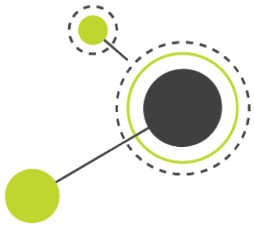

STANDPOINT

Proactive Regulation - Review of Global Initiatives and Findings

2014

Standpoint Decision Support Inc
www.StandpointDecisions.com
info@standpointdecisions.com
1+ 604-671-0012

Proactive Legal Regulation Review

Acknowledgements

We would like to thank Lysandra Bumstead for conducted the original research and developing a draft of this document.

Introduction

Among Canadian law profession regulators, discussions surrounding regulatory regime change, including proactive regulation, appear to be in the early days of implementation, such as in Alberta,[1] British Columbia, Nova Scotia, Saskatchewan, and Ontario.[2] Manitoba benchers have considered a UK model regarding the desirability of a national regulator,[3] and the Canadian Bar Association (CBA) has developed a voluntary model Self-Assessment Tool.[4] At present, based on publicly available information, Nova Scotia appears to be the most actively engaged in developing proactive processes for adoption into its regulatory regime. Searches for key terms on the websites of other law societies, such as New Brunswick, Northwest Territories, Nunavut, PEI, and Yukon, did not yield promising results.[5] Searches for resources on proactive regulation were conducted through Quicklaw, Westlaw, Hein Online, AGIS (Australia Attorney General's Information Service), Legal Journals Index (UK), the PAIS International Database, Google, Google Scholar, and the online library databases of the University of British Columbia and the

---

[1] In its 2014-2016 Strategic Plan, the Law Society of Alberta has listed proactive intervention and remediation as strategies to achieve its goal of acting as a "model regulator". In the Plan, it states that its goal is to "[u]use proactive measures to assist lawyers to deliver high quality legal services, avoid professional negligence, properly manage trust funds, and demonstrate high levels of ethical behavior in their practices." See: Law Society of Alberta, "Strategic Plan 2014-2016", online: Law Society of Alberta <http://www.lawsociety.ab.ca/docs/default-source/default-document-library/2014-16_strategic-plan_final-.pdf>.

See also, Don Thompson. "Executive Director's Report: Three Dimensions of Risk Being Strategically Managed", *The Advisory*, 9:3 (December 2011), online: <http://www.lawsociety.ab.ca/files/newsletters/Advisory_Volume_9_Issue_3_Dec2011.pdf>.

[2] Nova Scotia is to a large extent at the forefront in Canada with respect to regulatory change, while BC and Ontario are also considering new approaches, including the latter's recent adoption of paralegals, and its 2014 approval of a consultation on alternative business structures. See: Law Society of Upper Canada, "Report to Convocation of the Professional Regulation Committee" by Margaret Drent (Toronto, February 27, 2014), online: <http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2014/convfeb2014_PRC(1).pdf>.

[3] Laurel S. Terry, "Trends in Global and Canadian Lawyer Regulation" (2013) 76 Sask LR 145-184 at 157.

[4] Ethics and Professional Responsibility Committee of the Canadian Bar Association, "Assessing Ethical Infrastructure in Your Law Firm: A Practical Guide", online: Canadian Bar Association <http://www.cba.org/CBA/activities/pdf/ethicalinfrastructureguide-e.pdf>. ["CBA"]

[5] The Yukon has, however, been engaged in consultations on proposed changes to its governing legislation, to regulate in a manner that is more responsive to current regulatory realities. See: "Toward a New *Legal Profession Act* Policy Paper" (November 18, 2011), online: Yukon Law Society <http://lawsocietyyukon.com/forms/policypapernovember2011.pdf>.

University of Toronto. Searches were also conducted of the websites of Canadian law societies, some foreign law societies, and some other professional regulators.

Proactive Regulation

Traditionally, lawyer regulation has been "reactive" and individualistic – that is, regulators respond to *ex post* concerns about individual practitioners. Proactive regulation, on the other hand, involves the institutional or organizational context in which lawyers practice, and identifies and addresses potential gaps before they materialize into problems.[6] While there has been some suggestion, for example, that regulators reconsider admission standards for students,[7] the literature presently available indicates that the growing discussions among legal regulators about proactive regulation overwhelmingly focus on its utility in ameliorating ethical conduct and mitigating complaints amongst its current members.

