reports that “The legislation has been heavily criticized ... for giving lay people a majority of seats on the new regulator’s 11-member board – with the power of appointing those lay members resting with the minister ... Shatter said he would bring amendments to the legislation to ensure that appointment of members lay with nominating bodies.”<sup>191</sup> Shatter also is reported to have agreed to take steps to minimize the ‘possibility of political interference’ in the process for appointments to the Legal Practitioners’ Disciplinary Tribunal.<sup>192</sup>

In an article in the *Law Society Gazette* in September, Ken Murphy, CEO of the Law Society of Ireland, analyzed recent proposed amendments to the bill, including that the current proposal will see “... a series

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<sup>185</sup> Callaghan & Fox

<sup>186</sup> “Legal Services Bill proposes new regulator and more transparent fees”, *The Journal* May 10, 2011

<sup>187</sup> “Legal reform is a chance to finally do the right thing for consumers”, *The Journal*, May 2, 2012

<sup>188</sup> “This is a blueprint for Government control of the legal profession.” *The Journal*, February 2, 2012

<sup>189</sup> Summary of Bar Council position on the Legal Services Regulation Bill 2011, February 7, 2012

<sup>190</sup> *Ibid*

<sup>191</sup> “Statement regarding the Bar Council Report”, Department of Justice and Equality website March 5, 2012 [www.justice.ie](http://www.justice.ie)

<sup>192</sup> “Shatter offers olive branch to lawyers over appointment of new regulators.” *The Journal*, May 11, 2013

*of independent bodies will nominate the 11 members of the board ... with two nominated by the Law Society.*” Six of these 11 will be laypersons, and five will be nominees of the legal professional bodies and their close affiliates.<sup>193</sup>

We will want to closely follow the progress of this bill as we monitor regulatory model developments around the world.

## SCOTLAND

Regulation of the legal profession in Scotland is also undergoing change, but not to the same ‘enforced’ extent as Ireland. There is a surprising lack of consistency in the regulation of the legal profession among England and Wales, Ireland and Scotland, given their close proximity.

Lawyers in Scotland are divided into solicitors, advocates, solicitor-advocates, and conveyancing and executry practitioners, among others. The Law Society of Scotland is the professional body for solicitors. They govern through a Council made up of elected members as well as, more recently, non-solicitor members. Their authority currently comes from the *Legal Services Act*, enacted in November 2010. This relatively new Act allows solicitors to form partnerships with non-solicitors, and to have outside investors (although a majority share in any such business has to remain with solicitors or other regulated professionals). The Act is enabling as opposed to prescriptive, and creates a tiered regulatory framework, similar to that in England, in which the Scottish Government is responsible for approving and licensing regulators, who in turn will regulate the licensed legal services providers.<sup>194</sup>

Advocates are regulated by the Faculty of Advocates, while solicitor-advocates (experienced solicitors who are certified as specialists in court pleadings) are regulated by the High Court of Justiciary. Of interest is that paralegals in Scotland are regulated by the Scottish Paralegal Association, and must work under the supervision and support of a Scottish solicitor in delivering legal advice to clients.

Complaints about any legal practitioners are handled by the Scottish Legal Complaints Commission, created in 2007. Like the Legal Ombudsperson in England, the SLCC deals with front-line complaints and delegates conduct concerns to the relevant professional body. The Commission also plays an oversight role with regard to the conduct of complaints by professional bodies. On its website, the SLCC is described as:

*The SLCC is a neutral body and operates independently of the legal profession. We have legal status but are not a servant or agent of the Crown nor do we have any status, immunity or privilege of the Crown. We are also independent of Government.*<sup>195</sup>

Scotland is preparing for a referendum on independence scheduled for 2014, which may put to rest one way or another, the question of whether Scotland should become an independent country. According to the Law Society of Scotland, *“Since 2012 we have been discussing, debating and preparing for what a yes vote or a no vote could mean for the solicitor profession, businesses as well as the Scottish public.”*<sup>196</sup> As such, the future for the legal profession in Scotland remains closely tied to the changes occurring in England, and in some ways, to the outcome of the independence referendum.

