Re-imagining Lawyering: Whither The Profession?

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Keynote Address
Steve Mark, Legal Services Commissioner
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The theme of the first Australian Academy of Law Symposium in July last year was *"Fragmentation or Consolidation: Fostering a Coherent Professional Identity for Lawyers"* I have read the papers from last year's symposium with great interest. Professor Weisbrot in opening the symposium noted that there are a number of major influences that have had a formidable impact on the legal profession. These influences include globalisation, both at the national as well as at the international level, competition, the organisation of legal work, the rise of the mega-firm and the creation of Multi Disciplinary Practices (MDPs) and public companies. Noting these influences Professor Weisbrot poignantly asked attendees at the Symposium to think about how in the face of all that change do we maintain a coherent professional identity, and a healthy legal culture?

Not surprisingly, this question is just as relevant today as it was twelve months ago but perhaps more so as a result of two law firms publicly listing on the Australian Stock Exchange and international acceptance by the legal fraternity that the public listing of law firms is a reality and might even be attractive. As I have commented in many speeches, the practice of law is now big business. In NSW for example, there are now more than 840 incorporated legal practices (ILPs). In addition to the establishment of these ILPs, one law firm has franchised their practice[1] whilst another has adopted a limited partnership model and two law firms have already gone public.[2] Anecdotal evidence suggests however that these are not isolated occurrences. Recently enacted legislation in the United Kingdom allowing alternative business structures have sparked a renewed interest in publicly listing a law firm with many Wall St and Magic Circle firms now debating the prospects of attracting external investment. We are, it appears, now facing the prospect of post-professionalism[3] – the commercialisation of law.

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[1] This law firm operates through a group of independent branch offices throughout New South Wales, the ACT and Queensland. Each branch office is an ILP and is related to the law firm but not to each other, as is typically the nature of franchises. The law firm has to date entered into a franchise agreement with over 20 branch offices.

[2] On 21 May 2007, Slater & Gordon an ILP made legal and corporate history when it became the first law firm in the world to list its whole firm on the ASX. Following Slater & Gordon's listing, Integrated Legal Holdings (IHL), a Western Australian based law firm, listed on the ASX on 17 August 2007. Prior to Slater & Gordon's listing in March 2004, Noyce Legal, a Sydney based law firm, listed its banking and finance division of its practice on the ASX. Noyce Legal did not list the whole firm but incorporated the division which specialised in residential mortgage processing, into National Lending Services Ltd (NLS) and sold all of its shares to listed consumer finance website Infochoice.

[3] According to Herbert M. Kritzer the term postprofessionalism refers to the combination of three elements: the formal professions' loss of exclusivity (Abel 1986a; Commission on Nonlawyer Practice 1995; Kritzer 1998); the increased segmentation in the application of abstract knowledge through increased specialization (Ariens 1994; LoPucki 1990; Podgers 1993) and the growth of technology to access information resources (Calhoun & Copp 1988; Clark & Economides 1988; Katsh 1995:78-81; Susskind 1998; Wall & Johnstone 1997): See Herbert M. Kritzer, ""The Professions Are Dead, Long

The repercussions of this change in the legal services marketplace are immense. As the legal world emulates the structures of industry and big business, cracks have begun to emerge threatening the ethical obligations of a once solid profession. Commercialization by its very nature increases the pressure on firms to consider the profit motive as a superior (sole?) business objective and is antithetical to the concept of a profession, which promotes ethical conduct above all else. Market capitalism has had a profound effect of the practice of law by solicitors whether practising in large or medium firms or as sole practitioners.[4]

In the face of this change I think this year it may be prudent for us to ask - whither the profession?? - How can we ensure that the legal profession will still exist for future generations and not be relegated as a quaintness of the past? Are we entering into a period of "post-professionalism" that we cannot reverse? Does the 21st century need a legal profession? The answer to these questions is directly related to our perception of the legal profession and what we believe to be its purpose and function.

