

# Should Non-Lawyer Ownership of Law Firms be Endorsed and Encouraged?

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# SHOULD NON-LAWYER OWNERSHIP BE ENDORSED AND ENCOURAGED?

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## Introduction

Over the past few years a succession of academic and discussion papers have been published examining the arguments for and against the liberalisation of laws prohibiting non-lawyer ownership of law firms.<sup>3</sup>

Lawyers have a duty to seek out ways to provide meaningful, innovative and accessible solutions to a key problem which undermines the proper administration to justice - the lack of access to legal services. The key challenge faced in many jurisdictions is not one of defining rights and obligations, but rather providing people with knowledge of and access to the legal system so that rights can be exercised and obligations enforced - effectively. Whilst we do not contend that it is in a way a panacea to ending barriers to the legal system for ordinary citizens, we do contend that liberalising the ownership structures of law firms will contribute to improving access to the legal system and will also place the legal profession in a better position to compete with the current array of unqualified (and largely unregulated) providers entering the legal services market.

This paper argues that if regulated appropriately as Australia, England and Wales have done, non-lawyer owners of law firms present no risk to the professions core values. The greatest threat to the legal profession and the ethical practice of law is not the innovation and enlarged capital base that non-lawyer ownership facilitates, but the steady increase of legal service providers and enterprises offering unregulated legal services.

Part 1 of this paper considers how Australia, England and Wales, jurisdictions that have amended their legislation to allow non-lawyer ownership and regulate external investment in law firms, have approached regulation in this area. This part discusses the particular regulatory framework in each jurisdiction and how these frameworks have been designed to ensure ethical and professional standards are protected.

Part 2 of this paper discusses concerns raised by critics of non-lawyer ownership that focus on the diminution of professionalism as a result of non-lawyer ownership of law firms. It is argued that these concerns are unfounded.

Part 3 of this paper argues that in addition to a robust regulatory framework, law firms which have non-lawyer owners are well positioned to effectively mitigate any risk that ethics and professionalism will be eroded. As the first law firm in the world to publicly list Slater and Gordon provides a case study of how a law firm which has a majority of external shareholders effectively safeguards professional standards. The measures implemented by Slater and Gordon to protect professional standards are outlined.

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<sup>3</sup> The topic has been so hotly debated that a Google search of “non-lawyer ownership law firms” comes up with 4,820,000 results (as at 9 April 2015). See for example, B. MacEwen, M. Regan, L. Ribstein, *Law Firms, Ethics and Equity Capital: A Conversation* (2007) 21 *Georgetown Journal of Legal Ethics* 61; M. Regan Jr, *Commentary: Nonlawyer Ownership of Law Firms Might Not Cause the Sky to Fall* (2007) *The American Lawyer*; Paul Grout, ‘The Clementi Report: Potential Risks of External Ownership and Regulatory Responses (July 2005), <http://www.dca.gov.uk/legalsys/grout.pdf> ; S. Mark & T. Gordon, *Innovations in Regulation Responding to a Changing Legal Services Market* 22 *Geo. J. Legal Ethics* 501 (2000); N. Semple, *Access to Justice: Is Legal Services Regulation Blocking the Path?* (July 30, 2013); N. Robinson, *When Lawyers Don't Get all the Profits: Non-Lawyer Ownership of Legal Services, Access, and Professionalism* (Harvard Law School, Program on the Legal Profession, Center for Policy Research, August 27, 2014)

Part 4 of this paper considers some of the challenges facing the legal profession and identifies the risk that by not permitting non-lawyer ownership consumers are being exposed to legal (and quasi legal) services which are largely unregulated. The authors argue that whilst the emergence of these providers in the legal services market may be beneficial for consumers, their participation in the market needs to be properly regulated.

The paper concludes with a discussion about how challenges facing the legal profession may also present opportunities for lawyers to improve professional standards and contribute to improving access to the legal system.

## Part 1: Protecting Core Values: Robust Regulatory Frameworks in Practice

### Australia

On 1 July 2001 legislation was enacted in New South Wales, Australia permitting legal practices, including multidisciplinary practices (MDPs) to incorporate, share receipts and provide legal services either alone or alongside other legal service providers who may, or may not be legal practitioners.<sup>4</sup> The rationale for introducing new forms of legal structures in 2001 was multi-fold. Reasons included removing the regulatory barriers between states and territories to facilitate a seamless, truly national legal services market and regulatory framework; providing greater flexibility in choice of business structures for law practices; enhancing choice and protection for consumers of legal services; and enabling greater participation in the international legal services market.<sup>5</sup> There was also a growing perception in Australia that the traditional structure of law firms no longer met the needs of many practitioners and clients.<sup>6</sup>

The 2001 legislation in NSW introduced a number of unique regulatory amendments. Firstly, the legislation required that on incorporation a legal practice must appoint at least one “legal practitioner director”.<sup>7</sup> The legislation required that a legal practitioner director must be an Australian legal practitioner who holds an unrestricted practising certificate. This was the first time law firms in NSW were required to appoint such a person. The rationale for this requirement was to ensure that a legal practitioner maintains a direct interest in and accountability for the management of legal services of the practice.<sup>8</sup>

Secondly, the legislation mandated that all incorporated law firms must establish and maintain a management framework, legislatively coined “appropriate management systems”, to enable the provision of legal services in accordance with the professional and other obligations of lawyers.<sup>9</sup> The responsibility for establishing and implementing “appropriate management systems” rests with the legal-practitioner director. The legislation provides that failure to establish and maintain “appropriate management systems” is capable of being professional misconduct.<sup>10</sup>

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 a law firm should comprise. The regulator in New South

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<sup>4</sup> On 1 July 2001, the *Legal Profession (Incorporated Legal Practices) Act 2000* (“2000 Act”) and the *Legal Profession (Incorporated Legal Practices) Regulation 2001* came into force in New South Wales amending the *Legal Profession Act (NSW) 1987*. The 2000 Act and Regulations amended the 1987 Act to enable providers of legal services in New South Wales to incorporate by registering a company with the Australian Securities & Investment Commission (ASIC)

<sup>5</sup> S, Mark and T. Gordon, *Innovations in Regulation – Responding to a Changing Legal Services*, 22 *Geo. J. Legal Ethics* 501 (2009)

<sup>6</sup> Law Council of Australia, (2001) *2010: A Discussion Paper: Challenges for the Legal Profession*, [http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uid=0BE36A97-1C23-CACD-2225-CBD6713A3E09&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=0BE36A97-1C23-CACD-2225-CBD6713A3E09&siteName=lca)

<sup>7</sup> Section 140(1) *Legal Profession Act 2004 (NSW)*

<sup>8</sup> S, Mark and T. Gordon, *Innovations in Regulation – Responding to a Changing Legal Services*, 22 *Geo. J. Legal Ethics* 501 (2009), 506

