"What is Legal Work? – A Regulator's View"

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LAWASIAdownunder2005 Conference
Gold Coast, Queensland, 20-24 March 2005

THE ROLE OF A REGULATOR

The Office of the Legal Services Commissioner ("OLSC") was established in NSW in 1994 to receive complaints against legal practitioners. The OLSC is part of a co-regulatory system that also involves the NSW Law Society and the NSW Bar Association, which are the professional organizations for solicitors and barristers respectively. While the OLSC receives all complaints against NSW legal practitioners and tries to resolve those which raise consumer disputes or complaints about service delivery, it also investigates conduct complaints, or oversees the investigation of complaints that it refers to the Law Society or Bar Association. Where the OLSC is satisfied that there is a reasonable likelihood that a legal practitioner will be found guilty of professional misconduct (and in some circumstances, the lesser offence of unsatisfactory professional conduct), it will prosecute the legal practitioner in the Legal Services Division of the Administrative Decisions Tribunal.

In my role as Legal Services Commissioner and through my previous experience as President of the New South Wales Anti-Discrimination Board, I have formed the view that to be effective a regulator must strive to achieve three objectives:

1. To ensure compliance with the relevant laws, rules and regulations;
2. To consistently question those laws, rules and regulations both for relevance, and in assessing their impact upon both the profession and the community at large; and
3. To educate the profession and consumers of legal services with the goal of creating a culture of compliance within the profession. Once such a culture is achieved, I anticipate that there will be a reduction in the number of complaints received by my Office.

These three requirements, if met, should achieve the ultimate purpose of the OLSC which is, consumer protection.

COMPETITION POLICY

All State and Territory Governments in Australia must also adopt competition policy in an attempt to eliminate barriers to competition.

A somewhat simplistic equation in relation to competition policy suggests that barriers to competition must be eliminated unless it can be shown that the

cost of the elimination is greater than the cost of the retention of the barrier. While this is a readily understandable equation, what remains unclear is the definition of or what is included in the term "cost".

Concerns arise when a rigid view of costs is adopted as only relating to financial or monetary cost. For example, early discussions in relation to the application of competition policy to the legal profession resulted in a finding in at least one agency's view that the greatest barrier to competition in the legal profession was its ethics. This was due to the belief that a profession with ethics would have higher financial costs (to the consumer) than a profession without ethics.

Inevitably, it must be the case that the question of the utility of the establishment of "monopolies" in relation to any professional service must be whether or not it is ultimately in the public interest for such a monopoly to be established or maintained.

Accordingly, the definition of "costs" in the competition policy equation must include social costs, or the public interest.

THE DEFINITION OF LEGAL WORK

At present in New South Wales the Legal Profession Act 1987 lists areas of legal work reserved for solicitors and barristers. Section 48E states:

> ***"48E Limitation on general legal work and probate work***
> *(1) In this section:*
>
> ***fee** includes any form of, and any expectation of, a fee, gain or reward.*
> ***general legal work** means the work involved in drawing, filling up or preparing an instrument or other document that:*
>
> *(a) is a will or other testamentary instrument, or*
> *(b) creates, regulates or affects rights between parties (or purports to do so), or*
> *(c) affects real or personal property, or*
> *(d) relates to a legal proceeding.*
>
> ***probate work** means the work involved in:*
> *(a) taking instructions for a grant of probate or letters of administration, or*
> *(b) drawing or preparing papers on which to found or oppose a grant of probate or letters of administration.*
>
> *(2) A person must not directly or indirectly do any general legal work, or any probate work, for a fee unless the person is a barrister or solicitor or unless the person is an incorporated legal practice and the work is done on its behalf by a barrister or solicitor.*

Maximum penalty: 20 penalty units.

(3) Any general legal work or probate work is taken to have been done for a fee if it relates to, or is done in conjunction with, other work done by the same person for a fee, unless it is proved that the general legal work or probate work:

(a) was done without the person who did it receiving any advantage or benefit, and
(b) was not offered as an inducement to do the other work.