Both internationally and in Canada, legal regulators have begun to consider a number of trends in regulatory reform.[8] First, "who" should regulate lawyers, and should there be a move toward co-regulation or national regulation? Second, "what" should be regulated – that is, is there an increasing need for law societies to discuss regulating legal services, rather than merely providers? Thirdly, "when" should law societies regulate lawyers? Laurel S. Terry, for example, observes that Canadian law societies do not seem to perceive themselves as particularly proactive.[9] She anticipates that Canadian law societies will in future more directly consider when to regulate, especially given their prior proactive role with respect to regulating technology use by lawyers. She also notes the increasing number of academics calling for a more proactive

[6] CBA, *supra* note 4 at 1.
[7] Onen Zeynep, Darrel Pink, and Christian Tremblay. "Quality Assurance for Legal Professionals" (Abstract of talk delivered at the Spring 2014 Conference of the Federation of Law Societies of Canada) [unpublished].
[8] Terry, *supra* note 3.
[9] *Ibid*, at 170.

regulatory system in Canada, and suggests that the Canadian *Code of Professional Conduct* be amended to include a rule along the lines of the American Bar Association Model Rule of Professional Conduct 5.1,[10] because it could serve as "the lynchpin of a system of proactive ex ante regulation".[11]

Fourthly, questions arise as to "where" legal regulation occurs. Historically, lawyers and regulators were defined by geography; however, Terry posits that globalization has now made the practice of law "virtual, transnational, and borderless"[12] given that increasingly, lawyers may be located in one jurisdiction while working with clients who are in another. Questions thus arise as to whether, for example, the regulation of a lawyer ought to occur where the lawyer is located or where the client is. Fifthly, "why" are lawyers regulated, and what, if any, should legal regulators' regulatory objectives be? Finally, there are discussions around best practices and methods of regulation, including whether large firms representing sophisticated clients ought to be regulated differently from those who represent individual clients who may require additional protection.[13]

---

[10] Rule 5.1 of the American Bar Association *Model Rules of Professional Conduct* states:

Responsibilities Of Partners, Managers, And Supervisory Lawyers
(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

> (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
>
> (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

The American Bar Association, *Model Rules of Professional Conduct*, rule 5.1, online: <http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_1_responsibilities_of_a_partner_or_supervisory_lawyer.html>.

[11] Terry, *supra* note 3, at 172.

[12] *Ibid*.

[13] Terry, *supra* note 3.

Relatedly, Terry, Steve Mark, and Tahlia Gordon reviewed recently adopted regulatory objectives (or comparable statements) made by law profession regulators in Canada, Denmark, England and Wales, New Zealand, and Scotland, as well as proposed, but not as-then adopted, regulatory objectives in Australia, India, and Ireland.[14] They contended that the adoption of "regulatory objectives could help in achieving [regulators'] ultimate purpose of reducing complaints against lawyers and, particularly where coupled with principle-based regulation or outcomes-focused regulation, may facilitate disciplinary action based on first principles such as 'unconscionable conduct' rather than relying on specific breaches of proscriptive legislation".[15]

The Nova Scotia Barristers' Society (NSBS) is advocating for the development of a "proactive, risk-focused, principles-based regulatory regime" that includes clear regulatory objectives coupled with simplified regulations based on principles rather than details, to allow firms to adopt varying means to achieve such goals in a contextual manner.[16] Two comprehensive Consultation Reports[17] have been prepared for NSBS, noting the unique legislative[18] and

---

[14] Laurel S. Terry, Steve Mark, and Tahlia Gordon, "Adopting Regulatory Objectives for the Legal Profession" (2012) 80 Fordham L Rev 2685-2760.
[15] *Ibid*, at 2731.
[16] Nova Scotia Barristers' Society, "Transforming Regulation – Consultation Document" (February 3, 2014), online: Nova Scotia Barristers' Society < http://nsbs.org/sites/default/files/ftp/InForumPDFs/2014-02-03_TransformingRegulation_Consultation.pdf>.

See also: Nova Scotia Barristers' Society, "2014 Annual Report", online: Nova Scotia Barristers' Society <http://nsbs.org/sites/default/files/cms/publications/annual-reports/nsbsannrpt2014.pdf>; and Darrel Pink, "On the Precipice: The Future of Legal Regulation" (Paper delivered at the Law Society of Alberta Benchers' Retreat, Jasper, June 5, 2014), [unpublished].
[17] Steve Mark and Tahlia Gordon, formerly the Commissioner and Research & Projects Manager, respectively, at the NSW OLSC have now formed Creative Consequences P/L, which has been engaged to work with the NSBS on its regulatory reform project.