1. The definition of a profession

The term "profession" has no commonly accepted definition. As one commentator has eloquently observed, the concept of a 'profession' "is a slippery one that is not entirely fixed in our conceptual geography."[5] The term was first used in the post-Reformation period, as a calling or vocation professed by the clergy. The term derived from the verb "to profess" which in medieval times had come to mean the taking of religious vows and later in the 16th century to embody the idea that those with a specific knowledge would use that position "to teach" the common people. It was during this period the definition extended to refer to the clergy's fellows in law and medicine. Since then the term "profession" has been ambiguously used to refer to many different things depending on how inclusive you are.

The lay definition of a profession appears to be almost synonymous with "occupation."[6] Thus when used in common parlance a "professional" can in reality be anyone with a particular occupation i.e. a plumber, a secretary, a teacher, a vet, a pharmacist, a librarian, a doctor or a lawyer. This is the most inclusive definition of a profession.

The historical definition of a profession is on the other hand less inclusive as it is characterised by "trained expertise" and "selection by merit, a selection made not by the open market but by the judgment of similarly educated experts."[7] The key elements of this definition are the creation and recognition of trained expertise and the structuring of occupations around this expertise.

Live the Professions: Legal Practice in a Postprofessional World", Law & Society Review Vol. 33, No. 3, pp. 713-59 (1999).

[4] My comments in relation to this paper relate really to solicitors rather than barristers. I do however note that there has been considerable change in the nature of practice at the Bar.

[5] Joan C. Callahan, Ethical Issues in Professional Life, New York: Oxford University Press, 1999 in Stephen F. Barker, "What is a Profession?", 1 Professional Ethics at p. 77.

[6] Stephen F. Barker, "What is a Profession?", 1 Professional Ethics at p. 77.

[7] Harold Perkin, The Rise of Professional Society: England Since 1880, London, Routledge, 1989.

The sociological definition of a profession is the least inclusive definition. It adds altruism (i.e. a sense of service), regulatory autonomy and acceptance by the general public as being additional key elements.[8] It is this sociological definition that best represents how professions today perceive themselves. The Australian Council of Professions thus defines a "profession" as:

> "A profession is a disciplined group of individuals who adhere to ethical standards and who hold themselves out as, and are accepted by the public as possessing special knowledge and skills in a widely recognised body of learning derived from research, education and training at a high level, and who are prepared to apply this knowledge and exercise these skills in the interest of others.
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> It is inherent in the definition of a profession that a code of ethics governs the activities of each profession. Such codes require behaviour and practice beyond the personal moral obligations of an individual. They define and demand high standards of behaviour in respect to the services provided to the public and in dealing with professional colleagues. Further, these codes are enforced by the profession and are acknowledged and accepted by the community."[9]

From this inclusive definition we can see the following key elements that constitute a profession:

a) A group of individuals that adhere to codified ethical standards;
b) A group of individuals with specialized knowledge or skills;
c) A group of individuals that is socially acknowledged and accepted;
d) A group of individuals who are self-regulated, and
e) A group of individuals that is prepared to apply their knowledge or exercise their skills in the interest of others.

2. The definition of a legal profession

The sociological definition of a "profession" embodies the characteristics of the legal profession. In fact the legal profession's claim to professional status has never really been questioned. This is because the practice of law satisfies the definition of a profession: the law is a body of esoteric knowledge consisting of statutes, case law, doctrines, rules of evidence and procedures; it features institutionalized formal education requirements; it boasts elevated socio-economic and cultural status; it relies (at least in part) on self-regulation and has a monopoly over the provision of legal services; it has a set of codified ethical rules and a public service claim.

Whilst each of these elements that constitute a profession are in and of themselves important it is the notion of self-regulation and public service that deserve further

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[8] Abbott, Andrew (1988) The System of Professions: An Essay in the Division of Expert Labor, Chicago: Univ. of Chicago Press; Simecca, J "Conflict Resolution in the United States: An Emerging Profession?" in (eds) Avruch, Kevin, Black, Peter and Joseph Scimecca, Conflict Resolution: Cross-Cultural Perspectives, Greenwood Press, New York, 1991.

[9] Adopted at the Annual General Meeting of Professions Australia on 26 May 199, see Professions Australia, "Definition of a Profession", available at http://www.professions.com.au/defineprofession.html

attention particularly in light of the questions I have posed at the outset of my address today.