(4) This section does not apply to:
(a) a public officer drawing instruments in the course of his or her duty, or
(b) a person employed merely to engross an instrument, or
(c) a land agent in respect of an instrument he or she is entitled to draw, fill up or prepare, and to charge for, under the Land Agents Act 1927, or
(d) a licensed conveyancer acting in accordance with a licence in force under the Conveyancers Licensing Act 1995.

(5) This section does not apply to a person acting as an employee if the person:

(a) so acts in the ordinary course of his or her employment, and
(b) receives no fee, gain or reward for so acting other than his or her ordinary remuneration as an employee.

(6) This section does not apply to a person or work, or a class of persons or work, declared by the regulations as being exempt from the operation of this section.

(7) (Repealed)

(8) A foreign lawyer does not contravene this section if he or she is a locally registered foreign lawyer and the work done is work the foreign lawyer is permitted to do under Part 3C."

Interestingly, the section does not specifically refer to appearance as an advocate before the court or the provision of legal advice.

The Act defines "legal work" basically as work done by a legal practitioner, so the definition becomes somewhat circular.

Reviews of that Section by the National Competition Policy Review in 1998 and by the Legal Profession Advisory Council in 1999 upheld in general the public interest in reserving certain aspects of legal work for solicitors and barristers. The Legal Profession Advisory Council advocated that a broader definition than that contained in the Legal Profession Act be adopted including

the giving of legal advice and the appearance as an advocate in a Court of record.

Neither body that reviewed the legislation suggested that non-lawyers should not be licensed to perform work that might otherwise be considered legal work. For example, in New South Wales licensed conveyancers flourish and migration agents are licensed under Federal legislation as are tax agents.

As a result of several years work by the Law Council of Australia and the Standing Committee of Attorneys General, we now have in Australia a set of model laws relating to the regulation of the legal profession which is now a national profession.

The model rules adopt a very broad and general approach to resolving the conundrum of defining legal work by including a provision prohibiting a person engaging in legal practice for fee or reward when not so entitled. Unfortunately, "engaging in legal practice" is not defined.

As a result of the signing off by all Attorneys General of the model laws, various States are now finalising new legislation for the regulation of the profession to be in compliance with the model laws.

Accordingly, the new NSW *Legal Profession Act 2004* (likely to be proclaimed on 1 July 2005) adopts an identical provision to the model laws establishing prohibition on engaging in legal practice when not entitled, but again without defining legal practice.

The relevant Section 14 of the *Legal Profession Act 2004* then goes on to list a number of exceptions to the prohibition including the recognition of licensed conveyancers, instruments drawn up by a land agent under the Land Agents Act 1927 and perhaps most importantly 14(2)(e) "legal practice engaged in by an incorporated legal practice in accordance with Part 2.6 (Incorporated legal practices and multidisciplinary partnerships). Section 14 states:

"14 Prohibition on engaging in legal practice when not entitled

(1) A person must not engage in legal practice in this jurisdiction for fee, gain or reward unless the person is an Australian legal practitioner.

Maximum penalty: 200 penalty units.

(2) Subsection (1) does not apply to engaging in legal practice of the following kinds:

(a) legal practice engaged in under the authority of a law of this jurisdiction or of the Commonwealth,

(b) legal practice engaged in by an incorporated legal practice in accordance with Part 2.6 (Incorporated legal practices and multi-disciplinary partnerships),

(c) the practice of foreign law by an Australian-registered foreign lawyer in accordance with Part 2.7 (Legal practice by foreign lawyers),
(d) legal practice engaged in by a complying community legal centre,
(e) conveyancing work carried out in accordance with a licence in force under the Conveyancers Licencing Act 2003,
(f) work performed by a land agent in respect of instruments he or she is entitled to draw, fill up or prepare, and to charge for, under the Land Agents Act 1927,
(g) the drawing of instruments by an officer or employee in the service of the Crown (including the Public Service) in the course of his or her duty,
(h) legal practice of a kind prescribed by the regulations.