<sup>9</sup> Section 140(3) of the *Legal Profession Act 2004 (NSW)*

<sup>10</sup> Section 140(5) of the *Legal Profession Act 2004 (NSW)*

Wales, the Office of the Legal Services Commissioner (OLSC), interpreted the requirement to implement and maintain appropriate management systems as a way to effectively “manage” law firm conduct and ensure that, notwithstanding the presence of non-lawyers, law firms continue to act ethically and to the highest professional standards.<sup>11</sup>

After an extensive period of consultation with the profession and key stakeholders the OLSC created the content for “appropriate management systems” for law firms. They did so by considering the types of complaints that were made against lawyers and what elements comprise sound legal practice. The regulator came up with ten such objectives:

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 the *Legal Profession Act 2004 (NSW)* and proper accounting procedures).<sup>12</sup>

The regulator then developed a process by which law firms could assess themselves against the ten objectives. The process was based on a self-assessment. That is, the legal practitioner director of the law firm assesses the appropriateness of their management systems using a self-assessment document (developed by the regulator) that is forwarded after completion by the legal practitioner director to the regulator for review.<sup>13</sup> The self-assessment document takes into account the varying size, work practices, and nature of operations of different firms. Legal practitioner directors rate firm compliance with each of the ten objectives as either ‘Fully Compliant,’ ‘Compliant,’ ‘Partially Compliant,’ or ‘Non-Compliant.’<sup>14</sup> In addition to developing the framework for appropriate management systems, the regulator in NSW also developed processes and procedures to assist incorporated legal practices through the self-assessment process, and to improve their management systems.

The purpose of the appropriate management systems framework, which still exists today, is to ensure that every incorporated law firm considers and implements measures that support and encourage ethical and client-focused behaviour. One of the most important features of this framework, aside from the fact that it promotes ethics and professionalism, is that the framework applies not just directly to

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<sup>11</sup> S, Mark and T. Gordon, *Innovations in Regulation – Responding to a Changing Legal Services*, 22 Geo. J. Legal Ethics 501 (2009), 507-508

<sup>12</sup> Office of the Legal Services Commissioner, *Appropriate Management Systems to Achieve Compliance*, [http://www.olsc.nsw.gov.au/olsc/lsc\\_incorp/olsc\\_appropriate\\_management\\_systems.html](http://www.olsc.nsw.gov.au/olsc/lsc_incorp/olsc_appropriate_management_systems.html)

<sup>13</sup> Office of the Legal Services Commissioner, *Self-Assessment Process*, [http://www.olsc.nsw.gov.au/olsc/lsc\\_incorp/olsc\\_self\\_assessment\\_process.html](http://www.olsc.nsw.gov.au/olsc/lsc_incorp/olsc_self_assessment_process.html)

<sup>14</sup> *Ibid*

lawyers within an incorporated legal practice but to all staff, including non-lawyers (indirectly). Its intent is to curb any unethical behaviour from occurring and promote a sound ethical culture.

## England and Wales

England and Wales have also implemented a robust regulatory framework to regulate non-lawyer ownership through so called “Alternative Business Systems” (ABS’s) and “Legal Disciplinary Practices” (LDPs). The *Legal Services Act 2007* (LSA 2007) established a regulatory framework that mandates a fitness test for non-lawyers seeking to be owners of law firms and a law firm management structure that requires the appointment of persons responsible for ensuring compliance with professional obligations. The Solicitors Regulation Authority (SRA) commenced accepting applications from prospective ABS’s in January 2012 and licensed the first ABS’s in March 2012.

Pursuant to the regulatory framework in England and Wales, a firm that wants to employ a non-lawyer as a manager of a LDP or an owner or manager of an ABS must apply to the SRA for approval of that individual and satisfy the SRA that the individual is fit and proper to assume that role. The SRA’s “Suitability Test” outlines the necessary requirements for admission.<sup>15</sup> It forms part of the SRA Handbook, published on 16 September 2011. The test is divided into two main sections: Part 1: Basic requirements and Part 2: Additional requirements to become authorised under the SRA Authorisation Rules. Part 1 applies to everyone i.e. student enrolment, admission, authorised role holders and restoration. The basic requirements in Part 1 focus on 8 key areas. They include as follows: criminal offences, disclosure, behaviour, assessment offences, financial evidence, regulation history, evidence, rehabilitation, additional evidence.<sup>16</sup>

Part 2 applies only to those applying for authorisation as an authorised role holder.<sup>17</sup> Part 2 states that unless there are exceptional circumstances the SRA may refuse an application if:

- The applicant is disqualified from being a *charity* trustee or a trustee for a *charity* under section 178(1) (D) or (E) of the Charities Act 2011;
- *The applicant* has been removed and/or disqualified as a company director;
- Any body corporate of which the applicant was/is a *manager* or *owner* has been the subject of a winding up order, an administrative order or an administrative receivership, or has otherwise been wound up or put into administration in circumstances of insolvency;
- The applicant has a previous conviction which is now spent for a criminal offence relating to bankruptcy, IVAs or other circumstances of insolvency;
- The applicant is a corporate person/entity subject to a relevant insolvency event defined in rule 1.2 of the *SRA Authorisation Rules*;
- The applicant is a corporate person/entity and other matters that call *your* fitness and propriety into question are disclosed or come to light;
- The applicant has committed an offence under the Companies Act 2006; and/or the SRA has evidence reflecting on the honesty and integrity of a person the applicant is related to, affiliated with, or act together with where the SRA has reason to believe that the person may have an influence over the way in which the applicant will exercise their *authorised role*.<sup>18</sup>

In addition to the fitness to practice test for non-lawyers, law firms in England and Wales are required to comply with a range of obligations set out in the Solicitors Regulatory Authority’s (SRA) Handbook. The Handbook represents a complete re-writing of all of the SRA regulations for firms that are subject to its jurisdiction and includes a revised Code of Conduct and Accounts Rules.<sup>19</sup> The Code is not proscriptive, but identifies ‘key behaviours’ as examples of how to achieve stated outcomes.

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<sup>15</sup> Solicitors Regulation Authority, *Suitability Test*, <http://www.sra.org.uk/solicitors/handbook/suitabilitytest/content.page>

<sup>16</sup> *Ibid*

<sup>17</sup> *Ibid*

<sup>18</sup> *Ibid*

<sup>19</sup> Solicitors Regulation Authority, *SRA Handbook Welcome*, <http://www.sra.org.uk/solicitors/handbook/welcome.page>

Chapter 7 of the SRA's Code of Conduct (set out in the SRA Handbook) and Rule 8.2 of the *SRA Authorisation Rules 2011* ("the Authorisation Rules") require firms to "have effective systems and controls in place to achieve and comply with all the principles, rules and outcomes and other requirements of the Handbook" and to "identify, monitor and manage risks to compliance".<sup>20</sup>

The LSA 2007 requires that a head of legal practice (HOLP) and head of finance and administration (HOFA) are appointed within each alternative business structure (ABS). This requirement today extends to all firms. As a result of this extension the SRA has renamed the positions as compliance officer for legal practice (COLP) and compliance officer for finance and administration (COFA). It is the SRA Authorisation Rules for Legal Services Bodies and Licensable Bodies that outlines the requirements for these roles.<sup>21</sup> The designated COLP or COFA must be an individual; be a manager or an employee of the law firm; consent to their designation as the COLP and/or COFA; be of sufficient seniority and responsibility to fulfil the role; and not be disqualified from being a Head of Legal Practice (HOLP) or Head of Finance and Administration (HOFA) – as appropriate.