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<sup>193</sup> Darkness and light as Leinster House discusses LSR Bill. *Law Society Gazette* Aug/Sept. 2013

<sup>194</sup> [www.scotland.gov.uk](http://www.scotland.gov.uk) July 8, 2011

<sup>195</sup> [www.scottishlegalcomplaints.com](http://www.scottishlegalcomplaints.com), July 7, 2013

<sup>196</sup> [www.lawsco.org.uk](http://www.lawsco.org.uk) “Scotland’s constitutional future and independence referendum 2014” 2013

## NETHERLANDS

The legal profession in the Netherlands is at present very similar to our own, although it operates under a civil law system. The Dutch Bar Association serves the hybrid role as both regulator and advocate for the profession. It describes itself as a ‘self-governing profession,’ operating under government-enacted statute.

Interestingly, however, over the past year or so, the Dutch Government has been attempting to launch a bill that the Netherlands Bar Association and the Federation of European Bars perceive as a serious threat to independence of the legal profession. Concerns expressed by the various Bar Associations include that the bill will give government extensive authority over the conduct of lawyers, the rights of client privilege will no longer be guaranteed, a ‘monitoring circus’ involving different regulators will be created, and there will no longer be ‘truly independent oversight in the interests of the litigants.’<sup>197</sup>

In a presentation by Ernst Van Win, President of the Hague Bar, in Geneva in October 2012, on self-regulation of the Bars, he stated:

*Government control should be kept to a minimum: the government should have only one opportunity to interfere, that is to say in the drafting of the law, and there should be repressive supervision only if the regulators of the bar conflict with the public interest in an effective legal system.*<sup>198</sup>

President Van Win goes on to say, “Whereas the three most important core values of ‘partiality, independence and confidentiality’ were more or less undisputed in 2006, these are at risk in 2012.”<sup>199</sup> He states that because the government intends to incorporate the supervision of lawyers into a central body, without lawyers, with members appointed by the Minister and State Secretary of Justice, this represents an unacceptable interference with independence of the legal profession. According to the Dutch Government’s website, as of December 12, 2012, this bill remains under discussion.<sup>200</sup>

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<sup>197</sup> [www.hg.org/bar-associations-netherlands.asp](http://www.hg.org/bar-associations-netherlands.asp)

<sup>198</sup> Van Win, Ernst, President of The Hague Bar, “Self-Regulation of Bars/Legal Profession Situation in Nederland” presentation to Intermediate Meeting of the Federation des Barreaux D’Europe , Geneva, Switzerland October 10- - 13, 2012

<sup>199</sup> Ibid

<sup>200</sup> [www.overheid.nl](http://www.overheid.nl) July 30, 2013

## Appendix 6: SRA Regulatory Risk Index

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### **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 followup 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 that may arise in relationships with debt collectors and mercantile agencies, or conducting another business, referral fees and commissions, etc.)
7. **Records management** (minimizing 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 and 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)

## Appendix 7: Ten Appropriate Management Systems (New South Wales)

# Regulatory Risk Index December 2012

The following table provides a catalogue of risks to the achievement of regulatory objectives in the Legal Services Act 2007, identified by the SRA.

The Index is intended to be a living document which provides a common language and structure for risk information that will flex to incorporate new risks as

they are identified. These risks are embedded within our reporting and all regulatory activities are aligned to this central index.

To see the most up to date version of the SRA's risk index, please visit [www.sra.org.uk](http://www.sra.org.uk).

| Risk category                | Risk level 1  |
|------------------------------|---|
| Firm viability and structure | <b>Financial difficulty</b><br>Risk that a firm experiences difficulty in meeting ongoing financial liabilities.  |
|                              | <b>Group contagion</b><br>Risk that liabilities, losses or events affecting one part of a group (involving a corporate structure or common branding) affect a regulated legal firm within the group.                            |
|                              | <b>Geographical/jurisdictional conflicts</b><br>Risks posed by territories within which firm operates or is linked.   |
|                              | <b>Inappropriate firm structure</b><br>Risk that a firm is structured in a fashion that is non-compliant with regulatory or statutory requirements.   |
|                              | <b>Lack of independence</b><br>Risk that a firm's decision making is influenced by structural or commercial concerns.   |
|                              | <b>Structural instability</b><br>Risk that a firm's structure is destabilised by events or contains fundamental weaknesses.   |
| Fraud and dishonesty         | <b>Bogus firm or individual</b><br>Risk that an unregulated person(s) (unrelated to an authorised firm) hold themselves out as an authorised firm or individual.  |
|                              | <b>Bribery and corruption</b><br>Risk that firm or individual commits, facilitates or is otherwise involved in bribery or other corrupt practices.  |
|                              | <b>Criminal association</b><br>Risk that firm or individual is involved with criminal organisation/group.   |
|                              | <b>Dishonest misuse of client money or assets</b><br>Risk that firm or individual dishonestly misuses money from one client's account for the benefit of another account or dishonestly misappropriates client money or assets. |
|                              | <b>Dishonest misuse of non-client money or assets</b><br>Risk that firm or individual dishonestly misuses the office account or misappropriates non-client money or assets for their own or another's benefit.                  |
|                              | <b>Intentional misleading</b><br>Risk that firm or individual acts in a way that is intentionally deceptive.  |
|                              | <b>Money laundering</b><br>Risk that firm or individual commits, facilitates, or is otherwise involved in money laundering.   |