(3) Subsection (1) does not apply to:
(a) a person who as an employee provides legal services to his or her employer or a related entity if he or she:
(i) so acts in the ordinary course of his or her employment, and
(ii) receives no fee, gain or reward for so acting other than his or her ordinary remuneration as an employee, or
(b) a person or class of persons declared by the regulations to be exempt from the operation of subsection (1).

(4) A person is not entitled to recover any amount in respect of anything the person did in contravention of subsection (1) and must repay any amount so received to the person from whom it was received.

(5) A person may recover from another person, as a debt due to the person, any amount the person paid to the other person in respect of anything the other person did in contravention of subsection (1).

(6) The regulations may make provision for or with respect to the application (with or without specified modifications) of provisions of this Act to persons engaged in legal practice of a kind referred to in subsection (2) (other than subsection (2) (b)–(f)) or persons referred to in subsection (3)."

I will turn to the subject of incorporated legal practices (ILPs) and multidisciplinary practices (MDPs) shortly.

THREE APPROACHES: LIST, BROAD OR COMMON LAW

There has been much debate and disagreement amongst lawyers and regulators as to which method is the most effective: the list method of stating the areas of law that should be reserved to legal practitioners or the broad prohibition approach as defined in the model laws and the 2004 New South Wales Act.

A third approach would be to follow the common law decisions. In general, the Courts have regarded the giving of legal advice, the drafting of documents

which affect rights and duties and appearing for parties in litigation before the Courts as work that should be done by qualified legal practitioners.

It would appear that the broad approach adopted by the model rules and the 2004 New South Wales legislation will lead to a reliance on the courts to determine on a case by case basis what is or is not considered to be legal work for the purpose of establishing whether the prohibition for non-lawyers performing such work should apply. This could be a very lengthy process, and it is suggested that perhaps a better way would be to incorporate some of the definitions found in the common law decisions into a list approach to defining legal work.

From the regulator's perspective, it must be considered that consumer protection is paramount in this debate. Consumer protection in my view can best be achieved where the provision of legal services is appropriately regulated. I am concerned that under the broad or prohibitive approach, the result may be that individuals with legal qualifications but who avoid obtaining a practising certificate, will be practising outside the regulatory regime. They could provide "legal services" in areas that might be considered uncertain in relation to the prohibition, and therefore be un-regulated and un-insured. This would not be in the best interest of consumer protection.

INCORPORATED LEGAL PRACTICES INCLUDING MULTIDISCIPLINARY PRACTICES

Traditionally, NSW solicitors practiced as sole practitioners, or in partnership with other lawyers. While sole practitioners and partnerships remain the most prevalent form of legal practice in NSW, the use of "multi-disciplinary partnerships" ("MDP's") involving legal practitioners and non-lawyers working together and sharing receipts, has been permitted under the *Legal Profession Act 1987* (NSW) ("LPA") and the *NSW Professional Conduct and Practice Rules Legal Profession Act (1987)* ("Rules").

In 1998, the National Competition Policy Review determined that the rules governing MDPs were anti-competitive and should be repealed. As a result, in December 1999 the rules were amended such that it was no longer necessary for lawyers to retain the majority voting rights in an MDP, and the net income of the MDP could be shared by lawyers and non-lawyers without restriction. Such changes meant that the operation of MDPs has essentially been unfettered since December 1999.

The *Legal Profession (Incorporated Legal Practices) Act 2000* ("the Act") and the *Legal Profession (Incorporated Legal Practices) Regulation 2001* ("Regulations") came into force in New South Wales on 1 July 2001. The Act and Regulations enable providers of legal services in NSW to incorporate by registering a company with the Australian federal corporations agency, namely the Australian Securities and Investments Commission ("ASIC"). Once registered with ASIC, the rules that govern the framework of the ILP are found not only in the company's constitution, the Act and the Regulations, but also in the nation-wide "Corporations Act."

Legal practitioners who practice as "solicitor directors" or employee solicitors of such ILPs continue to be subject to their professional obligations under the LPA, the Legal Profession Regulation 2000, the Rules and the general law. However, to the extent that the provisions of the Act or Regulations conflict with the Corporations Act, the provisions of the LPA will prevail.

