

Incorporated Legal Practices

Explanatory Notes

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Version 6

Introduction

Historically, the regulation of lawyers focused on individual ethical behaviour. The individual takes responsibility for their own acts and omissions – this is reflected in the decisions of the disciplinary bodies in all Australian States. However, with the commencement of section 117 (3) of the *Legal Profession Act* (“**Act**”) on 1 July 2007 requiring incorporated legal practices to implement and maintain “appropriate management systems” a paradigm shift occurred in this State in terms of the regulation of the profession – the principle of “law firm” regulation was recognised.

Relevantly, sections 117(2) – (4) of the Act provide:

(2) Each legal practitioner director of an incorporated legal practice is, for the purposes of this Act, responsible for the management of the legal services provided in this jurisdiction by the practice.

(3) Each legal practitioner director of an incorporated legal practice must ensure that appropriate management systems are implemented and kept to enable the provision of legal services by the practice-- (a) under the professional obligations¹ of Australian legal practitioners and other obligations imposed under this Act; and (b) so that the obligations of the Australian legal practitioners who are officers or employees of the practice are not affected by other officers or employees of the practice.

(4) If it ought reasonably to be apparent to a legal practitioner director of an incorporated legal practice that the provision of legal services by the practice will result in breaches of the professional obligations of an Australian legal practitioner or other obligations imposed under this Act, the director must take all reasonable action available to the director to ensure that—

(a) the breaches do not happen; and

(b) if a breach has happened--appropriate remedial action is taken in relation to the breach.

The important feature of this section is the obligation on ILP directors to implement and maintain “appropriate management systems”. An appropriate management system simply means a firm’s formal and informal management policies, procedures and controls, work culture, and habits of interaction and practice that support and encourage ethical behaviour by all employees. In short, the intent of the Act is that the firm will develop and implement management systems and culture which enables them to detect, prevent and correct employee conduct which may result in contravention of their professional and legislative obligations.

Obviously, that does not mean that management systems appropriate for one law practice will be appropriate for another. Likewise, there is no one best way to proceed with the implementation of a management system and there is no one system that is applicable to every practice.

For example, what is an appropriate management system to a large commercial law practice is different to that applicable to a sole practitioner conveyancing practice. The ethical obligations may be the same but the management systems to be designed, implemented and maintained will by necessity be different.

The Act, then, clearly provides a greater recognition that law firms themselves are influential in supporting or undermining ethical behaviour. In accordance with that recognition, the Commissioner is now treating the law firm itself as a valid subject of ethical inquiry and responsibility.

¹ The Act defines the professional obligations of an Australian legal practitioner at section 110 ‘to include duties to the Supreme Court; obligations in connection with conflicts of interest; duties to clients, including disclosure; and ethical rules the legal practitioner must observe.’

We appreciate that some firms may have concerns about a heavier regulatory burden. We understand these concerns and we are committed to ensuring that our regulation is proportionate and targeted so as to maintain and enhance public confidence in the profession and to sustain high standards. You will see in the discussion below that we have designed much of our audit strategy to be consistent with that goal.

The purpose of this explanatory statement is to provide law practices with some general information about how to undertake the initial self assessment audit process as well as a brief background to the Commission's approach to the regulation of ILPs.

Initial Self Assessment Audit

An initial self-assessment audit, also called an internal audit, is conducted internally by the ILP for management review of the law practice's compliance with the *Legal Profession Act 2007* ("**Act**"). Accordingly, the initial self-assessment audit forms the basis for an ILPs management review and self-declaration of compliance with the provisions of part 2.7 of the Act and in particular against the 10 Objectives set out in Part B of the self assessment form.

As you are probably aware, regulators are increasingly looking at what risk management procedures are in operation within businesses and this is equally true in respect of law practices. The approach reflects the view that the completion of internal (and external) audits as part of a regulatory framework results in better management which generally promotes compliance and prevents non-compliance. The initial self assessment audit which you are now being required to undertake provides the structure to do this since it not only covers the main causes of complaints against solicitors, but also includes specific risk management systems and procedures.

