

INCORPORATED LEGAL PRACTICES PORTAL PROJECT – TECHNOLOGY AT THE OLSC

Since July 1, NSW legal service providers have been permitted to incorporate and provide legal services to clients either alone, or alongside other service providers who may, or may not be, legal practitioners.

There are currently 745 incorporated legal practices (ILPs) operating in NSW, of which approximately 5 are incorporated multi-disciplinary practices (MDPs). There are currently two ILPs that have listed on the Australian Stock Exchange, with another currently making its initial public offer. New ILPs are being formed at a rate of approximately 15-20 per month.

By virtue of sections 140(3) and 670 of the Legal Profession Act 2004 (LPA), the Office of the Legal Services Commissioner (OLSC) has the role of auditing ILPs to determine compliance with the legislative obligations which apply. The test for compliance is found in part in s 140(3) of the LPA, which provides that a legal practitioner director must ensure that “appropriate management systems” are implemented and maintained by the ILP. A failure to do so is capable of being professional misconduct.

The LPA does not define “appropriate management systems”. Accordingly, the

OLSC worked collaboratively with the Law Society of New South Wales, LawCover, the College of Law and other stakeholders to determine the objectives to be met to help ascertain whether an ILP has “appropriate management systems” in place. The approach formulated was an “education towards compliance” strategy which requires ILPs to demonstrate that they have procedures in place to ensure compliance with what the OLSC considers to be the ten key objectives of a sound legal practice. All ILPs are required to self-assess their management systems and rate their compliance with the following ten objectives in a Self-Assessment Document:

- Negligence – providing for competent work practices
- Communication – providing for effective, timely and courteous communication.
- Delay – providing for timely review, delivery and follow up of legal service.

- Liens/file transfers – providing for timely resolution of document/file transfers.
- 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.
- 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 which may arise in relationships with debt collectors and mercantile agencies, or conducting another business, referral fees and commissions etc.
- Records management – minimising the likelihood of loss or destruction of correspondence and documents through appropriate document

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retention, filing, archiving etc and providing for compliance with requirements regarding registers of files, safe custody, financial interests.

- 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 and costs assessors.
- 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.
- Trust account regulations – providing for compliance with Section 253 of the LPA and proper accounting procedures.

Each of these areas (colloquially known as the ‘ten commandments’) are essentially a systemisation of ethical conduct. Each of the ‘ten commandments’ refers to certain behaviours which, if followed, will result in an ethical outcome and hopefully effect cultural change.

To enable legal practitioner directors to assess their management systems, the OLSC developed a standard self-assessment document. This document is sent to all ILPs shortly after commencement. The self-assessment document is completed and then forwarded to the OLSC. Once received the OLSC assesses the document for compliance and undertakes audits where necessary pursuant to section 670 of the

Act. In addition to these tasks the OLSC also provides support to ILPs who ring the ILP Unit for guidance. As the number of incorporations increase, so too do the regulatory, administrative and educative tasks which fall to the OLSC as regulator.

Noting the growth in incorporated legal practices and the likelihood that an increasing number of firms will incorporate over the next few years, the OLSC has been working toward establishing an effective system to monitor compliance with the self-assessment programme. To this end the OLSC has worked closely with the Information Technology Services at the Attorney General’s Department to design and develop a web-based Portal for assessing compliance amongst ILPs. The main objectives of the Portal are to:

- Enable the electronic submission of administrative and regulatory information by ILPs to the OLSC;
- Track the life cycle of an ILP by collating and indexing data in a searchable database;
- Allow the viewing, completion and submission of the self-assessment form and any supporting documentation online by an ILP;
- Automate the self-assessment process including validation of information submitted by ILPs;
- Enable the generation of standard and customised correspondence;
- Automate the tracking of the annual self-assessment process;

- Provide standard and customised reports for the OLSC and online distribution to other approved external parties such as ILPs, ASIC and the Law Society;
- Provide tracking of the assessment process electronically, including generating email alerts in the self-assessment process to improve monitoring of the process by both Legal Practitioner Directors and OLSC staff;
- Provide profiling to assist in the identification of suitable targets for information dissemination or audit by the OLSC;
- Enable the statistical analysis of ILP data using OLAP tools.
- Provide customisations of and alternate paths through the self-assessment and display different types of information that is relevant to ILP profiles;
- Enable electronic distribution of regulatory and educational information by the OLSC to ILPs and other interested parties via a web based portal; and
- Facilitate the adoption of good business practices and appropriate management systems through analysis of data submitted by ILPs.

The design phase of the Portal Project is complete and we are presently considering tenders for the project. We anticipate that the construction phase of the project will be completed in mid 2007. Following user acceptance testing and the successful completion of a pilot programme, the system should be available to all ILPs by early 2008.

It is expected that by 2010 there will be approximately 1200 ILPs in New South Wales alone. As the numbers of ILPs increase both within New South Wales and nationally, the position of New South Wales as market leader becomes more significant, with other regulators increasingly looking to the New South Wales experience for guidance with their own jurisdictions. The self-assessment program has been widely acclaimed both by regulators and practitioners as a success. In October 2005 at the Annual Conference of Regulatory Officers in Adelaide, regulators of the legal profession in all Australian jurisdictions voted unanimously to adopt the OLSC "education towards compliance" approach to the regulation of ILPs (namely, self assessment based on the ten commandments). New South Wales must continue to lead the way in terms of effective, efficient and sustainable oversight of ILPs. The ILP Portal Project hopes to achieve this aim.