As the overall framework for an ILP is that of a corporation under the Corporations Act, the provisions of the Act with respect to the establishment of an ILP are relatively straightforward. An ILP will be characterised by the appointment of at least one "solicitor director" who is generally responsible for the management of the legal services provided in NSW by the ILP. A solicitor director is a solicitor who holds an unrestricted practising certificate permitting such person to practise as a solicitor or barrister in NSW and who is appointed as a director of an ILP. To obtain an unrestricted practising certificate, a legal practitioner must attend a practical management course at the NSW College of Law. My Office has prepared additional material for the practical management curriculum such that solicitor-directors, or prospective solicitor-directors, are educated about the duties and obligations involved in such role.

Regulation 24 provides that each solicitor director of an ILP (and any solicitor who provides legal services) must ensure that a disclosure is made to a client with respect to the provision of "legal" and "non-legal services" by the ILP. The disclosure must be in writing and include certain information. The disclosure must also be made before any legal services are provided to a client or as soon as practicable after being engaged by the client.

Regulation 22 defines "non-legal services" as "services provided by an incorporated legal practice that are not legal services, but does not include clerical or administrative services (such as typing, filing and photocopying) that are provided in connection with legal services." The term "legal services" as used in Regulation 24 is not defined, however, in Section 48E(1) of the LPA, "general legal work" is defined.

Despite the definition of "general legal work," there are some areas of the law in which there is no guidance as to whether such work should only be provided by a lawyer, and which areas of work may be performed by either a lawyer or non-lawyer. The issue regarding the distinction between "legal work" or "legal services" and "non-legal services" arose in respect of multi-disciplinary partnerships and, in view of Regulation 24, is again the focus of debate.

While the development of a comprehensive definition would no doubt be very difficult, it has been suggested that, "to the extent that "legal work" can be identified, it should be done by lawyers, for the protection of the consumer." However, in an evolving market for professional services it is very difficult to restrict the interpretation of tax law, or the compliance aspects of migration law, to lawyers, while prohibiting tax accountants and migration agents from interpreting the law and performing such work. While this issue has not been

resolved, what is certain from the Act is that persons who are not qualified lawyers but who *act* as lawyers in NSW are not regulated by my Office.

Section 47E(3) of the Act is "mandatory" in that it states that it *is* professional misconduct if any solicitor director does not ensure that:

(a) appropriate management systems are implemented and maintained to enable the provision of those legal services in accordance with the professional obligations of solicitors and the other obligations imposed by or under this Act; and
(b) any conduct of another director of the practice that has resulted or is likely to result in a contravention of those obligations is reported to the Law Society Council promptly after the solicitor director becomes aware of it; and
(c) any professional misconduct of a solicitor employed by the practice to provide legal services is reported to the Law Society Council promptly after the solicitor director becomes aware of it; and
(d) all reasonable action available to the solicitor director is taken to deal with any professional misconduct or unsatisfactory professional conduct of a solicitor so employed by the practice.

The concept of "appropriate management systems" in section 47E(3)(a) is not defined in the Act. Accordingly, there has been much deliberation about the meaning of this phase and how it should be assessed from a compliance and regulatory perspective.

The Act gives the Office of the Legal Services Commissioner and the Law Society wide powers to investigate and review the operation of ILPs. In relation to investigations, I am at liberty to exercise my traditional powers of investigation in relation to ILPs in the same way as my powers apply to persons who are or were legal practitioners. My investigative powers in respect of an ILP also extend to all the affairs of the ILP and to all of its documents, provided the investigation relates to the provision of legal services.

In respect of conducting reviews, either my Office, or the Law Society may conduct a review of an ILP's compliance (and that of its officers and employees) with the requirements of the Act. However, in practice, it is generally agreed that my Office will be the primary body conducting such reviews.

In practice, my Office has assumed the role of reviewing ILPs for compliance with the Act and Regulations. The test for compliance is found in s47E(3)(a) of the Act which stipulates that it is professional misconduct if a solicitor director does not ensure that "appropriate management systems" are implemented and maintained by the ILP to ensure that legal services are provided by solicitors in accordance with the Act.