The Compliance Officer for Legal Practice (COLP) is responsible for overseeing risk and compliance within their firm and be the SRA point of contact. COLPs are responsible for ensuring that the law firm complies with relevant statutory obligations that are set out in the SRA's Handbook; recording any failure(s) to comply and informing the SRA of such noncompliance. The COLP must report any material failure to the SRA as soon as reasonably practical.<sup>22</sup>

The Compliance Officer for Finance and Administration (COFA) is responsible for the role and its obligations. COFA's are responsible for the overall financial management of the firm. COFA's are required to ensure that the law firm, including its employees and managers, comply with any obligations imposed under the SRA Accounts Rules; keep a record of any failure to comply and make this record available to the SRA.<sup>23</sup> COFA's are also required to report any material failure (either taken on its own or as part of a pattern of failures) to the SRA as soon as reasonably practical.

Individuals who are COLPs and COFAs must be fit and proper to undertake the role/s.<sup>24</sup> Fit and proper is assessed by taking into account the criteria in the SRA Suitability Test 2011 and any other relevant information. The assessment as to whether an individual is a fit and proper person is undertaken upon initial approval. If the COLP or the COFA is deemed unfit and improper, the SRA may withdraw its approval.

## Part 2: Concerns raised about Non-Lawyer Ownership of Law Firms

"The fundamental problem with the opposition to external ownership is that ethics is a state of mind, not a state of ownership."<sup>25</sup>

Those that oppose non-lawyer ownership of law firms typically do so on the basis that non-lawyer ownership will lead to an erosion of professional standards. For example, the Ontario Trial Lawyers Association (OTLA) has stated that it is "unequivocally opposed" to non-lawyer ownership of law firms on the grounds of ethics.

OTLA's submission to the Law Society of Upper Canada's Inquiry into ABS's states as follows:

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<sup>20</sup> Clause 7.2, SRA Code of Conduct 2011. See Solicitors Regulation Authority, *Code of Conduct 2011*, <http://www.sra.org.uk/solicitors/handbook/code/content.page>; *SRA Authorisation Rules 2011*, <http://www.sra.org.uk/solicitors/handbook/authorisationrules/content.page>

<sup>21</sup> See Solicitors Regulation Authority, *COLPs and COFAs*, <http://www.sra.org.uk/solicitors/colp-cofa.page>

<sup>22</sup> See Solicitors Regulation Authority, *Responsibilities of COLPs and COFAs*, <http://www.sra.org.uk/solicitors/colp-cofa/responsibilities-record-report.page>

<sup>23</sup> *Ibid*

<sup>24</sup> See Solicitors Regulation Authority, *What is a COLP and a COFA*, <http://www.sra.org.uk/solicitors/colp-cofa/ethos-roles.page>

<sup>25</sup> S.Mayson, *External ownership and the forked tongue of ethics*, May 2012, <http://stephenmayson.com/2012/04/13/external-ownership-and-the-forked-tongue-of-ethics/>

“OTLA is unequivocally opposed to unrestricted non-lawyer ownership and particularly to any change that would allow publicly-traded law firms in Ontario. We believe that lawyers should always maintain a controlling interest in law firms, in order to ensure that the core values concerning conflicts of interest, client confidentiality and independence of lawyers are maintained and protected.”<sup>26</sup>

And:

“All law firms are businesses, to be sure. And all have financial pressures and responsibilities, and must ensure a healthy cash flow in order to thrive or at least survive. However, a publicly traded company whose principal responsibility is to shareholders will necessarily operate in a way that sees the duties owed to clients yielding to the financial pressures on lawyers to meet the demands of the shareholders. OTLA is concerned that profits and dividends will trump professionalism and duty.”<sup>27</sup>

The OTLA’s view is, in our view, completely misinformed. OTLA has not conducted any research of the effect of non-lawyer ownership in jurisdictions that allow non-lawyer ownership of law firms. Rather, they commissioned a report from Dr Jasminka Kalajzdic who on her own admission utilised “secondary sources” to support a finding which supported OTLA’s position, and on Nick Robinson’s work assessing ABSs and access to justice. Neither rely on any empirical research to support the assertions they make. If they had they would have found legislative frameworks that safeguard ethics, and strengthen, not weaken professional standards.

We contend that the available evidence not only refutes the contention that non-lawyer ownership will diminish professional standards, but on the contrary are likely to contribute to an improvement in standards over time.

There simply is no evidence to support the proposition that non-lawyer ownership will lower professional standards or undermine the proper administration of justice – in fact all the available evidence points to the contrary.

Australia, England and Wales have each entrenched a robust, proactive regulatory regime that is designed to ensure that ethics and professionalism are maintained and improved. On the basis of what is now more than 10 years’ experience in Australia and as one of the first licensed Alternative Business Structures (ABS’s) in England and Wales the experiences of Slater and Gordon suggests that the core values of the profession in Australia, England and Wales have not been diminished by regulations allowing non-lawyer ownership. Complaints against lawyers acting unethically or unprofessionally have not increased. In fact quite the opposite has occurred.

The available evidence provides strong support for the view that non-lawyer ownership poses no practical or real threat to ethics or professionalism.

Incorporated legal practices have now been permitted in New South Wales for close to 15 years. During this period a number of remarkable things have occurred. First, the legislation has now been adopted by all States and Territories in Australia permitting the non-lawyer ownership of law firms nationally.<sup>28</sup>

Second, a considerable number of law firms Australia-wide (approximately 30%) have incorporated.<sup>29</sup> Firms of all sizes have incorporated. This may be because there are a number of benefits that can be gained as a result of incorporation. These benefits include asset protection, greater flexibility for

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<sup>26</sup> Ontario Trial Lawyers Association, *Submission to Law Society of Ontario on Alternative Business Structures*, 15 December 2014, at p.2, <https://www.lsuc.on.ca/uploadedFiles/Ontario%20Trial%20Lawyers%20Association.pdf>

<sup>27</sup> Id at p.21.