See: Creative Consequences P/L, "Transforming Regulation and Governance Project Phase 1", online: Nova Scotia Barrister' Society <http://nsbs.org/sites/default/files/ftp/InForumPDFs/NSPhase1Rstructure_Mar2014.pdf> ["NSBS Phase 1"]; and Creative Consequences P/L "Transforming Regulation and Governance Project Phase 2" Nova Scotia Barristers' Society <http://nsbs.org/sites/default/files/ftp/InForumPDFs/NSPhase2Rpt_May2014.pdf>. ["NSBS Phase 2"]
[18] Section 27 of the Nova Scotia *Legal Profession Act*, RSNS 2004 provides that unless otherwise stated, a member of the Society would include a firm, and s. 28 provides the Society the authority to develop professional and ethical standards for members. See NSBS Phase 1, *supra* note 17, at 12.

demographic[19] landscape in which the NSBS operates.[20] The reports contend that entity regulation and proactive management-based regulation (PMBR) can work effectively to reduce the NSBS' regulatory burden and to conserve resources. For example, the NSBS could focus resources on higher-risk firms while reducing or removing the regulatory burden on well-functioning firms.[21]

Entity Regulation (or "Ethical Infrastructure") and Incorporated Legal Practices

Ted Schneyer has been widely credited with pioneering the call for the adoption of "ethical infrastructure" by firms, which "consist[s] of the policies, procedures, systems, and structures—in short, the 'measures' that ensure lawyers in their firm comply with their ethical duties and that nonlawyers associated with the firm behave in a manner consistent with the lawyers' duties."[22] While it is not unusual for authorities to require educational and other prescriptive processes to prevent future mistakes, the traditional, *ex post* approach is the norm.[23]

In Canada, numerous academics have called for proactive regulation, including firm regulation.[24] Adam Dodek argues that it is insufficient to regulate individual lawyers because firms have an

---

[19] The number of sole practitioners is markedly lower than in other practice types, which is atypical to many jurisdictions in Canada and internationally. As well, for unclear reasons, the province's number of solicitors and associates compared to partners is relatively low.

[20] Additionally, there is a lack of self-reporting by lawyers of regulatory breaches, whether about themselves or about others.

[21] The NSBS has developed a number of "elements" to represent building blocks toward an effective management system. These ten elements include: 1) developing competent practices to avoid negligence; 2) achieving effective, timely and courteous/civil communication; 3) ensuring confidentiality requirements; 4) avoiding conflicts of interest; 5) maintaining appropriate records/file management; 6) ensuring effective firm/staff management; 7) charging of appropriate fees and disbursements; 8) ensuring reliable trust accounts practices; 9) sustaining effective relationships with clients, colleagues, courts, regulators and the community; and 10) achieving access to justice (at 19). Nova Scotia is currently in its "Phase 3" consultation stage, wherein the above set of ten regulatory "elements" have been developed and approved for registrant commentary. This phase is scheduled to conclude at the end of August 2014.
See: Nova Scotia Barristers' Society, "Consultation on proposed Regulatory Objectives – Your input is requested" (July 7, 2014), online: Nova Scotia Barristers' Society < http://nsbs.org/sites/default/files/ftp/InForumPDFs/2014-07-07_ConsultationPartI&II.pdf>.

[22] Ted Schneyer, "On Further Reflection: How 'Professional Self-Regulation' Should Promote Compliance with Broad Ethical Duties of Law Firm Management" (2011) 53 Ariz L Rev, 577-628 at 585.

[23] Terry, *supra* note 3.