As previously stated, the Act does not define "appropriate management

systems." Accordingly, my Office worked collaboratively with the Law Society, the NSW College of Law and "LawCover" (the professional indemnity insurance body) ("the organisations") to determine the objectives to be met to help ascertain whether an ILP has "appropriate management systems" in place. The approach formulated is an "education towards compliance" strategy in which ILP's must show that they have procedures in place which evidence compliance with what my Office considers to be the ten objectives of a sound legal practice.

The ten objectives or "ten commandments" as they have become known, are 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 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 (minimising 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 LPA in relation to trust accounts.

To enable solicitor directors to assess their management systems, a standard "self assessment" document was developed and is sent to all solicitor directors as part of the impending ILP review programme. It is acknowledged that as ILPs vary in terms of size, work practices and nature of operations, no "one size fits all" in terms of meeting uniform criteria in order to meet the objectives.

Instead, the self-assessment document contains concepts to consider when addressing each of the ten objectives and then examples of what an ILP *may* do to evidence compliance with each of the objectives. For example, under the objective of maintaining "competent work practises to avoid negligence," a

concept to consider is that, "fee earners practise only in areas where they have appropriate competence and expertise." The self-assessment document then suggests that an example of a procedure that will evidence compliance is that there is "a written statement setting out the types of matters in which the practice will accept instructions and that instructions will not be accepted in any other types of matters." The self-assessment document also contains a column within which the solicitor director can rate the ILP's compliance with each of the ten objectives as either "Compliant," "Non-Compliant" or "Partially Compliant."

The ten objectives and the self-assessment document were extensively tested both within a forum of interested parties and with over twenty practicing law firms before being sent out to incorporated practices at large.

In February 2004 the first batch of 300 self-assessment forms were sent out to those incorporated legal practices who existed at that time. We ultimately received back 294 completed forms.

Not all forms received stated that the relevant incorporated legal practice was compliant with all aspects of the self-assessment, indeed the majority required assistance from this Office, the Law Society and the College of Law, to obtain a standing of being fully compliant.

At the time of writing this paper there are over 410 incorporated legal practices in New South Wales.

MULTIDISCIPLINARY INCORPORATED LEGAL PRACTICES

It has been argued that the reason behind establishing the somewhat onerous requirements and responsibilities of the solicitor/director(s) of incorporated legal practices was to address the problem of establishing ethical standards for multidisciplinary legal practices which contain non-lawyers.

A concern existed that where a multidisciplinary incorporated legal practice was formed, a solicitor/director may be out voted or pressured by other directors who are not legal practitioners into behaviour which would be contrary to a legal practitioner's duties and responsibilities to the Court or as established under the Legal Profession Act and Regulations.

Accordingly, not only is it professional misconduct for a solicitor/director not to ensure that appropriate management systems are implemented and maintained, but the conduct of any other director, whether or not they are a lawyer, that the solicitor/director considers may render the practice in breach of the Legal Profession Act must be reported to the Law Society.

In addition, should the solicitor/director have their practising certificate removed for any reason, the incorporated practice has seven days in which to replace the solicitor/director or go into external administration.

However, the main subject for discussion in this paper, is the question of what

is covered by the term "legal services".

My Office is aware that a number of multidisciplinary incorporated legal practices are actually providing financial services as defined by the *Financial Services Reform Act 2001*.

In a hypothetical multidisciplinary incorporated legal practice we might have a solicitor, an accountant, a tax agent and a financial adviser. A hypothetical client approaches the practice for some assistance in estate planning. The client is fairly wealthy and wishes to leave their estate to three of their children equally divided between them, but the client wishes to ensure that their eldest child who has become an heroin addict receive nothing from the estate.