<sup>28</sup> *Legal Profession Act 2006 (ACT)* Part 2.6; *Legal Profession Act 2004 (NSW)* Part 2.6; *Legal Practitioners Act 2006 (NT)* Part 2.6; *Legal Profession Act 2004 (Vic)* Part 2.7; *Legal Practice Act 2003 (WA)*; *Legal Profession Act 2007 (Qld)* Part 2.7; *Legal Profession Act 2007 (Tas)* Part 2.5; *Legal Practitioners Act 1981 (SA)*, Schedule 1

<sup>29</sup> Statistics obtained from the Law Society as at March 2015. On file with the authors

raising and retaining capital, greater flexibility for remunerating employees, possible tax advantages, opportunity to introduce more effective management and decision-making arrangements.<sup>30</sup>

Third, the framework for regulating incorporated legal practices has resulted in an effective co-regulatory partnership between the OLSC, the Law Society of NSW and the financial services regulator and a reduction in red tape. It has not lead to a loss of self-regulation by professional associations. There has been no loss of regulatory control as feared by some.<sup>31</sup> Quite the contrary has occurred.

Fourth, the regulatory framework, has been lauded for its ability to curb unethical behaviour and improve law firm management because it is 'proactive' rather than 'reactive'. The framework is a radical departure from the traditional regulatory approach in which certain behaviours or conduct standards are defined and lawyers are disciplined if the behaviours and standards are not met.

Rather than the regulator reacting after a complaint against a lawyer is made, the framework in Australia is designed to help firm leaders detect and avoid problems by focusing on management systems and processes designed to entrench ethical behaviours. This can occur because the framework allows firms to develop their own process and management systems and develop internal planning and management practices designed to achieve regulatory goals. This type of framework is referred to as "proactive, management based regulation."<sup>32</sup>

The success of the framework is outlined in a series of research projects. In 2008, a research study by Dr. Christine Parker of the University of Melbourne Law School in conjunction with the NSW regulator assessed the impact of ethical infrastructure and the self-assessment process in NSW to assess whether the process is effective and whether the process is leading to "better conduct" by firms required to self-assess.<sup>33</sup> The research focused on the number of complaints relating to incorporated legal practices after incorporation and comparing this with prior to incorporation. The research found that complaints rates for incorporated legal practices were two-thirds lower than non-incorporated legal practices after the incorporated legal practice completed their initial self-assessment. The research also revealed that the complaints rate for incorporated legal practices that self-assessed was one-third of the number of complaints registered against similar non-incorporated legal practices.

Moreover, another recent research study conducted on incorporated legal practices in NSW, by Professor Susan Saab Fortney of Hofstra University, New York, in conjunction with the NSW regulator, revealed that a majority (84%) of respondents reported that they had revised policies and procedures related to the delivery of legal services. Seventy-one percent of the respondents indicated that they had actually revised firm systems, policies and procedures. Close to half (47%) of the respondents reported that they had adopted new systems, policies, and procedures. In terms of encouraging training and initiatives, 29% indicated that their firms devoted more attention to ethics initiatives and 27% implemented more training for firm personnel.<sup>34</sup>

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<sup>30</sup> See Queensland Law Society, Practice Structures, file:///C:/Users/Tahlia/Downloads/qls\_factsheet\_-\_practice\_structures.pdf.

<sup>31</sup> See Law Society of Ontario, *Alternative Business Structures Working Group Report, February 2015*, <https://www.lsuc.on.ca/uploadedFiles/ABS-full-report.pdf>

<sup>32</sup> The term "proactive based management regulation" (PMBR), coined by Ted Schneyer, is characterised by the appointment of one or more lawyer-managers by the firm to take enhanced responsibility for their firm's "ethical infrastructure". The term "ethical infrastructure", again coined by Ted Schneyer refers to formal and informal management policies, procedures and controls, work team cultures, and habits of interaction and practice that support and encourage ethical behaviour: T. Schneyer, *On Further Reflection: How "Professional Self-Regulation" Should Promote Compliance with Broad Ethical Duties of Law Firm Management*, 53 Arizona L. Rev 576; T. Schneyer, *Proactive Management based-regulation and the case for fresh thinking about how to improve "Professional Self-Regulation" for American Lawyers*, 2013 Conference on Legal Ethics, Hofstra Law School, April 5, 2013

<sup>33</sup> C.E. Parker, T. Gordon, S. Mark, 2010, *Regulating law firms ethics management: an empirical assessment of an innovation in regulation of the legal profession in New South Wales*, Journal of Law and Society, Vol 37, issue 3, Blackwell Publishing, UK, pp. 466-500

<sup>34</sup> S. Fortney & T. Gordon, *Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation*, 10 St. Thomas L.J. 152 (2012)

Finally, the framework regulating incorporated legal practices is being recognised by jurisdictions around the world as the best way to curb unethical behaviour and increase professionalism. The framework adopted in NSW has been replicated to varying extents in the United Kingdom (discussed below) and Canada and is being considered by a number of jurisdictions in the United States.<sup>35</sup>

The experience in England and Wales is not dissimilar to Australia.

In England and Wales, ABS's today comprise over 2 percent of legal entities regulated by the SRA in England and Wales.<sup>36</sup> Some firms that have gained an ABS licence have ceased to operate but they are few in number. ABS's have become a popular option for law firms generally because the ABS structure allows for the appointment or promotion of non-legal staff to managerial posts; and the ability to attract investment from non-lawyers.<sup>37</sup>

The impact of ABS's to date on the legal services marketplace in England and Wales is interesting. According to the SRA, research indicates that ABS's "have achieved a significant share of the overall market in certain areas of legal work." The SRA found that ABS's accounted for a third of all turnover in the personal injury market; ABS's have captured a significant percentage of turnover in mental health, non-litigation (eg. Conveyancing, wills and probate), consumer and social welfare; and that ABS's are spread relatively evenly across a range of different legal work types.<sup>38</sup> Of most interest, the survey found that "[T]he most significant changes that ABS's have made, as a result of their new business model, relate to how the business is financed and the attraction of new investment."<sup>39</sup> ABS's have not had any adverse impact on professionalism and ethics some feared.

According to the Legal Services Consumer Panel in England and Wales "**the dire predictions about a collapse in ethics and reduction in access to justice as a result of ABS have not materialised.**"<sup>40</sup> (Emphasis added) The Panel state in their *2014 Consumer Impact Report*, released on 5 December 2014, as follows:

"There have been no major disciplinary failings by ABS firms or unusual levels of complaints in the Legal Ombudsman's published data. Our Tracker Survey isn't able to segment between ABS and non-ABS firms, but does show that overall consumer confidence in the quality of work and professionalism of lawyers has held steady since 2011."<sup>41</sup>