[24] Academics involved in the call for regulatory reform in Canada include Richard Devlin and Alice Woolley.

independent existence and identity, and the failure to regulate firms threatens the legal profession's claim to a right to self-regulation.[25] He further argues for requirements for firms to file annual reports (as is required in Nova Scotia) and for the creation of public registries of information and disciplinary data about firms and their lawyers.[26] He also recommends that every firm be obligated to appoint an "'ethics counsel'" and that regulators have both compliance and disciplinary powers over firms.[27] Relatedly, Michael Trebilcock argues for professional regulation by Canadian law societies that is centred on a consumer protection, and not a professional protection, rationale.[28] However, he cautions against a Canadian movement toward co-regulation in the vein of the UK and Australia, given the potential for political interference or regulatory retribution in the face of "the fearless discharge of lawyers' responsibilities to their clients".[29] The CBA Ethics and Professional Responsibility Committee views entity regulation – as, for example, has been implemented in Australia – as a means by which to reduce client complaints.[30]

In the US, only New Jersey and New York engage in some form of law firm discipline, and these powers have been used only sparingly.[31] Although it has been some years since those two states adopted firm discipline, there has not been much recent indication of interest from other states to implement such a regulatory regime.[32] Notwithstanding, Schneyer proposes that a proactive regulatory system that complements the disciplinary process could enable regulators to draw on firm management to encourage ethical compliance.[33] Elizabeth Chambliss expands on

[25] Adam M. Dodek, "Regulating Law Firms in Canada" (2011) 90 Can Bar Rev 381-438 at 395.
[26] *Ibid*, at 434.
[27] *Ibid*, at 435-436.
[28] Michael Trebilcock, "Regulating the Market for Legal Services", (2008) 45:5 Alta L Rev 215-232 at 230.
[29] *Ibid*. See p. 15 for further information on co-regulations.
[30] CBA, *supra* note 4, at 1.
[31] Dodek, *supra* note 25, at 413.
[32] *Ibid*, at 418.
[33] Schneyer, *supra* note 22.

Schneyer's conceptualization of ethical infrastructure to note that lawyers conform most to their firms' norms and expectations, thus arguing that firms with strong internal means to encourage ethical compliance have the greatest potential to positively influence individual lawyers' behaviour.[34]

Although Schneyer initially proposed the concept in relation to entity or firm regulation, calls for regulatory reform have grown to include broader conceptualisations of proactive regulation, including proposals such as alternative business structures (ABS), including incorporated legal practices (ILPs), and proactive management-based regulation (PMBR). PMBR in particular has gained considerable momentum, particularly in Australia, and some version of the PMBR model is now in place in seven of eight Australian states and territories, including Queensland and Victoria.[35]

Proactive-Management Based Regulation

Amendments to New South Wales's (NSW) legislation introduced ownership of law firms by non-lawyers, and the incorporation of legal practices as long as they demonstrate "appropriate management systems".[36] The "introduction of legislation requiring 'appropriate management systems' was unique not only to legal profession regulation but to regulation generally. It was not based on any pre-existing model and the regulators were not given any guidance from the legislators as to what 'appropriate management systems' or a management based system for law

---

[34] Elizabeth Chambliss, "The Nirvana Fallacy in Law Firm Regulation Debates" (2005) XXXIII Fordham Urb LJ 119-151 at 139.

[35] Susan Saab Fortney, "Proactive Regulation of Law Firms: Proof and Possibilities" (23rd FB Wickwire Lecture in Professional Responsibility and Legal Ethics, March 6, 2014),[unpublished, online: <http://nsbs.org/sites/default/files/ftp/InForumPDFs/2014-03-27_WickwireLecture_long.pdf>.

See also John Briton and Scott McLean, "Incorporated Legal Practices: Dragging the Regulation of the Legal Profession into the Modern Era" (2008) 11 Legal Ethics 241-254.

[36] Nova Scotia Barristers' Society, "Transforming Regulation and Governance in the Public Interest" by Victoria Rees (Halifax, October 28, 2013), online: <http://nsbs.org/sites/default/files/cms/news/2013-10-30transformingregulation.pdf> at 37. ["Rees"]

firm [*sic*] should comprise."[37] Accordingly, the Office of the Legal Services Commissioner (OLSC)[38] engaged in consultations with representatives of key stakeholder groups, including the Attorney General's Department, the Law Society of NSW, NSW's professional indemnity insurer, the Quality in Law Assurance Program for Lawyers, and the College of Law, as well as representatives from ILPs of a variety of sizes, locations, and practice areas.[39]

Following the consultations, the OLSC developed an "education towards compliance" strategy with a list of ten objectives for sound legal practice, along with a self-assessment process for ILPs.[40] ILPs are now required to appoint at least one "Legal Practitioner Director" who will take responsibility for the ethical processes in place at a firm. The ten areas of focus are:

1. **Negligence** (providing for competent work practices).
2. **Communication** (providing for effective, timely and courteous communication).
3. **Delay** (providing for timely review, delivery and follow up of legal services).
4. **Liens/file transfers** (providing for timely resolution of document/file transfers).
5. **Cost disclosure/billing practices/termination of retainer** (providing for shared understanding and appropriate documentation on commencement and termination of retainer along with appropriate billing practices during the retainer).
6. **Conflict of interests** (providing for timely identification and resolution of "conflict of interests", including when acting for both parties or acting against previous clients as well as potential conflicts which may arise in relationships with debt collectors and mercantile agencies, or conducting 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 regarding registers of files, safe custody, financial interests).
8. **Undertakings** (providing for undertakings to be given, monitoring of compliance and timely compliance with notices, orders, rulings, directions or other requirements of regulatory authorities such as the OLSC, courts, costs assessors).
9. **Supervision of practice and staff** (providing for compliance with statutory obligations covering licence and practising certificate conditions, employment of persons and providing for proper quality assurance of work outputs and performance of legal, paralegal and non-legal staff involved in the delivery of legal services).
10. **Trust account requirements** (providing for compliance with Part 3.1 Division 2 of

[37] NSBS Phase 1, at 11.
[38] See pp. 15-16 for more on the introduction of the OLSC.
[39] Susan Fortney and Tahlia Gordon, "Adopting Law Firm Management System to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation" (2013) 10:1 University of St. Thomas Law Journal 152-194.
[40] Office of the Legal Services Commissioner – NSW Government, "Appropriate Management Systems to Achieve Compliance" online: <http://www.olsc.nsw.gov.au/olsc/lsc_incorp/olsc_appropriate_management_systems.html>.

the *Legal Profession Act 2004 (NSW)* and proper accounting procedures).[41]

Empirical Assessments of Appropriate Management Systems

In what has now become widely cited research, Christine Parker, Mark, and Gordon conducted a 2008 study based on complaints rate data in NSW following the implementation of the PMBR process.[42] They concluded that ILP complaint rates dropped to one-third of what they were prior to incorporation. In addition, ILPs' complaints rates dropped by one-third in comparison to non-incorporated law firms over the same period, even taking into account that larger firms tend to receive fewer complaints per lawyer. They found very little support for a correlation between the ratings given by ILPs in their self-assessments and complaint rates, and extrapolated that it is the learning and changes prompted by the self-assessment process that prompted the reduction. While practice reviews can be conducted on any legal practice, regardless of whether allegations have been raised,[43] Parker *et al.* found that, where self-assessed firms find themselves non-compliant or only partially compliant, they typically engage with the OLSC to work toward compliance. Parker *et al.* praised NSW's "education towards compliance" approach, whereby firms are required to consider and implement systems to promote ethical behaviour, while allowing flexibility in their individual developments of those systems.

Relatedly, in 2009, Mark and Gordon noted that although the absolute number of complaints had remained roughly equal to the number of complaints received in 1994 (when the OLSC was founded), the number of lawyers in NSW during that same period had more than doubled.[44] In

---

[41] *Ibid*.

[42] It is worth noting that Steve Mark was the then-Legal Services Commissioner, and Tahlia Gordon was the Research & Projects Manager at the OLSC.

See: Christine Parker, Steve Mark, and Tahlia Gordon, "Assessing the Impact of Management-Based Regulation on NSW Incorporated Legal Practices", (25 September 2008), online: Office of the Legal Services Commissioner – NSW Government <http://www.olsc.nsw.gov.au/agdbasev7wr/olsc/documents/pdf/research_report_ilps.pdf>.

[43] Dodek, *supra* note 25, at 422.

[44] Steve Mark and Tahlia Gordon, "Compliance Auditing of Law Firms: A Technological Journey to Prevention"

recognition of these successes, the OLSC was working to expand its self-assessment resources from ILPs to include all law practices in the state.[45] In 2013, Fortney and Gordon conducted a follow up study, in which they surveyed lawyer-directors of ILPs and identified that the AMS and self-assessment process impacted firm management and risk management most.[46] Based on their own results and those of other researchers evaluating the efficacy of the NSW system, the authors encourage non-Australian regulators, researchers, educators, and lawyers to consider proactive partnerships over the reactive norm.[47]