Professional self-regulation is grounded in the ideals of consumer protection and support of the rule of law. The purpose of self-regulation is to provide evidence that practitioners are meeting society's expectations and maintaining expected standards of practice as judged by their peers. Self-regulation is also aimed at insuring independence of the profession from Government interference, an essential element of the rule of law. Elements of self-regulation include: setting of professional standards; development of a Code of Ethics and a Code of Professional Conduct; peer review; participation in professional activities and continuing education; research; uncovering new knowledge; professional publications; developing and monitoring advanced practice, and credentialing and certification processes. This model was the traditional model for regulating the legal profession in NSW until 1994 when NSW opted to institute a co-regulatory system with the establishment of my office.

The public service claim of the profession of law embodies the ideal of the legal profession as one of faithful service beyond pure economic self-interest. The practice of law has always been seen as a privilege. The privilege was not only that of being fortunate enough to study the law but also the privilege of being able to use that study to profess and protect those that were not fortunate enough to be protected from the injustices of the state. The public service claim therefore embodied ideals of wise and dispassionate advice to clients. The public service claim also embodied the ideal of personal relationships and loyalty between practitioner and client that was of the utmost importance and highly respected. It is this public service claim that became essential to the purpose of the legal profession and the real justification for its existence.

The relevance of this definition in today's legal marketplace is however questionable since the legal marketplace of the 21st century is vastly different from the legal marketplace of a century ago.

3. Changes to the legal marketplace

It would not be trite to say that the legal services marketplace in Australia and the rest of the common law world has fundamentally changed both in structure and in practice over the last century. Today for example in NSW we have a legal services marketplace that is made up of the traditional Bar, and for solicitors the partnership model, incorporated legal practices, franchised legal practices, multidisciplinary partnerships and law firms that have publicly listed on the Australian Stock Exchange. The traditionalists of the bygone era would be aghast at the forms and variations that currently exist yet the trend to adopt non-traditional legal structures has been generally embraced by the legal profession in NSW. Such acceptance is evident in the number of legal practices opting to incorporate and even flirt with the possibility of listing due to the belief that the benefits of doing so outweigh the challenges.

Incorporation can bring with it numerous benefits not previously experienced by law firms. In contrast to partnerships, incorporation protects directors of a practice through limited liability, grants the drafters of the company constitution flexibility regarding ownership, control and distribution of profits and can constitute a profitable

investment for shareholders. Share transferability gives owners and other shareholders, who may be non-lawyers, greater flexibility by comparison with partnerships in their financial relationship to the firm. Non-lawyer directors may make valuable contributions to the operations of a company, providing speciality expertise. Incorporated legal practices also avoid the requirement found in partnerships to reconstitute themselves on the death, retirement or withdrawal of a partner. In addition, whereas non-performing partners may have only been exorcised from a practice through litigation, in an ILP they need only be voted off the board. Incorporation provides for greater flexibility in how employees are rewarded for productivity and that may contribute to a greater corporate camaraderie.

Law firms considering the shift to incorporation must however consider the impact of the relatively rigorous reporting requirements of the *Corporations Act 2001 (Cth)* and potentially the rules of the Australian Stock Exchange (ASX) as well as the possibility of attracting payroll tax, stamp duty etc. Law firms must also consider the possibility of a breakout of increased industrial democracy, which may result from the creation of a more vertical structure, which can diffuse decision-making and that remuneration may follow merit, rather than disproportionately reward seniority. Furthermore, through the process of incorporation partners may have to cede authority for the ownership and management of the practice. The competing obligations of a listed legal practice to the court, its clients and to shareholders presents a tension that tests the ethics of its decision makers as well as the sufficiency of the regulatory regime. This tension is made more apparent if we consider the distinct financial advantages that incorporation has for potential shareholders and directors through more favourable taxation, superannuation and redundancy pay arrangements.[10]

Acceptance of alternative legal profession business structures is increasingly not just limited to NSW alone. All jurisdictions in Australia have now committed to introducing legislation to allow incorporation and all but two jurisdictions have done so.[11] Last year the United Kingdom adopted comparable legislation permitting lawyers to form partnerships with non-lawyers, and accept outside investment or operate under external ownership.[12] The UK Act permits new kinds of legal practices in which solicitors are able to join with barristers and non-lawyers to form Legal Disciplinary Practices (LDPs). In a LDP up to 25 per cent of partners or equivalent managers are permitted to be non-lawyers, without any external ownership and will come into force in 2010. In the longer term, the UK Act also allows lawyers to form multidisciplinary practices with other kinds of professionals, accountants, for example. The "Tesco Law" proposal as it has come to be colloquially known (because of the assumption that big retailers and supermarkets will want to buy law firms and

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[10] Mark, S., "A short paper and notes on the issue of listing of law firms in New South Wales', presented to the Joint NOBC, APRL and ABA Centre for Professional Responsibility Panel, pp. 9-10, 2007.