Whereas it is possible that the advice that the hypothetical client receives from any of the stated members of the practice could be the same, what if it were not? The difficulties in "writing someone out of a will" in the face of the possibility of a claim under the Family Provisions Act would be well known to lawyers. An accountant may be nothing more than a holder of an accountancy degree. If they had become a Certified Public Accountant or a Chartered Accountant they would have had to do additional educational work and be subject to forms of regulation greater than someone who simply held a degree, but still arguably not as extensive as that which applies to legal practitioners. Taxation advisers and financial advisers may or may not be licensed and the question of whether they carry any professional indemnity insurance would need to be explored.

In this example the question of whether or not the advice given or the services provided is actually legal advice or a legal service is left up in the air. Is the service or advice legal if it is given by the lawyer and not so if given by one of the non-lawyers? Is all of the advice or service provided made "legal" by the fact that it is given by a lawyer, or can a lawyer give non-legal advice or services within such a practice?

There appears to be serious consequences following from the choice of adviser by our hypothetical client. Working with the lawyer would attract the operation of his or her mandatory professional indemnity insurance should an issue of negligence arise, as long as the work performed was "legal work". Were the lawyer to misappropriate the client's money, the Fidelity Fund which applies only to legal practitioners would compensate the loss dollar for dollar. Can the same be said of negligent advice or unlawful activities by the non-lawyer members of the incorporated legal practice?

The *Financial Services Reform Act 2001* requires that financial advisers now be licensed. Legal practitioners argued strenuously at its introduction that legal practitioners providing financial advice need not be licensed as the regulatory regime within which they work provides sufficient consumer protection so that licensing would be unnecessary. The lawyers were, at least partially successfully in this argument. However, with the introduction of multidisciplinary incorporated legal practices which are providing financial services, this argument or debate may well be re-ignited.

CONCLUSION

The overwhelming purpose for regulation in the legal profession is consumer protection. It has been argued that consumer protection can best be achieved through the pure application of market forces.

In my view, this is misconceived as it not only ignores the large power imbalance between legal practitioners and the majority of their clients but also ignores the fact that there is no legal services market due to the absence of information to the public about many aspects of the legal profession, including the definition of "legal work".

As outlined in this short paper there have been several legislative attempts to address the problem of defining legal work, either in the positive or the prohibitionist view, and the shortcomings of both systems should be obvious.

Allowing the Courts to determine what is or is not legal work on a case by case basis would be inefficient and extremely costly.

However, it appears extremely important to attempt to define legal services or legal work due to the high level of critical legal and social analysis that is or should be required when determining the nature, breadth and content of any monopoly of service delivery.

Also touched on in this paper is the overlapping of regulatory regimes that apply to the provision of what might be defined as legal services or legal work. These include the regulatory roles of ASIC, my Office and other State equivalents, the Legal Professional Associations, the Financial Services Reform Act, the NSW Department of Fair Trading and the Migration Agents Regulatory Authority, but to name a few.

With the acknowledgement that what might be defined as legal work is performed by non-lawyers in accountancy practices, tax offices or multidisciplinary incorporated legal practices, it is clear that a consistency of approach would be most attractive.

It is widely acknowledged that the regulatory regime and the ethical duties and responsibilities that apply to legal practitioners is of the highest standard, even though offices like my own have to deal with a number practitioners who fail to meet those standards.

What I propose is, rather than continuing to struggle with the problem of defining what legal work actually is, we should be extending the regulatory and ethical regime which applies to legal practitioners to all those who provide legal services or perform such work whether or not they are certified legal practitioners. This would not only provide levels of consistency and certainty, but also avoids the question of the extent or preservation of monopolies and in my view provides the level of consumer protection that the community both

demands and deserves.

In its 2000 report on the licensing of legal practitioners, the Legal Profession Advisory Council stated that they would support the reservation of legal work to qualified lawyers as being in the public interest but went on to say that they believed that legal work or services provided by unqualified people should also be properly regulated.

This is consistent with Federal Government initiatives, particularly by the Financial Action Task Force on Money Laundering who have recognised that to effectively address the complex issue of money laundering requires the assistance and regulation of lawyers, accountants, tax advisers and financial advisers as well as financial institutions themselves.

To achieve consistency, lack of confusion and consumer protection, the regulation of legal services or legal work should extend to all who perform such services or work and be regulated by one body.