Parker *et al.* noted that there had been opposition to ILPs and AMS related to concerns of devolution into tick box regulation. There appeared to be some support for such concerns arising out of the UK in the 1980s and 1990s, wherein lawyers resisted initiatives aimed at addressing the large number of public complaints. However, the authors noted that in the UK, lawyers were distrustful of the regulatory body, whereas in NSW the regulator has a reputation for being effective and trustworthy, enjoying "an excellent relationship with legal professional associations, consumers, and other stakeholders".[48]

More recently, Fortney conducted follow up interviews with 41 lawyer-directors regarding what steps, if any, they had taken as a consequence of their first self-assessments after incorporation.[49] The results indicated that at least some ILPs were treating self-assessment as a means to implement management systems in a way that demonstrated a genuine desire to improve firms'

(2009) 28(2) UQLJ 201-223 at 211.
[45] *Ibid*, at 220.
[46] Fortney and Gordon, *supra* note 39.
[47] However, it must be noted that the results of the 2013 study are somewhat limited, because out of 356 ILPs to whom the authors' questionnaire was provided, only 39.6% responded.
[48] Christine Parker, Tahlia Gordon, and Steve Mark, "Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales" (2010) 37:3 JL & Soc'y 466-500 at 497. ["Parker *et al*. 2010"]
[49] Fortney, *supra* note 35.

ethical practices. She postulated:

> All indications from my study were that the NSW approach to management-based regulation is successfully providing firm directors the incentive, tools, and authority to take steps to improve the delivery of legal services. Evidently, a significant percentage of directors learned from the process, taking steps to avoid problems and complaints, as evidenced by the significant reduction in the number of complaints against firms that completed the process.[50]

Mark and Gordon reported that in NSW there are only 30 employees regulating 30,000 lawyers and 5,000 firms, of which 1,300 have been incorporated. Of note, the NSW framework has been cost-effective, as regulation of the 1,300 ILPs' AMS requires only 2.5 staff thanks to risk profiling and self-assessment.[51] It has thus been touted as a model that can be replicated in other jurisdictions, even where finances and resources may pose a concern.[52]

Parker *et al.* also observed that further revisions to the regulatory regime may be necessary over time to encourage ILPs to continually improve. For example, they suggest that self-assessment tools designed for particular practice areas, such as litigation and alternate dispute resolution, may be called for, especially given that complaints are typically driven by consumer satisfaction and may not always reflect adherence to other legal duties (such as lawyers' duties to the court). They conclude that regulators must continue to use AMS in conjunction with other, harder regulatory instruments (including practice reviews) in order to capture the full and complex range of unethical or unprofessional conduct,.

Self-Assessment

There is some difficulty in parsing the successes of the NSW model of proactive regulation, given that legal regulators there have adopted both entity regulation and self-assessment. However, Parker *et al.* postulated that it is not the process of incorporation that leads to the

[50] *Ibid*, at 4.
[51] NSBS Phase 1, *supra* note 17 at 19.
[52] NSBS Phase 2, *supra* note 17.

reduction in complaints; instead, they proffer that the decrease occurs following self-assessment (as opposed to following incorporation).[53] They reach this conclusion by noting that there was a time lag of several months or sometimes years between firms' incorporation and their first self-assessment, and that the number of complaints against practitioners of those firms significantly decreased following the self-assessment date but not prior.[54]

Recently, Fortney made a series of recommendations for Canadian regulators contemplating adopting the Australian AMS model.[55] These included: 1) that regulators emphasize an "education towards compliance" approach; 2) the refinement of the format and content of self-assessment instruments; 3) management-based approaches in the vein of the Australian lawyer-director requirement; 4) devoting more time and resources to practice management assistance; and, 5) a certification program for business development. She also encourages some form of peer review privilege among lawyers, similar to that available in medicine to encourage lawyers to participate in self-assessments without fear of discovery.[56]

In Canada, the CBA Ethics and Professional Responsibility Committee has developed a broad tool for use by firms to develop their own ethical infrastructure.[57] The Committee observes that "[g]iven that many lawyers practice together in firms, [the traditional regulatory] focus on individual conduct fails to address much of what happens at a law firm that either encourages or deters ethical conduct."[58] The Committee is of the view that given the current realities of legal practice, clients will frequently interact with a number of lawyers in a firm over the course of a complex matter, thus precipitating the need for firms to become more proactive in enhancing

[53] Parker *et al.* 2010, *supra* note 48.
[54] *Ibid* at 485.
[55] Fortney, *supra* note 35.
[56] Fortney, at 8.
[57] CBA, *supra* note 4.
[58] *Ibid*, at 3.

their individual practitioners' conduct.[59] The CBA Ethical Practices Self-Evaluation Tool suggests a series of questions and practices to assess and ensure compliance with the objectives of: competence, client communication, confidentiality, conflicts, preservation of client property/trust accounting/file transfers, fees and disbursements, hiring, supervision/retention/lawyer and staff wellbeing, rule of law and administration of justice, and access to justice.[60] The Committee encourages firms to implement the voluntary self-assessment tool; however, as the CBA does not currently have data on the tool's adoption by firms, it remains to be seen whether the tool has affected any discernible change on firms' behaviour or complaint rates.