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<sup>35</sup> The Canadian Bar Association has developed a management tool to embed ethical practice within firms called "The Ethical Practices Self-evaluation Tool": See The Canadian Bar Association, *The Ethical Practices Self-evaluation Tool*, <http://www.cba.org/CBA/activities/code/ethical.aspx>; A. Salyzyn, *Regulating Law Practice as Entities: Is the Whole Greater than the Sum of Its Parts?*, November 29, 2013, <http://www.slaw.ca/2013/11/29/regulatinglaw-practices-as-entities-is-the-whole-greater-than-the-sum-of-its-parts/>; A.Salyzyn, *What if We Didn't Wait? Promoting Ethical Infrastructure in Canadian Law Firms*, July 25, 2013, <http://www.slaw.ca/2013/07/25/whatif-we-didnt-wait-promoting-ethical-infrastructure-in-canadian-law-firms/>. Nova Scotia, Canada is also in the process of developing a similar framework as is Singapore: See Nova Scotia Barristers Society, *Transform Regulation*, <http://nsbs.org/transform-regulation> and Ministry of Law, *Second Reading Speech by Minister for Law, K Shanmugam, on the Legal Profession (Amendment) Bill*, <https://www.mlaw.gov.sg/content/minlaw/en/news/parliamentary-speeches-and-responses/2R-speech-Min-LPA-bill-2014.html>

<sup>36</sup> Solicitors Regulation Authority, *Research on alternative business structures (ABS's) Findings from surveys with ABS's and applicants that withdrew from the licensing process*, May 2014, p.9, <file:///C:/Users/Tahlia/Downloads/abs-quantitative-research-may-2014.pdf>

<sup>37</sup> Ibid

<sup>38</sup> Solicitors Regulation Authority, *Research on alternative business structures (ABS's) Findings from surveys with ABS's and applicants that withdrew from the licensing process*, May 2014, p.3, <file:///C:/Users/Tahlia/Downloads/abs-quantitative-research-may-2014.pdf>; See also ICF GHK, *Qualitative Research into Alternative Business Structures (ABS's)*, May 2014, [file:///C:/Users/Tahlia/Downloads/abs-qualitative-research-may-2014%20\(1\).pdf](file:///C:/Users/Tahlia/Downloads/abs-qualitative-research-may-2014%20(1).pdf)

<sup>39</sup> Ibid

<sup>40</sup> Legal Services Consumer Panel, *2014 Consumer Impact Report*, 5 December 2014, p.15, [http://www.legalservicesconsumerpanel.org.uk/publications/research\\_and\\_reports/documents/Consumer%20Impact%20Report%203.pdf](http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/Consumer%20Impact%20Report%203.pdf)

<sup>41</sup> Ibid

Although it is early days for non-lawyer ownership in England & Wales, these statements by the Legal Services Consumer Panel are an unequivocal affirmation that in practice non-lawyer ownership does not pose a threat to ethics or professionalism.

The experience of Slater and Gordon, for example, indicates that external shareholders are very concerned to ensure that the organisations they invest in have very well-articulated values and have invested in the human resources, training and systems needed to support compliance with the ethical and professional standards which allow them to continue to operate and generate sustainable returns.

There is also no evidence that non-lawyer ownership has resulted in lawyers at Slater & Gordon being less able or less willing to uphold their obligations as legal practitioners – to place their clients' interests above their own and/or those of the firm or organisation they work for. Nor is there any evidence that there is any additional risk of breaches of client confidentiality. For example in the eight years post listing Slater and Gordon has never been in a position where its continuous disclosure obligations under the stock exchange listing rules have encroached upon its obligations to maintain the confidentiality of client communications.

### Part 3: Managing Ethics and Professionalism: A Firm Responsibility

In addition to Australia, England and Wales' robust regulatory frameworks, a number of incorporated law firms have adopted measures to curb the threat of unethical behaviour. Such measures include adopting a statement of duties that stipulates that the primary duty of the firm is to the Court, the secondary duty is to the client and the tertiary duty is to shareholders. In addition, enforceable practice standards, staff codes of conduct and value and mission statements support professional standards and ethics. To illustrate, a number of measures have been deployed by Slater and Gordon to ensure all of its staff are supported in their endeavours to maintain the highest attainable standards of professionalism.

#### Case Study: Slater and Gordon

##### Hierarchy of Duties

The highest attainable standards of ethics and professionalism are the first priority for the management and Board of Slater and Gordon as a publicly listed law firm. As the first law firm in the world to list its legal practice on the Australia Stock Exchange in 2007, Slater and Gordon has implemented various measures to ensure that high standards of professionalism are upheld by all staff, irrespective of whether the staff are lawyers or not.<sup>42</sup> In recognition of the possibility of a conflict between the duties owed to the company and shareholders and the duties owed to the court and to clients, Slater & Gordon outlined a hierarchy of duties prior to listing to ensure this issue was dealt with in its prospectus and constituent documents. For instance, section 3.2 ('Duties') in Slater & Gordon's Constitution states:

The Company and the Directors must procure that, where possible, the Company fulfils its duty to the Shareholders, to the clients of the Company and to the court. In the case of an inconsistency or conflict between those duties of the Company, that conflict or inconsistency shall be resolved as follows:

- (a) the duty to the court will prevail over all other duties; and
- (b) the duty to the client will prevail over the duty to Shareholders.<sup>43</sup>

This hierarchy of duties also applies to Slater & Gordon's practice in the United Kingdom and is reinforced in many of Slater & Gordon's key operating documents. Clause 4 of Slater & Gordon's Code of Conduct, for example, states as follows:

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<sup>42</sup> A. Grech & K. Morrison, *Slater & Gordon: The Listing Experience*, 22 Geo J. Legal Ethics 535 (2009)

<sup>43</sup> Slater & Gordon Ltd, *Constitution*, <https://media.slatergordon.com.au/constitution-of-slater-gordon-amg-11.pdf>

## **“4. Professional Obligations**

You are expected to always:

1. Fulfil your duty to the Court;
2. Respect and act in the best interests of clients and treat them courteously and consistently;
3. Respect colleagues and treat them fairly, openly and honestly; and
4. Select suppliers and vendors on quality, service and cost only. If there is a conflict, the first duty is to the Court over all duties, and then the duty to the client will prevail over the duty to shareholders.”<sup>44</sup>

Similarly, the statement of the hierarchy of duties which is generally well understood by staff and is also articulated in Slater & Gordon’s Principles of Good Practice as follows:

### **“2. My paramount duty is to the Court and to uphold the rule of law.**

As officers of the Court, lawyers are obliged to serve the Court and the administration of justice ethically and professionally. This is a paramount duty and informs all client engagements. Staff are expected to provide clients with independent and honest legal advice.

In exercising professional judgment, staff should ask: “Do my actions serve the administration of justice and uphold the rule of law? Do my actions encourage public confidence in the administration of justice and in the legal profession?”<sup>45</sup>

The Principles of Good Practice are applicable in both Australia and the United Kingdom.

## **Compulsory Practice Standards**

Slater and Gordon has also adopted Practice Standards which all staff are expected to comply with. The Practice Standards set out a model for staff behaviour and include step by step requirements on the processes and procedures to be followed in all dealings with clients. An important feature of the Practice Standards is that they assist in embedding a culture where the ethical and professional responsibilities of lawyers are given primacy by all staff. Every Slater and Gordon staff member is bound by his or her commitment to comply with the requirements of the Practice Standards and every practice group is subjected to periodic internal review for compliance. The results of the internal audit program are used to improve training and staff development, as well as to modify and improve practice standards.