| Risk category                     | Risk level 1  |
|-----------------------------------|---|
| Firm operational risks            | <b>Acting outside regulatory permissions</b><br>Risk that firm or individual fails to obtain or acts outside appropriate regulatory permissions.  |
|                                   | <b>Breach of confidentiality</b><br>Risk that firm fails to properly protect information in their possession.   |
|                                   | <b>Conflict of interests</b><br>Risk that a firm acts in a conflict of interests.   |
|                                   | <b>Disorderly closure</b><br>Risk that a firm fails to close in a proper and orderly manner.  |
|                                   | <b>Failure to co-operate or comply with notification and information requirements</b><br>Risk that firm or individual fails to co-operate or comply with the notification and information requirements of relevant regulators or ombudsmen. |
|                                   | <b>Failure to meet duties to 3rd parties or the court</b><br>Risk that firm fails to comply with duties owed to third parties or to the Courts.   |
|                                   | <b>Inadequate complaints handling</b><br>Risk that firm fails to properly deal with consumer complaints.  |
|                                   | <b>Inadequate systems and controls</b><br>Risk that firm's systems and controls are inadequate.   |
|                                   | <b>Misleading or inappropriate publicity</b><br>Risk that firm is publicised in a way which is inappropriate or misleading.   |
|                                   | <b>Poor standard of service</b><br>Risk that firm fails to provide a proper standard of service to consumers.   |
|                                   | <b>Supply chain risks</b><br>Risk that firm is critically dependent on the actions of a third party supplier or provider.   |
| Competence, fitness and propriety | <b>Discrimination</b><br>Risk that firm or individual discriminates on a prohibited ground against consumers or employees.  |
|                                   | <b>Failure to act with integrity or ethics</b><br>Risk that firm or individual acts in a way that demonstrates a lack of integrity or ethics.   |
|                                   | <b>Lack of legal competence</b><br>Risk that firm or individual lacks necessary legal competence.   |
|                                   | <b>Lack of financial competence</b><br>Risk that firm or individual lacks necessary competence in financial matters.  |
|                                   | <b>Lack of management competence</b><br>Risk that firm or individual lacks the competence needed for management of the firm or of staff.  |
| Market risks                      | <b>Changing regulatory landscape</b><br>Risks arising from the development of the regulatory framework for legal service providers.   |
|                                   | <b>Competitive constraints</b><br>Risk that market is not operating freely.   |
|                                   | <b>Failure to meet consumer demand</b><br>Risk that the legal services market does not or cannot meet consumer demand.  |
|                                   | <b>Lack of consumer awareness of rights and duties</b><br>Risk that consumers are not sufficiently aware of their legal rights and duties.  |
|                                   | <b>Lack of adequate training provision</b><br>Risks arising from a lack of adequate legal services training provision.  |
|                                   | <b>Lack of diverse and representative profession</b><br>Risks arising from failure to reflect diversity of consumers within legal services providers.   |
|                                   | <b>Lack of public interest provision</b><br>Risk that firms become profit-driven to the detriment of the wider public interest.   |
| External risks                    | <b>Economic risk</b><br>Risk that economic changes impact on the legal market or legal service providers.   |
|                                   | <b>Legal risk</b><br>Risk that legal or regulatory changes impact adversely on the legal market or legal services providers.  |
|                                   | <b>Political risk</b><br>Risk that changes in the political landscape locally, nationally or internationally impact adversely on the legal market or legal service providers.   |
|                                   | <b>Poor perception of legal services</b><br>Risk that public perception of legal services is adversely affected.  |
|                                   | <b>Public emergencies</b><br>Risk that the provision of legal services by firms or the market as a whole is impacted by external public emergencies.  |
|                                   | <b>Social / cultural risk</b><br>Risk that social / cultural changes impact adversely on the legal market or legal service providers.   |
|                                   | <b>Technological risk</b><br>Risk that technology impacts adversely on the legal market or legal service providers.   |



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