Co-Regulation

There is currently, and has been for some time, passionate debate about whether a co-regulatory model is superior to the traditional model of self-regulation. A comprehensive review of this debate is beyond the scope of this literature review; however, in brief, there are jurisdictions in which it appears that public and government trust has been lost in the legal profession's ability to appropriately regulate itself.[61] Notwithstanding, there are those who opine that lawyers, over and above other professions, must be independent of external (and especially government) control, given lawyers' crucial role as defenders of the rule of law.[62] It remains as yet unclear whether co-regulation is a successful and appropriate means of regulating the legal profession.

Notwithstanding this debate, several jurisdictions have already adopted a co-regulatory model.

[59] CBA Legal Futures Initiative, "Regulating Law Practices as Entities: Is the Whole Greater than the Sum of its Parts?" (January 4, 2014), online: Canadian Bar Association Legal Futures Initiative <http://www.cbafutures.org/FoL-Blog/Blog/December-2013/Regulating-Law-Practices-as-Entities-Is-the-Whole>.
[60] CBA, *supra* note 4.
[61] Rees, *supra* note 36, at 39- 41.
[62] Richard Devlin and Albert Cheng, "Re-calibrating, re-visioning and re-thinking self-regulation in Canada" (2010) 17:3 IJLTP 233-281 at 252.

NSW has operated under a co-regulation model since 1994, in which the Law Society and Bar Association work with the OLSC.[63] England and Wales and Scotland also implemented co-regulatory approaches, placing oversight in a body discrete from the legal profession.[64] Recent reforms in England and Wales were driven by chronic dissatisfaction with that Law Society's response to complaints, a push for increased competition in legal service delivery, and a perceived conflict of interest in the dual regulatory and representative role of the Society.[65] There has now been a "shift in regulatory focus from the individual to the firm, both through discipline and compliance".[66] The new co-regulatory model involves a variety of sanctions against individuals or entities, such as financial penalties, disqualification of individuals from associating with particular entities, and authority to suspend or revoke entities' licences.[67] Ireland is currently in the midst of a possible sea change in its regulation of solicitors from self-regulation to a co-regulatory model, in a proposed bill that has been subject to vocal criticism from that country's Law Society.[68]

It is difficult to say whether co-regulation constitutes proactive regulation in and of itself, and this was not a distinction that was addressed in the literature reviewed. Interestingly, however, in New South Wales, it was the OLSC— following its imposition by government as a co-regulator—that developed and implemented what appears to be a highly successful proactive-management based regulation system. In this regard, co-regulation may be a form of proactive regulation (as defined by above, per the CBA), since practicing and moderating behaviour under the auspices of an external body such as the OLSC could arguably meet the

[63] Rees, *supra* note 36, 37.
[64] Terry, *supra* note 3.
[65] Dodek, *supra* note 25, at 426.
[66] *Ibid*.
[67] *Ibid*, at 428.
[68] Rees, *supra* note 36, at 37-38.

definition of "the institutional or organizational context in which lawyers practice". [69]

Non-Lawyer Professional Regulation[70]

Parker *et al.* noted that the regulation of both individuals and firms is the standard in areas of regulation such as environmental, health and safety, discrimination, and consumer protection.[71] In many professions, firm regulation is an established part of the Canadian regulatory system: "[m]edicine, pharmacy, accounting, engineering, architecture, real estate and securities are all characterized by significant entity regulation".[72] Trebilcock notes that in the accountancy and medical professions (particularly the latter) many institutions have implemented systematic quality assurance and risk management programs that proactively monitor the quality of care provided.[73]

In the United Kingdom, recommendations have arisen from three Law Commissions (England and Wales, Scotland, and Northern Ireland) as recently as the spring of 2014 for the regulation of health professions – ranging from chiropractic, dentistry, pharmacy, psychology, speech and language therapy, to medicine, physiotherapy, nursing, and midwifery – to come under a single statute for the regulation of 32 health and social care professions under a proactive model.[74]

A 2007 position paper by the Canadian Nurses Association called for proactive regulation under a framework that supports coordinated regulatory approaches across Canada.[75] Specifically in

---

[69] CBA, *supra* note 4.