[11] *Legal Profession Act* 2006 (ACT) Part 2.6 ; *Legal Profession Act* 2004 (NSW) Part 2.6, ss 135-164; *Legal Practitioners Act* 2006 (NT) Part 2.6 ; *Legal Profession Act* 2004 (Vic) Part 2.7, ss 2.7.4 to 2.7.35; *Legal Practice Act* 2003 (WA) ss 45-74; *Legal Profession Act* 2007 (Qld) Part 2.7. Similar legislation is in progress in Tasmania and SA: *Legal Profession Act* 2007 (Tas) Part 2.5 (Not yet proclaimed, received assent 15/08/07); *Legal Profession Bill* 2007 (SA) Part 5 (third reading speech 26/02/08).

[12] The *Legal Services Act 2007 (UK)* came into effect on 30 October 2007.

offer their own legal services)[13], also allows non-lawyers to own firms that provide legal services whether by flotation of law firms on the UK Stock Exchange or by the setting-up or acquisition of law firms by other corporate entities.

Scotland too has expressed an interest. Following the UK's legislative changes Scotland after much angst, expressed preparedness to implement a version of the reforms to remove the ownership restrictions. The Scottish Government has recently indicated that although it would not go as far as the "Tesco reforms", it would allow larger firms to raise external capital.[14]

4. Why the change?

The change is due in part to legislation permitting different business structures and in part to legal practices recognising that the practice of law is not just a profession or a vocation anymore but a business or even an "industry". It is this latter part that has the potential to have a profound effect on the legal profession of the 21st century.

Over the past few decades we as a society have witnessed a phenomenal increase in technological developments in transportation, industry and communication leading to much freer exchanges between communities formerly considered prohibitively distant from one another. The growth of international trade, investment and capital flows has fostered a global free trade movement that has found expression in a range of international agreements aimed at reducing or removing the impost previously met at any given national border. The incremental deconstruction of trade barriers has simulated freer movement of capital and paved the way for companies to set up global businesses.

The practice of law has not gone unaffected. As a result of globalisation large law firms are now having to think about restructuring their practices to align themselves with the dynamic internationalized business environment in which they operate, and offer transnational legal services as well as other services that were traditionally unfamiliar to the practice of law. Recently I attended and presented a paper on ILPs and legal practices at a Symposium hosted by the Georgetown Center for the Study of the Legal Profession at Georgetown University entitled "The Future of the Global Law Firm." The Sympoisum, as its title suggests considered the role of transnational law firms, multi-national law firms and global law firms. Several of the papers presented at the Symposium addressed the concept of the global law firm as distinct from the transnational and multi-national law firm in a way which, in my view, seemed to transcend the role of Nation States. The Symposium also discussed external equity investment in law firms. Representatives of many of the Magic Circle and Wall Street law firms that were in attendance appeared to accept the inevitable that in order for their firms to thrive and grow in the current global climate their firms would have to seriously reconsider their business structures. While some were more

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[13] See R. Zair, Would investment in law firms pay dividends?", The Times, 13 September 2005 available at http://www.timeslonline.co.uk/article/0,,8163-1773856,00.html , accessed on 29 January 2008.

[14] I. Fraser, SNP victory ushers in new look at legal services market reform", The Herald, 28 June 2007 available at http://www.scottishlegaljobs.com/news/2007-05-28-1.shtml , accessed on 18 September 2007.

reluctant than others, they all seemed to acknowledge that external equity investment is inevitable at some point in the near future.