## **ASX listing and corporate governance regulations**

As a publicly listed company, Slater and Gordon is subject to high levels of accountability and audit. These obligations are in addition to all of the duties a lawyer has to the Court and regulations imposed on the legal profession. One of the primary obligations for a listed company is continuous public disclosure. The disclosure regime provides greater transparency for clients’ and staff compared to non-listed law firms.

Listing also increases the focus on governance in comparison to non-listed law firms. The Australian Securities Exchange Listing Rule 4.10.3 requires ASX listed entities to benchmark their corporate governance practices against the Corporate Governance Council’s recommendations; and where they do not conform, to disclose that fact and the reasons why. The ASX Corporate Governance recommendations cover a range of matters which include ethical decision making, remuneration issues and risk management. Slater & Gordon, like all listed companies, is required to report in relation

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<sup>44</sup> Slater & Gordon Ltd, *Code of Conduct*, <https://media.slatergordon.com.au/code-of-conduct.pdf>

<sup>45</sup> Slater & Gordon, *Principles of Good Practice*, on file with the author

to these issues and does so in its Annual Reports. Law firms that are not publicly listed have no obligations to report such information and rarely do so.

### **Code of Conduct and the protection of staff ‘whistle-blowers’**

Slater and Gordon have instituted many measures aimed at protecting ethics and professionalism. Directors and staff of Slater and Gordon, for example, are expected to adhere to the Company’s Code of Conduct. The Code of Conduct sets out detailed standards of ethical behaviour. Slater and Gordon also have a comprehensive range of policies covering equal employment opportunity, discrimination, harassment, confidentiality, privacy and occupational health and safety. These policies are aimed at ensuring the maintenance of standards of honesty, integrity and fair dealing. Slater and Gordon have also developed a Whistle-blower Policy which encourages employees to bring any problems to the attention of management. This includes activities or behaviour that may not be in accordance with the Company’s Code of Conduct, financial reporting Policies, Insider Trading Policy, other Company policies, or other regulatory requirements and laws.<sup>46</sup>

### **Client focused complaints handling**

Prior to listing, Slater and Gordon managed complaints through the Managing Director and/or the senior lawyer in the relevant team. Slater and Gordon have now developed a comprehensive process for dealing with client feedback with a dedicated Professional Standards team. The team is responsible for addressing any client concerns as well as conducting an internal audit program to monitor compliance levels. Client feedback (and the results of the internal audits) are used to further improve practice standards.

### **The impact of these measures on ethical and professional standards**

The impact of the measures implemented at Slater and Gordon to mitigate the risk of eroding ethical and professional standards appear to have had a significant impact. Since listing in 2007 there has been a decline in both complaints made directly to the firm as well as a decline in complaints made to external regulators.

Not one complaint has ever been made (let alone upheld) to legal regulators in Australia, the UK or to Slater and Gordon itself alleging Slater and Gordon has ignored its primary duty to the Court in favour of a shareholder or group of shareholders.

The hierarchy of duties articulated by Slater and Gordon (and other publicly listed law firms in Australia) and other measures also appears to demonstrate that there has been no diminution of ethical behaviour. In the years since Slater & Gordon and other law firms have listed publicly, there has been no evidence to suggest that external ownership has led to a lowering of professional standards. In fact, quite the opposite has occurred. It appears that access to external capital and the sharing of fees with non-lawyers has strengthened the ethical focus of publicly listed law firms.

## **Part 4: Where are we now? The New Legal Landscape and the challenges for the Legal Profession**

In Australia, like most other jurisdictions around the world, the cost of accessing the legal system significantly limits the capacity of many to initiate action or respond to legal problems.<sup>47</sup> Access to the legal system is an increasingly distant goal for many ordinary citizens, as recent studies have shown.<sup>48</sup>

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<sup>46</sup> Slater & Gordon, *Annual Report 2010-11*, p.32, available at

[http://www.slatergordon.com.au/files/editor\\_upload/Flash/Flash/SGH-Annual-Report-2011.pdf](http://www.slatergordon.com.au/files/editor_upload/Flash/Flash/SGH-Annual-Report-2011.pdf)

<sup>47</sup> See C. Coumarelos, *Legal Australia-Wide Survey: Legal Need in Australia*, Law and Justice Foundation of New South Wales, August 2012, p.xiv, available at

[http://www.lawfoundation.net.au/ljf/site/templates/LAW\\_AUS/\\$file/LAW\\_Survey\\_Australia.pdf](http://www.lawfoundation.net.au/ljf/site/templates/LAW_AUS/$file/LAW_Survey_Australia.pdf)

<sup>48</sup> See for example, R.L Sandefur, *Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study*, American Bar Foundation, 8 August 2014 at p.3,

There are many reasons why the legal needs of the community are not being met. Such reasons include reductions in funding for legal aid and community legal centres as well as declining revenue of small law firms who can no longer afford to offer pro bono services or even reduced cost legal services. Regulations prohibiting the involvement of non-lawyers in legal services, such as the rules in the United States preventing lawyers from sharing fees<sup>49</sup>, also perpetuate the access to justice gap.

According to several academics, strict licencing regulations for the legal profession is another barrier to providing affordable legal services.<sup>50</sup> The inability of law firms to obtain external investment as a result of strict regulatory frameworks prohibiting non-lawyer ownership of law firms is considerable. According to Noel Semple, the “insulation” of law firms from non-lawyer investment impedes the accessibility of justice in three ways:

“First, they constrain the supply of capital for law firms, thereby increasing the cost which the firms must pay for it. To the extent that this cost of doing business is passed along to consumers, it will increase the price of legal services. Second, bigger firms might be better for access to justice, due to risk-spreading opportunities and economies of scale and scope. Individual clients must currently rely on small partnerships and solo practitioners, and allowing non-lawyer capital and management into the market might facilitate the emergence of large consumer law firms. Large firms would plausibly find it easier than small ones to expand access through flat rate billing, reputational branding, and investment in technology. Finally, insulating lawyers from non-lawyers precludes potentially innovative inter-professional collaborations, which might bring the benefits of legal services to more people even if firms stay small.”<sup>51</sup>

Semple is right. Traditional professional partnerships within law firms do not typically concentrate on capital growth and are capital constrained. Generally, partnerships and the individual partners or owners comprising these partnerships focus on attempting to maximise the income for the partners in each year, thereby reducing the opportunity for longer-term planning and growth in the underlying value of the practice. According to Gillian Hadfield external investment in law firms and expanded scale can produce benefits for individuals who need legal services. As Hadfield writes:

“Expanded scale is necessary to accommodate branding, to support investment in the research and development of products and processes, and to increase significantly the scope for specialization in the component elements of legal service delivery and across different market segments. Innovation and specialisation need to extend the many non-legal dimensions involved in ultimately producing the benefits of legal assistance for an individual facing a legal situation.”<sup>52</sup>

The notion that law firms could provide access to justice as result of external investment has however been vehemently rejected and denied by ABS opponents. The latest manifestation of this rejection is outlined in a submission by the Ontario Trial Lawyers Association (OTLA) which alleges that ABS’s do not improve access to justice. This assertion was based on research OLTA commissioned from Dr Jasminka Kalajzdic who on her own admission utilised “secondary sources” to support this finding, and on Nick Robinson’s work assessing ABS’s and access to justice.<sup>53</sup> As stated earlier in this paper, neither rely on any empirical research to support the assertions they make.