[70] Searches were conducted for information on proactive regulatory approaches among the professions of accounting; dentistry; engineering; medicine; nursing; and teaching. However, completion of a comprehensive review of the adoption or contemplation of a proactive approach to self-regulation by other (non-law) professional regulatory bodies, whether in Canada or abroad, would require a considerable amount of time, given the sheer number of regulated professions, and was accordingly beyond the scope of this literature review. The following section provides a cursory overview of some regulators' approach toward proactive self-regulation.

[71] Parker *et al.*, *supra note* 48 at 470.

[72] Dodek, *supra* note 25, at 397.

[73] Trebilcock, *supra* note 28 at 225.

[74] Law Commission, "Regulating Health Care Professionals" (April 2, 2014), online: Law Commission <http://lawcommission.justice.gov.uk/news/2670.htm>.

[75] Canadian Nurses Association, "Regulatory Framework for Registered Nurses" (November 2007), online: Canadian

British Columbia, the College of Registered Nurses of BC (CRNBC) has incorporated a proactive, principles-based approach into its regulatory philosophy. Such an approach "favour[s] the achievement of an outcome, a 'value', by whatever means needed that does not inflict a 'corollary harm' (more harm than the problem it seeks to address), over ritual compliance with a set of detailed instructions, protocols or rules".[76] CRNBC seeks to expand its regulatory role from "ensuring not only that 'bad things don't happen' but also that 'good things' do".[77]

The regulation of public accounting firms is "commonplace and extensive", involving direct and indirect regulation, compliance, and discipline.[78] In engineering, each of the provinces regulates firms to some extent, with intertwined individual and firm responsibility. Firms must receive authorization to practice, and regulations include a requirement that there must be a supervising engineer on staff. Architectural firms are also subject to firm regulation, though disciplinary measures are taken against individual architects and not against firms.[79] Firm regulation in securities is "extensive, active and wide-ranging"[80], while in pharmacy, there is a strong relationship between individual registrants and their pharmacies, such that discipline of pharmacies and individuals often occurs together.[81] Similarly, real estate regulation applies to both individuals and to real estate firms.[82] In medicine, there is significant entity regulation with respect to physicians practicing in hospital environments and, in certain jurisdictions (e.g., Alberta, BC, and Ontario), regulators have been given some authority over non-hospital medical

---

Nurses Association <http://www.cna-aiic.ca/~/media/cna/page-content/pdf-en/ps90_canadian_regulatory_2008_e.pdf>.

[76] College of Registered Nurses of British Columbia, "Underlying Philosophies and Trends Affecting Professional Regulation" by Lillian Bayne, (February 2012) online: College of Registered Nurses of British Columbia <https://www.crnbc.ca/crnbc/Pages/MandatePurpose.aspx> at 13.

[77] *Ibid*, at 16.

[78] Dodek, *supra* note 25, at 397-398.

[79] *Ibid*, at 398-399.

[80] *Ibid*, at 400.

[81] *Ibid,* at 401 note 74.

[82] *Ibid*, at 402 note 75.

facilities.[83]

Concluding Remarks

Proactive regulation, broadly speaking, refers to a variety of mechanisms by which regulators may attempt to address common challenges facing practitioners, with the objective of identifying and mitigating poor practices before they crystalize into complaints. As anticipated, Australia, and in particular New South Wales, has been, and continues to be, the global leader in proactive law profession regulation. However, there is growing interest in considering regulatory reform among Canadian legal regulators. Among them, Nova Scotia appears to be the most overtly engaged in moving toward a more proactive system, based on publicly available information. Suggestions for such processes have included firm regulation (or "ethical infrastructure"), co-regulation, principles-based regulation, and self-assessment. While opinions may differ on which processes constitute proactive regulation, or which would best serve the needs of a particular jurisdiction, it is clear that the traditional *ex post* regulatory model is actively being called into question, precipitated in large part by the immense, apparent successes arising out of New South Wales.

[83] *Ibid*, at 401 note 73.