It would not be incorrect to say that in the current legal environment profit has become a rather large motivating factor and driving force behind legal practice. While this can be said of legal practice generally, its impact is perhaps experienced differently by large law firms than smaller law firms and sole practitioners, and it should be noted that my Office has far more experience with the last two groups than the former. Several commentators have postulated that some large law firms have much in common with merchant banks and professional service firms and tend to model themselves on their own clients. As Bret Walker SC has stated:

> "Imitation of clients is universally rejected when lawyers represent criminals, but is massively growing in the case of lawyers advising on, and representing the interests of, money - that is, money lawfully obtained and used."[15]

Walker then suggests that perhaps the time is ripe for "the lawyers closest to the big money of their business clients, having really nothing to do with the general corpus of law and no real interest in the administration of justice, to leave the legal profession and join with the management consultants, accountants, finance brokers and merchant bankers."[16]

The commercialisation of law is also evidenced by the growing business of litigation funding. In Australia for example, litigation funding is principally provided by corporate commercial entities, for profit, to insolvency practitioners, and increasingly to multiple plaintiffs in group litigation or individual parties in large and complex litigation. This also presents challenges to lawyers and legal regulators who are concerned about the possible diminution of the fiduciary relationship and the potential to focus increasingly on profit.

The emphasis of the billable hour is yet another bi-product of the commercialisation of law. As Chief Justice Rehnquist of the U.S. Supreme Court stated:

> "... The practise of law is today a business where once it was a profession ... Market capitalism has come to dominate the legal profession in a way that it did not a generation ago. Law firms, whether in 1956 or 1996 have always had to turn a profit if they were to stay in business. But today the profit motive seems to be writ large in a way that it was not in the past. ... Perhaps nowhere in the profession is this tendency more developed than in the emphasis on billable hours. It appears that now clients are insisting on some changes in this form of billing, and perhaps it will not be as dominant in the future as it has been in the past. ... Hourly billing rewards inefficiency: the work of lawyer A, who spends 100 hours preparing a motion for summary judgment, costs the client 100 times the billing rate;

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[15] Bret Walker SC, "Lawyers & Money", 2005 Lawyers' Lecture, St James Ethics Centre available at http://.www.ethics.org.au

[16] Ibid.

> the work of lawyer B whom it takes 200 hours to do the same work costs the client twice as much for the same service."[17]

This pressure on lawyers to generate "business" whether in the form of new clients or new work from existing clients has been coined by Professor Milton Regan as the "eat what you kill" phenomenon – such that those who do not "kill" enough do not "eat." The eat what you kill culture makes rainmaking or business generation a high priority with commensurate rewards. The most ethical "non-killer" may thus starve.

In order to demonstrate this phenomenon Professor Regan has written a book entitled "Eat What You Kill: The Fall of a Wall Street Lawyer"[18] which uses the tragic true case of John Gellene, a former partner in the prestigious New York law firm of Milbank, Tweed, Hadley & McCloy, to comment on the ethical issues raised by "eat what you kill" compensation schemes. He describes the pressures that Gellene, a young partner with relatively little experience as a bankruptcy lawyer, faced when he was asked to represent a company in a major bankruptcy proceeding and realized that if he fully disclosed the fact that his firm not only represented the company, but two of its creditors as well, his firm would be disqualified and he would have lost the "kill." Gellene opted to try to hide the conflict and when it was inevitably discovered, he tried to hide it from his partners as well. Gellene spent thirteen months in prison for his "mistaken judgment." Gellene's case sheds a contemporary light on the ethical quandaries faced by lawyers under pressure to please their bosses and bring in business. The consequences of this pressure and the commercialisation of the practice of law have had a profound effect on the legal profession.

The current legal services marketplace also appears to have a diminishing connexion with the notion of law as a profession. This becomes clear when one considers the definition of a profession (and by extension the legal profession) as outlined in the first part of this paper and with it the ideal that a fundamental purpose of the legal profession is to protect the individual from the excesses of the State. Lawyers have been traditionally seen as the portal to the justice system, a bridge between society at large and its underpinning rules, and it is in providing this service that the legal profession may stake its claim to public service. However the very notion of justice in the final part of this definition and the ideal of the legal profession as one of faithful service beyond pure economic self-interest is being challenged under the current climate of today's legal service marketplace.