In line with principles of better regulation, the Commission views the completion of the self assessment audit as an investment by both the firm and the Commission in a prevention rather than costly cure approach. It also reflects the "*education toward compliance*" approach which has been adopted by the Commission's interstate partners.

The key objectives of the initial self assessment audit can be summarised as follows:

- to assist the law practice identify systems which may lead to improved client care and demonstrate the existence of an "appropriate management system"
- to obtain information about the corporation to enable future risk analysis of ILPs to be undertaken
- to identify areas of non-compliance with the Act so that remedial action may be undertaken by the ILP.

Self-assessment is an approach that enables you to look closely at your practice and the systems you and the organisation have in place. It should be seen as a platform for discussion, the identification of issues and the implementation of improvements to the law practices management systems² to enable compliance by its officers and employees with the *Legal Profession Act 2007*, the *Australian Solicitors' Conduct Rules 2012*, *Legal Profession Regulations 2007* as well as the general professional obligations recognised at common law. We strongly believe that the completion of the self assessment audit will result in better service to your clients and real benefits to the practice as well.

² We recognise that a number of best practice quality management standards are being utilised within firms and those ILPs that are currently certified to such a standard are requested to inform this Office in writing of the certification held and its expiry date. Completion of the self assessment form may not be necessary for those practices that are already certified to a quality management standard.

Whilst undertaking the self assessment audit it is important to remember that the intent of Act is to encourage ethical practice within ILPs and to promote professional standards, competence and honesty. It is also important when completing the audit not to simply view it as an administrative hurdle to be completed as quickly as possible. The Commission encourages ILP's to engage positively in the self assessment process and to candidly identify areas which require improvement.

You will note that the self assessment audit is divided into Part A (Information about your Practice) and Part B (Self Assessment). These are discussed below.

Part A Information about your Practice

Risk assessment is the key to transparent and proportionate regulation. The purpose of this part is to obtain information so that we can better understand your firm as well as to develop a better picture of potential risks to clients and the public interest. It will enable us to be proactive in regulating the profession rather than simply being reactive to complaints about conduct which has already occurred.

To achieve this we are requiring firms to provide us with different information about the practice so we can develop various matrixes of possible risk factors. Against this information we will be able to assess whether particular factors or combination of factors give rise to a higher or lower risk of misconduct occurring within a firm.

Obviously, the assessment of those risk factors will assist the Commission in determining whether or not an external audit is required.

Please be assured that the information gathered is strictly confidential and is subject to the confidentiality provisions provided by the Act.

Part B Self Assessment - Appropriate Management Systems

This part relates to ensuring that your practice implements and keeps appropriate management systems. The requirement to implement and keep appropriate management systems is designed towards ensuring that a practice maintains an "ethical infrastructure" which enables its employees to practice in accordance with their professional obligations. The section in effect establishes a system of "practice" based" regulation whereby the practice (through the legal practitioner director) is liable to disciplinary proceedings for not taking reasonable steps to having such management systems.

In consultation with the Queensland Law Society, the Legal Services Board in Victoria and the Legal Services Commissioners of NSW and Victoria, the Commission has agreed to a list of ten objectives that we consider should be addressed by such systems. The self assessment audit form outlines the key concepts for legal practitioner directors to consider and also provides suggested approaches to ensure the ILP meets the objectives. The suggestions are not exhaustive or prescriptive, as each ILP will differ in terms of its size and the nature of legal work undertaken. These examples are provided merely as a guide to the types of procedures and systems that may be appropriate to fit the needs of both your practice and your clients. It will be up to each ILP to determine the most effective systems for their practices.

Given that this could be the first time that service delivery and operations have been systematically reviewed in some practices, the self-assessment audit has been designed to be as simple, time effective and the least resource intensive as possible. Ideally, all key staff members in the practice should be involved in the process. The information collected during the self-assessment audit should then be carefully analysed to see how it could be used to improve the delivery of legal services. The perspective of clients should of course also be considered in this process.