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[http://www.americanbarfoundation.org/uploads/cms/documents/sandefur\\_accessing\\_justice\\_in\\_the\\_contemporary\\_us\\_a\\_aug\\_2014.pdf](http://www.americanbarfoundation.org/uploads/cms/documents/sandefur_accessing_justice_in_the_contemporary_us_a_aug_2014.pdf);

<sup>49</sup> ABA Model Rule 5.4 prohibits a lawyer or a law firm from sharing fees with a non-lawyer.

<sup>50</sup> N. Semple, *Access to Justice: Is Legal Services Regulation Blocking the Path?* International Journal of the Legal Profession, Vol. 20, No.3, 2013.

<sup>51</sup> Semple, n 12 at p.24.

<sup>52</sup> G. Hadfield, *The Cost of Law: Promoting Access to Justice through the (Un)Corporate Practice of Law* (October 30, 2013). International Review of Law and Economics, Forthcoming; USC CLASS Research Paper No. 13-4; USC Law Legal Studies Paper No. 13-16 at p.28, see <http://ssrn.com/abstract=2333990>

<sup>53</sup> Submission by Dr Jasminka Kalajzdic on file with the author; N. Robinson, *When Lawyers Don’t Get all the Profits: Non-Lawyer Ownership of Legal Services, Access, and Professionalism* (Harvard Law School, Program on the Legal Profession, Center for Policy Research, August 27, 2014) at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2487878](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2487878).

“Historically, lawyers have been a conservative profession which has successfully resisted change. However, if anything is certain about the future, it’s surely that lawyers can no longer withstand the major forces that are reshaping all markets. In the past, lawyers served local communities, disliked technology ....They were protected from competition and clients were passive recipients of their advice. Today’s markets are global, technology goes to the heart of all legal work and the problems lawyers are asked to solve are multi-disciplinary and require them to interact with experts in other fields. Competition is being fully unleashed and the consumer/business relationship is getting turned on its head.”<sup>54</sup>

The need for the profession to better understand the changing needs of the community and the impact of globalisation and new technology has been recognised in a number of jurisdictions.

In August 2009 the American Bar Association established the ABA Commission on Ethics 20/20 (the 20/20 Commission) to conduct a comprehensive review of lawyer ethics rules and regulations across the United States in light of advances in technology and the increasingly global nature of law practice.<sup>55</sup> In 2012 the Canadian Bar Association formed a Committee called the *Legal Futures Committee* to “examine the challenges facing lawyers and the legal profession, and to make recommendations about the kind of organization the CBA should be in 2015 and what it would need to offer lawyers and the legal profession in order to be relevant and vibrant.”<sup>56</sup>

The Legal Services Board in the United Kingdom has also been particularly interested in the effects of globalisation, commercialism and technology on the practice of law. Whilst the LSB has not established a ‘commission’ or ‘committee’ to look at the future of legal practice, it has conducted a range of research projects and commissioned research together with other regulators that look at the effects of globalisation, commercialisation and practice.<sup>57</sup> The primary goal has been to identify impending trends of legal practice and assist the legal profession to understand the many and varied challenges ahead.

## Technology

Advancements in technology have created a completely new paradigm for lawyers. Remote access to one’s office, reliance on smart phones to share data, email and social media to communicate with clients and other emerging technologies have transformed the mechanics of practicing law.

According to Richard Susskind, perhaps the most well-known and oft-cited legal futurist today, new technologies such as online legal document websites and online dispute resolution; intelligent computer systems that are able to manage and access data, solve problems, and draw conclusions (Big Data); and, e-marketplace technology (where sellers of legal services can present their offerings, credentials and fee structures and buyers can choose the types of services they wish to purchase), are already having an overwhelming impact on the practice of law globally.<sup>58</sup> Jordan Furlong, another well-known legal futurist from Canada, agrees. For Furlong, the widespread automation of legal

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<sup>54</sup> The Consumer Legal Services Panel, *2020 Legal Services How regulators should prepare for the future*, November 2014, [http://www.legalservicesconsumerpanel.org.uk/publications/research\\_and\\_reports/documents/2020consumerchallenge.pdf](http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/2020consumerchallenge.pdf)

<sup>55</sup> Throughout its 3 year existence, the 20/20 Commission held many hearings, developed numerous draft statements and ultimately produced a series of recommendations for the ABA House of Delegates to consider primarily related to technology and the practice of law. For example, the 20/20 Commission recommended that the term “e-mail” in the definition section of the Model Rules be changed to “electronic communications,” reflecting the advances in text messaging and website submissions that didn’t exist when the Model Rules were first drafted. The 20/20 Commission also recommended that the ABA Center for Professional Responsibility create a centralized user-friendly website with continuously updated and detailed information about confidentiality-related ethics issues arising from lawyers’ use of technology: see ABA Commission on Ethics 20/20, [http://www.americanbar.org/groups/professional\\_responsibility/aba\\_commission\\_on\\_ethics\\_20\\_20.html](http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html)

<sup>56</sup> Canadian Bar Association, “*CBA Legal Futures Initiative*”, [http://www.cba.org/CBA/sections\\_civil/newsletters2013/futures.aspx](http://www.cba.org/CBA/sections_civil/newsletters2013/futures.aspx)

<sup>57</sup> Legal Services Board, *Welcome to LSB Research*, <https://research.legalservicesboard.org.uk/>

<sup>58</sup> R. Susskind, *Tomorrow’s Lawyers: An Introduction to Your Future*, Oxford University Press (2013)

services created by new technology is devaluing legal information and knowledge and making it much cheaper.<sup>59</sup>

Technology analysts suggest we are at the start of a third age of computing which will disrupt information-intensive professions like legal services.<sup>60</sup> This is because technology is enabling consumers to break down commoditised legal work into discrete tasks and decide which to do themselves and which to use a lawyer for.<sup>61</sup>

## On-line providers

Online legal document providers such as *LegalZoom*, *RocketLawyer*, and *Epoq*, for example, provide a versatile option for consumers seeking legal information and advice in jurisdictions like the United States and the United Kingdom.<sup>62</sup> In March this year, for example, LegalZoom announced that their network of lawyers had completed 200,000 consultations for customers seeking legal assistance.<sup>63</sup>