Over the last forty or so years we have seen a shift from the tradition of client loyalty to law firms. The development of corporate or in-house counsel by corporations illustrates this move. Not to long ago clients dealt with their law firms exclusively to act on their behalf on all matters. With the engagement of corporate counsel by clients seeking better value for money this exclusivity however went into decline. Corporate counsel, fixated on cost as much as value handled previous "bread and butter" matters in house, putting the larger matters out to tender to ensure the best price. The impact of this is the loss of client loyalty and competition based significantly on cost.

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[17] W H Rehnquist, Remarks of the Chief Justice, Catholic University School of Law Commencement, 25 May 1996, unpublished at 4 cited by The Hon Justice Michael Kirby AC CMG in "Legal Ethics in Times of Change", The St James Ethics Centre, Forum on Ethical Issues, 23 July 1996.

[18] M Regan, "Eat What You Kill: The Fall of a Wall Street Lawyer", 2006, University of Michigan Press

Competition, rather than client loyalty has today become a driving force in the legal services marketplace. That is competition for work, not competition to maintain high ethical standards and serve the community beyond pure economic self-interest. This presents a dangerous situation for the profession, the community and from my perspective, regulators of the legal profession.

In addition to the erosion of the concept of loyalty there is also an erosion of the type of work that practitioners are currently performing in today's legal marketplace. If we think once again about the traditional role of a legal practitioner it was commonly perceived to be that of a "problem solver" and interpreter of archaic laws, rules and regulations, a person who was there to assist their clients in navigating through the problems that arose in the ordinary course of life. "Problem solving" may still be a dominant function for today's legal practitioner, but the problems have changed, and this is especially true for practitioners who practice in the medium to larger firms. Perhaps it is now more appropriate to define the role of a lawyer in these practices as not only a "navigator", but a strategic advisor, often engaged to assist in the client meeting its objectives which tend to primarily be economic.

As research suggests we modern lawyers tend to both self select and are trained to be adversarial, risk adverse, perfectionists, and prone to depression. Perhaps the role of problem solver should not then be our prime focus!

5. Regulation in a time of significant change

The changing legal services marketplace where there exists a perceived clash between profit and ethics, is a potential threat to the practice of law as a profession. Ethics is central to the concept of a profession. The legal profession has always aspired to maintain the highest of ethical standards as a counterpoint to the great privilege that attaches to a position as an Officer of the Court. Commercialization by its very nature increases the pressure on firms to consider the profit motive as a superior business objective. This has profound implications for the legal profession whose duty to the court and the client has always been paramount. Professionalism speaks of ethically minded conduct and duties to the court, all of which may be antithetical to corporate business objectives. These completing obligations not only have implications for law firms themselves but also for legal regulators who are charged with regulating the profession. As the regulator of legal practices in NSW, the Office of the Legal Services Commissioner (OLSC) has thus been forced to rethink its role to ensure that its regulatory framework responds effectively to this change.

We have done so in part by implementing a regulatory regime that attempts to institute an "ethical infrastructure" within ILPs – that is, formal and informal management policies, procedures and controls, work team cultures, and habits of interaction and practice that support and encourage ethical behaviour.[19] This

[19] The term "ethical infrastructures" was developed by Prof Ted Schneyer. See "T. Schneyer, "A tale of Four Systems: Reflections on How Law Influences the "Ethical Infrastructure of Law Firms" (1998) 39 South Texas Law Review 245. It was developed further by Elizabeth Chambliss and David Wilkins in "Promoting Effective Ethical Infrastructure in Large Law Firms: A Call for Research and Reporting" (2002) 30 Hofstra Law Review 691 and "A New Framework for Law Firm Discipline" (2003) 16 Georgetown Journal of Legal Ethics 335

approach, enshrined in the New South Wales *Legal Profession Act 2004* (LPA 2004), requires ILPs to implement and maintain "appropriate management systems." The legal practitioner director[20] of the ILP (of which the Act requires at least one[21]) must ensure that the practice has appropriate management systems that meet the requirements of the Act.[22]

"Appropriate management systems" are not defined in the Act. Rather than establishing a "best practice" program and imposing it on legal practitioners, we considered what issues a management system would need to address to be appropriate. The ultimate list of issues, or objectives was determined in collaboration with the professional associations in NSW, the College of Law, Professional Indemnity Insurers and numerous law firms and practitioners. These ten objectives include as follows:

1. Competent work practices to avoid negligence.
2. Effective, timely and courteous communication.
3. Timely delivery, review and follow up of legal services to avoid instances of delay
4. Acceptable processes for liens and file transfers.
5. Shared understanding and appropriate documentation from commencement through to termination of retainer covering costs disclosure, billing practices and termination of retainer.
6. Timely identification and resolution of the many different incarnations of conflicts of interest including when acting for both parties to a transaction or acting against previous clients as well as potential conflicts which may arise in relationships with debt collectors and mercantile agencies or conducing another business, referral fees and commissions etc.
7. Records management which includes minimizing the likelihood of loss or destruction of correspondence and documents through appropriate document retention, filing, archiving etc and providing for compliance with requirements as regards registers of files, safe custody, financial interests.
8. Undertakings to be given with authority, monitoring of compliance and timely compliance with notices, orders, rulings, directions or other requirements of regulatory authorities such as the OLSC, Law Society, courts or costs assessors.
9. Supervision of the practice and staff.
10. Avoiding failure to account and breaches of s61 of the Act in relation to trust accounts.[23]

ILPs use these objectives to conduct a self-assessment of their practice and rate themselves on a form provided by the OLSC as either "Compliant," "Non-Compliant" or "Partially Compliant" on each. Once the ILP has conducted the self-assessment process and completed the form it is returned to the OLSC for consideration. The OLSC has, in practice, by agreement with the Law Society, assumed the role of "auditing" (or as we refer to them "conducting practice reviews") ILPs for compliance with the LPA 2004 and Regulations pursuant to sections 140(3) of the LPA 2004.

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[20] A legal practitioner director is defined as a director of an incorporated legal practice who is an Australian legal practitioner holding an unrestricted practicing certificate.
[21] Section 140(1) of the LPA 2004.
[22] Section 140(3) of the LPA 2004.
[23] See the OLSC website at http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/OLSC_ilp

The self-assessment and practice review process is a revolution in the regulation of legal practice because it focuses on the management and culture of the firm as a whole rather than only on the conduct of individual practitioners. This approach sits well within the OLSC's general philosophy of regulation that a regulator should:

(i) ensure compliance with the relevant laws, rules and regulations;
(ii) consistently questions those laws, rules and regulations both for relevance, and in assessing their impact upon both the profession and the community at large, and to make appropriate recommendations for change or improvement; and
(iii) educate the profession and consumers of legal services with the goal of creating a culture within the profession whereby compliance itself becomes cultural. Once such a culture is achieved, it follows that there will be a reduction in the number of complaints received by my Office. In fact, it has been a long standing stated aim of my Office to reduce the number of complaints about lawyers.

It now appears that the process has been a success.

The results of a recent study conducted by Dr Christine Parker of Melbourne University on OLSC complaint data relating to practices that incorporate reveals that ILPs who have gone through the self-assessment process are the subject of significantly fewer complaints. On average the complaint rate for each ILP after self-assessment was about one half to one third the complaint rate before self-assessment. This suggests that the OLSC's processes for assisting ILPs in adopting appropriate management systems or 'ethical infrastructure' for their firms has had a very positive impact.

The public listing of a law firm however presents numerous additional ethical challenges. Listing raises the fundamental concern of the tension between a practitioner's duties owed under the LPA 2004, being primary to the Court and then to the client, and the requirements of a director, officer or employee under the *Corporations Act 2001 (Cth)* (Corporations Act), being primarily to the corporation and its shareholders. Accordingly, there is a potential and perhaps inevitable latent tension between a solicitor director's duties to a company's shareholders and a solicitor's professional obligations.

Listing can also threaten the duty of confidentiality owed by a lawyer to the client. A lawyer's client is entitled to expect that information received by the lawyer in relation to the client within the bounds of the legal retainer and the fiduciary relationship will be treated as confidential. Such a duty does not however generally attach to a business relationship. A duty of confidentiality may form part of a business relationship if included in a contract between the parties, but it is not implied into that relationship, as it is in the case of legal professionals and their clients. Shareholders therefore have no reciprocal commitment to maintain client confidentiality. Furthermore, Under the Corporation's Law, a corporation is obliged to continually disclose its business and dealings. Section 674 of the Corporations *Act 2001* makes it a legal requirement for listed disclosing entities to abide by the ASX Listing Rule 3.1 on continuous

disclosure.[24] The ASX defines continuous disclosure as the "timely advising of information to keep the market informed of events and developments as they occur."