MONEY LAUNDERING

By Steve Mark
Legal Services Commissioner

Last month I presented a paper at a conference in Sydney dealing with money laundering and counter terrorist financing. The purpose of the conference was to provide participants who were mainly from the financial world, with anti-money laundering strategies and solutions to protect their organisations, optimise data management and ensure compliance with the recently enacted Anti-Money Laundering (AML) legislation in Australia. I was asked to address the philosophical and ethical underpinnings of the new wave of AML legislation and its impact on the accounting and legal professions.

Money laundering is a real threat to 20th century society. Like terrorism, money laundering has the potential to cause significant social and political damage to the global community. Today rapid developments in financial information, technology and communication allow money to move anywhere in the world with speed and ease. In Australia today, fewer than 10 per cent of transactions are carried out in bank branches.¹ Criminals are taking advantage of the globalization of the world economy by quickly transferring funds through a variety of intuitive methods across international borders, including through law firms.

Recently the OLSC was asked to investigate a complaint from a bank in the UK about a sole principal law firm. The bank alleged that a fraudster withdrew \$260,000 from a customer account, transferred the funds into the trust account of the law firm and instructed the law firm to transfer the funds into an offshore account. This case is the first known case of money laundering via a law firm that has come to the attention of regulators in Australia. Unfortunately, it

will not be the last. As worldwide financial services compete to achieve greater ease and facility in the transfer of funds and the provision of services, money laundering becomes easier to successfully achieve.

Noting these changes in the money-laundering environment in December 2003 the Australian Government announced a review of Australia's Anti-Money Laundering/Counter Terrorist Financing (AML/CTF) system as part of the implementation of international standards issued by the Financial Action Taskforce (FATF).

On 12 December 2006 a new package of money laundering legislation was proclaimed. The new AML/CTF legislation will replace the existing *Financial Transaction Reports Act 1988* (FTRA) and will be supplemented by Regulations together with legally binding AML/CTF Rules and non-binding guidelines to be issued by the Australian Transaction Reports and Analysis Centre (AUSTRAC).²

Although the first tranche of the Act is supposed to only relate to the financial services sector as well as the gambling sector and bullion dealers, the Act is in reality likely to affect the provision of legal services. For example, lawyers providing a financial service such that may be provided by some incorporated legal practices and multi-disciplinary practices will be covered under the Act. Pursuant to the new Act therefore, lawyers may be obliged to undertake the following measures to comply with the requirements of the Act:

- Undertaking a money laundering and terrorism financing risk assessment on their existing business functions;

¹ http://www.ag.gov.au/www/agd/agd.nsf/Page/Anti-moneylaundering_Factsheets

² The full text of the draft Rules are available on AUSTRAC's website at www.austrac.gov.au

MONEY LAUNDERING (CONTINUED)

- Developing and implementing compliance programs and ensuring that all staff are trained;
- Developing and implementing systems to identify high-risk customers and monitoring those customers to report suspicious transactions;
- Ensuring all staff are aware of what a “suspicious matter reporting obligation” is and how not to breach the tipping-off rules;
- Establishing systems and processes for collecting and retaining both identification and transaction related records;
- Providing their business details are recorded on a register of “providers of designated remittance services” that is maintained by AUSTRAC.

The implications of the reporting requirements under the Act has raised numerous concerns by the professions, specifically, that the government does not

understand the true impact of the reforms it is proposing.³ For the legal profession, the reporting requirements present a substantial danger to the foundations of the practice of law and adversely interfere with the relationship between lawyers and clients.⁴ The proposed compliance requirements for lawyers are incompatible with the principles of client confidentiality and legal professional privilege. The Law Council of Australia, the peak national body representing the legal profession, has made several submissions throughout the extensive consultation process on the Act outlining their concerns. The Law Council have also expressed their concerns that the proposed new compliance arrangements place an unreasonable cost burden on legal firms, particularly small firms and sole practitioners, raise the potential

³ S. Fagg, “Clean up time”, *Lawyers Weekly*, 8 December 2006 at p.21

⁴ Law Council of Australia, “Revised Anti-Money Laundering and Counter-Terrorism Financing Exposure Draft Bill, 28 August 2006 at p.4.

for actions of lawyers to attract criminal liability and create a need for lengthy education programs to explain any reforms.⁵

The independence of the legal profession is an essential element of a pluralist democratic society and should not be compromised. Accordingly, legislation dealing with money laundering should not unduly encroach on the independence of the profession.

It is the experience of the OLSC that organizational culture is the best defence against unethical behaviour. Proof of this fact is validated by our successful approach to the regulation of ILPs using the concept of appropriate management systems. Issues such as recruitment, staff retention and education including ethical education is an essential weapon for the world against money laundering.

⁵ Ibid.

COMING UP

Our next edition of *Without Prejudice* will discuss ‘course of conduct’ complaints and repeat offenders in the legal profession.

WITHOUT PREJUDICE VIA EMAIL

As indicated in our last issue the OLSC will send out future issues of *Without Prejudice* via email. If you would like to receive *Without Prejudice* via email and haven’t already let us know please contact us at OLSC@agd.nsw.gov.au

Comments ? Suggestions ? Something you’d like to know more about ? Write to us at OLSC@agd.nsw.gov.au



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GPO Box 4460, Sydney NSW 2001 DX 359 Sydney

Level 15, Goodsell Building, 8-12 Chifley Square Sydney 2000

Tel: 02 9377 1800 **Fax:** 02 9377 1888 **Toll Free:** 1800 242 958 www.lawlink.nsw.gov.au/olsc

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