



TAB 13

## Report to Convocation April 23, 2015

---

### Professional Regulation Committee

#### Committee Members

Malcolm Mercer (Chair)  
Susan Richer (Vice-Chair)  
Paul Schabas (Vice-Chair)  
Robert Armstrong  
John Callaghan  
John Campion  
Cathy Corsetti  
Seymour Epstein  
Robert Evans  
Julian Falconer  
Patrick Furlong  
Carol Hartman  
Jacqueline Horvat  
Brian Lawrie  
Jeffrey Lem  
William C. McDowell  
Ross Murray  
Jan Richardson  
Heather Ross

**Purpose of Report: Information**

**Prepared by the Policy Secretariat  
(Margaret Drent (416-947-7613))**

**TABLE OF CONTENTS**

**For Information**

*In Camera* Item.....13.1  
Entity and Compliance-Based Regulation..... 13.2

## COMMITTEE PROCESS

1. The Professional Regulation Committee (“the Committee”) met on April 9, 2015. In attendance were Malcolm Mercer (Chair), John Callaghan, Cathy Corsetti, Seymour Epstein, Robert Evans, Julian Falconer, Patrick Furlong (by telephone), Carol Hartman, Jacqueline Horvat, Brian Lawrie, Jeffrey Lem, Ross Murray, Paul Schabas (by telephone), Jan Richardson, and Heather Ross. Staff members attending were Robert Lapper, Q.C., C.E.O., Zeynep Onen, Elliot Spears, Jim Varro, Naomi Bussin, and Margaret Drent.

*THIS SECTION CONTAINS  
IN CAMERA MATERIAL*

**FOR INFORMATION**

**COMPLIANCE BASED, ENTITY REGULATION**

44. Further to its report to January 2015 Convocation, the Committee provides this status report on the development of a framework for compliance based, entity regulation at the Law Society.
45. As reported in January, on February 27, 2014, Convocation approved the development of a framework for the regulation of firms using a compliance based approach but has not yet determined a specific direction on the subject. The framework is being prepared for the consideration of Convocation. The Professional Regulation Committee has directed Law Society staff to develop models for its consideration.
46. A compliance-based, entity approach to professional regulation is characterized by the following:
  - a. acting proactively in addressing issues of public protection and the quality of services provided to the public;
  - b. enhancing public protection and public confidence in the Law Society and licensees by focusing on management principles and systems to improve practise and controlling practise management risks;
  - c. regulating more effectively through firm regulation in addition to regulation of individuals;
  - d. enhancing the autonomy of licensees and firms; and
  - e. designing changes that are efficient and not costly to the extent that is possible.
47. Entity regulation can be defined as the regulation of legal services provided by any entity, including a law firm. Currently law firms are the only type of entity that is permitted by the Law Society. Consequently, only law firms would be regulated unless any other type of entity were permitted by the Law Society.
48. In a compliance based model, the regulator sets out expected outcomes and licensees have flexibility in how they meet those objectives. The Law Society currently engages in some compliance based activities but the regulatory process is generally reactive, rules based, and focussed on the individual licensee.

49. The following advantages of entity-based compliance regulation have been identified:
- a. Entity regulation would permit a more proactive, compliance based approach for firms. In other jurisdictions, compliance based regulation has been found to have a significant positive effect on the number of complaints received about a firm and its licensees. Establishing regulatory objectives for entities may improve practice and therefore better protect clients and the public interest.
  - b. Entity regulation may enhance the Law Society's ability to respond to complaints, through systems that could, for example, provide for a designated person to respond to the Law Society or ensure that a response is obtained; a designated person responsible for trust accounting matters and for ensuring that the firm's record-keeping is current; a process where the Law Society provides notification to the firm that one of its licensees is under investigation; and addressing issues that are firm level, for example, lack of supervision, advertising or conflicts issues.
50. Entity regulation may also be a more effective response for regulation of entities that provide legal services both within and outside of Ontario.
51. Some of the issues being considered by the Committee, which are part of regulatory systems in other jurisdictions, are described in greater detail in this report are as follows:
- a. the role of a "Legal Director";
  - b. establishing an "ethical infrastructure" in a firm; and
  - c. the development of rules specific to firms.
52. A Legal Director, or designated person in a law firm or regulated entity, can be a component of a compliance-based entity regulatory scheme. The Legal Director may be designated by the firm to receive notice about complaints. They may also be required to take reasonable steps to address a firm's failure to meet its regulatory responsibilities.
53. An "ethical infrastructure" describes a law firm's organization, policies and operating procedures.<sup>1</sup>
54. Jurisdictions that have adopted compliance based regulation have used different tools to build an ethical infrastructure for firms. One area of focus has been to adopt outcomes focused principles applicable to firms – firms are required to comply but the regulator does not prescribe how to achieve compliance.

---

<sup>1</sup> This term was first used by Professor Ted Schneyer of the University of Arizona; see, for example, "On Further Reflection: How 'Professional Self-Regulation' Should Promote Compliance With Broad Ethical Duties of Law Firm Management", (2011) 53 Arizona Law Review Vol. 577 at 585.

55. For example, a principle for firms would be to avoid conflicts of interest. One way to achieve compliance would be to implement a conflicts checking system. The key principle is that the responsibility is that of the firm to determine how to achieve compliance. The regulator would assist firms to achieve compliance by providing tools and templates and working with firms if they are non-compliant.
56. Other Canadian legal and financial services regulators have adopted requirements regarding firm-wide policies and procedures. One specific area of focus for firms could be trust accounts. Law societies in Nova Scotia and Alberta, for example, have specific compliance oriented rules regarding firm trust accounts:
  - a. The Nova Scotia Barristers Society requires an annual law firm report and a specific trust account report, which must be signed by at least four partners of the firm.
  - b. The Law Society of Alberta requires a number of specific controls on trust accounts.
  - c. The Ontario Securities Commission requires a firm to set up a compliance system which includes internal controls for safeguarding client and firm assets and accuracy of books and records.
57. Some regulators require law firms to make reasonable efforts to ensure that all licensees comply with the Rules. A law firm may demonstrate compliance with this requirement by demonstrating that it has policies and procedures.
58. Some of these regulators also have rules specifically for firms. These can include the duty to report certain breaches, inappropriate advertising, failure to serve a client, sexual harassment, conflict of interest, failure to supervise, failure to maintain financial records and failure to respond to or cooperate with the regulator.

### **Next Steps**

59. The Committee will continue its consideration of these issues and report back to Convocation as appropriate.