Realising the possibility of these conflicts we at the OLSC have worked together with firms prior to and during the listing process and with firms who have expressed an interest in listing. When Slater & Gordon, the first law practice in the world to list, was in the process of listing, the OLSC worked together with them to ensure that their prospectus, constituent documents and shareholder agreements attempted to address these conflicts.

As a result, the Slater and Gordon prospectus states:

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

The primacy of a lawyer's duties to the court, as stated in the prospectus, is also reflected in Slater & Gordon's constituent documents and shareholder agreements. In addition the documents state that if a conflict were to arise between the provisions of the LPA 2004 and the Corporations Act, the provisions of the LPA 2004 will prevail. While this bold statement may raise concerns over the application of displacement provisions and Constitutional law generally, I believe the statement to be a positive one.

6. Conclusion

Several days ago a newspaper article crossed my desk concerning a Silicon Valley lawyer in California who has just established a virtual law firm.[25] The article stated that the virtual firm is expected to have hundreds of legal practitioners possibly located throughout the world working for it, but has no offices, infrastructure or management systems. The primary virtue attributed to the practice is that it would reduce the cost of lawyer billing by about half for commercial clients. The article concluded with the question - "is this the way of the future for the legal profession?"

At the commencement of this address I raised several questions about the future of the legal profession including the role of ethics, client loyalty and the impact of "post-professionalism." Indeed whether the 21st century even needs a legal profession?

My reaction to the article on the virtual law firm was to consider that much in law today can and is outsourced or off-shored. This is particularly true in those aspects of legal work that are of a more mechanical or processed based nature. This leads me to question whether the outsourcing or off-shoring of conceptual legal reasoning, client relationship building and ethical behaviour is on the horizon. From a regulator's

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[24] ASX Listing Rules, Chapter 3, Continuous Disclosure, available at http://www.asx.com.au/ListingRules/chapters/Chapter03.pdf ; ASX Guidance Note 8: Listing Rule 3.1 http://www.asx.com.au/ListingRules/guidance/GuidanceNote8.pdf

[25] Z. Elinson, "VLG Co-Founder Starts Virtual Law Firm", Law.Com, 16 July 2008 available at http://www.law.com/jsp/law/

standpoint of oversighting professional conduct, this initiative causes me much concern. For example, how are issues such as supervision of staff, effective communication, ensuring ethical legal service delivery and establishing an ethical culture to be achieved or maintained?

In order to achieve our two prime objectives at the OLSC - consumer protection and promoting high ethical standards through support for the rule of law, my Office has attempted to address at least in part, some of the issues explored in this paper through embedding ethical behaviours in management systems particularly as they relate to ILPs. It is somewhat ironic that the framework we have developed utilizing appropriate management systems to achieve this objective has been found not only to improve management systems and reduce complaints against firms, but also to increase firm profitability. However, this may also go some way to reduce the perception that ethics and profit are incompatible.

The example of Slater & Gordon listing has caused international as well as national concern due to the potential to further commoditise law, but conversely it may have the effect of promoting the professions role of commitment to the good of the community.

Were Slater & Gordon, for example, to conduct a class action against the tobacco industry, and determine in the interest of its clients, (many who are suffering emphysema), and their primary duty to the court, to settle the litigation, against the possibility of ongoing profit to its shareholders, what remedy would the shareholder have? Under the Corporations law, a shareholder who considered themselves financially disadvantaged by a director's decision could sue that director, possibly successfully. In the case of Slater & Gordon with their primary duty to the Court, a secondary duty to the client and tertiary duty to the shareholder the outcome of such litigation would hopefully be significantly different.

Accordingly the questions I have raised are not for me alone to attempt an answer, they are for all of us to consider. In doing so we should bear in mind the primacy that high ethical standards have in the legal profession and ponder the ramifications of one publicly listed law firm where the directors primary duty is to the community through their duty to the Court and not only to delivering shareholder value.