You will note that Part B of the form is divided into 4 columns.

Column 1 contains the key concepts to be considered in determining your overall rating which must be completed at the end of each Objective. If you believe any of the key concepts are not applicable, please note them as being inapplicable and provide reasons.

Column 2 contains **examples** of the type of systems which may demonstrate that the key concept in column 1 has been addressed. If your practice uses an alternate system to those described in this form and which you believe addresses the key concepts, please describe it.

Column 3 details the arrangements your practice **already** has in place which addresses the key concept and the location of any material which evidences that system.

For example, if you were assessing Objective 9 **Supervision** and your practice already has a system in place which addresses the key concept of file reviews and that is contained in the your practices Office Manual, you could complete column 3 as simply as “*Quarterly independent file review procedure in place. See Office Manual para 6.6*”. This will assist in conducting future external audits undertaken to verify the self assessment form.

Column 4 provides an opportunity to inform the Commission what steps (if any) your practice intends to undertake in the future to improve any perceived weaknesses within the practices management systems. If you rate yourself as either 1 or 2 within an Objective, you must provide details of what steps you intend to undertake to improve your management systems and the timeline in which those improvements will be implemented.

The Self Assessment Rating - Only at the end of each section is it necessary to assess the performance of the firm’s management systems against the **overall Objective** (eg *Objective 9 Supervision*) based on the rating scale 1- 5 set out below.

SELF-ASSESSMENT RATING	EXPLANATION
1	The Objective has not been addressed.
2	The Objective has been addressed but management systems are not fully functional.
3	Management systems exist for the Objective and are fully functional.
4	Management systems exist for the Objective and are fully functional and regularly assessed for effectiveness.
5	The Objective has been addressed, all management systems are documented and all are fully functional and all are assessed regularly for effectiveness plus improvements are made when needed.

It will be up to the legal practitioner director(s) to determine the relevance to the practice of any gaps in systems identified through the self-assessment and precisely what action needs to be taken to rectify them. However, when considering what systems are appropriate for your practice you should consider that one of the Corporation’s objectives should be to ensure that its policies and procedures are updated as required to avoid compliance breaches from occurring. Given the provisions of part 2.7 of the Act, you should consider management systems which aim to ensure that non-compliance with the

Act, Regulations and Rules by staff members can be detected and for those compliance failures to be rectified.

Following completion of the Audit

Once you have undertaken the audit, please complete the self assessment form provided or use the electronic version from our website www.lsc.qld.gov.au. A law practice is required to undertake the initial self-assessment audit within 3 months of receipt of this documentation and submit the completed self assessment form. Please note that failure to respond to the self assessment audit by the due date may trigger an external audit of your ILP by the Commission or the QLS pursuant to section 130 of the Act. If you require further time in which to complete the audit, please do not hesitate to contact us. You should also note that failure to implement and keep appropriate management systems may amount to professional misconduct or unsatisfactory professional conduct.

All legal practitioner directors should be aware that completion of the initial self assessment audit does not in itself indicate compliance with the Act. Once the Commission has received your self assessment form, we will evaluate the information provided by you to establish if professional development is needed to assist with complying with the Act or with maintaining management systems. In the event that you have identified areas which require improvement the Commission may contact you to check that the proposed changes have been implemented.

Obviously, the initial self assessment audit does not deal with all of the obligations imposed by the Act on the Corporation, legal practitioner directors and executive officers. If you require further information regarding the regulatory framework of the Act as it relates to ILPs, I suggest that you refer to the Commission's website located at www.lsc.qld.gov.au.

The Commissioner trusts that the above discussion is of assistance when undertaking the self assessment process. However, if further assistance or guidance is needed, please contact Queensland Law Society Practice Support Manager 1300 367 757 or the Commission's officer on ph 07 3406 7737.