Clients are also turning to other more generalised online services offering free or inexpensive legal advice through “ask an expert” websites. These sites allow consumers to post questions concerning a legal issue and receive a response from a lawyer. Different business models offer either a one-off payment or regular subscription payments or free advice. *Justanswer.com* and *lawanswer.com.au* allow consumers to ask an online lawyer a question for a fee. There are also an array of websites that offer free legal advice like *LawPivot* (which is now owned by *RocketLawyer*) and *Avvo*.<sup>64</sup> Lawyers answer specific and detailed questions for free, with the aim of generating business. *Lawzam.com* allows clients to talk to lawyers online by video chat for free. In 2013, *LawZam* actually released its mobile application for iOS, allowing attorneys to stay connected and available to chat and videoconference virtually anywhere anytime.<sup>65</sup>

Online dispute resolution (ODR) is another addition challenging the traditional legal services marketplace.<sup>66</sup> ODR is conducted by web-based, independent software systems created for the purpose of dispute resolution and involve only the parties to the dispute and the computer. eBay’s use of ODR sees millions of disagreements amongst traders resolved every year. *SquareTrade*, eBay’s preferred dispute resolution provider, offers two services: a free web-based forum which allows users to attempt to resolve their differences on their own or if necessary, the use of a professional mediator.<sup>67</sup>

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<sup>59</sup> J. Furlong, *Transformation: Five Catalysts at Work in the Canadian Legal Services Marketplace* (2010) Fordham Law Review 7, p.3

<sup>60</sup> See for example, B. Szoka & A. Marcus, *The Next Digital Decade Essays on the Future of the Internet*, 2010, <http://www.nyu.edu/projects/nissenbaum/papers/The-Next-Digital-Decade-Essays-on-the-Future-of-the-Internet.pdf>; Deloitte, *Digital Disruption Short Fuse, Big Bang?*, 2012, <https://www2.deloitte.com/content/dam/Deloitte/au/Documents/Building%20Lucky%20Country/deloitte-au-consulting-digital-disruption-whitepaper-0912.pdf>; Nimbus Ninety IGNITE, *Market Trends Report 2014*, <http://www.je.logicalis.com/globalassets/united-kingdom/reports/market-trends-report/logicalis-marketing-trends-report-2014.pdf> (Nimbus Ninety, founded in 2005, runs communities for end-users of business technologies)

<sup>61</sup> S. Kimbro, M.A., J.D., *Using Technology to Unbundle in the Legal Services Community*, Harvard Journal of Law & Technology Occasional Paper Series — February 2013, <http://jolt.law.harvard.edu/symposium/articles/Kimbrow-UsingTechnologytoUnbundleLegalServices.pdf>

<sup>62</sup> See generally, B.H. Barton, *The Lawyer’s Monopoly—What Goes and What Stays*, 82 Fordham L. Rev. 3067 (2014); J. Flood, *Will There Be Fallout from Clementi? The Global Repercussions for the Legal Profession After the UK Legal Services Act 2007*, 2012 Mich St. L. Rev. 537

<sup>63</sup> LegalZoom, *LegalZoom Achieves Milestone of 200,000 Legal Plan Attorney Consultations*, 24 March 2015, [http://www.businesswire.com/news/home/20150324005036/en/LegalZoom-Achieves-Milestone-200000-Legal-Plan-Attorney?\\_ga=1.101562561.1550617856.1427354860#.VRO54\\_mUeRN](http://www.businesswire.com/news/home/20150324005036/en/LegalZoom-Achieves-Milestone-200000-Legal-Plan-Attorney?_ga=1.101562561.1550617856.1427354860#.VRO54_mUeRN)

<sup>64</sup> RocketLawyer, *Rocket Lawyer Acquires LawPivot. The fast and easy way to get answers to your legal questions*, 14 January 2013, <https://www.rocketlawyer.com/news/article-Rocket-Lawyer-Acquires-LawPivot.aspx>

<sup>65</sup> PR Web, *LawZam(R) Releases Mobile App for Legal Video Consultations on iPhone and iPad*, 20 March 2013, <http://www.prweb.com/releases/2013/3/prweb10546948.htm>

<sup>66</sup> J.W. Goodman, *The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites*, 2 *Duke Law & Technology Review* 1-16 (2003)

<sup>67</sup> Ebay, *Dispute Resolution Overview*, <http://pages.ebay.com/services/buyandsell/disputeres.html>

This year the Civil Resolution Tribunal will be launched in British Columbia, Canada. The online tribunal will be available as an alternative pathway to the traditional courts for resolving small claims through a process that is expected to be more convenient and less costly. It will deal with claims (under 25,000 Canadian dollars) relating to debts, damages, recovery of personal property, and certain types of condominium disputes. ODR has also found acceptance in the United Kingdom recently with Lord Dyson, the Master of the Rolls, supporting a Report that urges all political parties to give their support in principle to new legislation to set up 'Her Majesty's Online Court' (HMOC).<sup>68</sup>

## Machine intelligence

Machine intelligence is also being recognised as likely to have an impact on the legal services marketplace. According to McGinnis and Pearce, five areas of legal practice will change dramatically in the near future as a result of machine intelligence.<sup>69</sup> These areas include: (1) discovery; (2) legal search; (3) document generation; (4) brief and memoranda generation; and (5) prediction of case outcomes. The role of predictive coding in large scale litigation is already becoming a common feature in discovery.

The ability of machines to make "judgments" about the strength of precedents, and the future ability of machines to identify the issues implicated by a given set of facts is a potential new method for legal search. In relation to document generation, McGinnis and Pearce predict that within ten to fifteen years, computer-based services will routinely generate the first draft of most transactional documents.

Technology assisted review, also known as predictive coding or computer assisted coding has already been adopted by law firms as an efficient and cost-effective way to manage litigation. Predictive coding programs which can identify key strengths and weaknesses in a client's case during early case assessment and preliminary investigations; streamline aspects of document review when responding to document requests; analyse a document received from an opposing party or a third party and prepare for depositions, expert discovery, summary judgment motions and trial, are poised to become a standard practice in e-discovery in the near future. *Lex Machina*, for example, has gathered data from mining thousands of IP litigation cases. It claims that the information is used by corporate counsel to "select and manage outside counsel, increase IP value and income, protect company assets, and compare performance with competitors" and by lawyers to "pitch and land new clients, win IP lawsuits, close transactions, and prosecute new patents."<sup>70</sup> Similarly, *Juristat* claims that its software, "transforms raw patent application data into actionable analytics allowing you to optimise prosecution and marketing strategies."<sup>71</sup>

Separately, legal scholars have developed an algorithm that can predict outcomes. Two legal scholars in the United States have developed an algorithm that can apparently predict, with 70% accuracy, whether the US Supreme Court will uphold or reverse the lower-court decision before it.<sup>72</sup>

## Outsourcing

Outsourcing has also fundamentally altered legal practice. Initially, outsourcing was used to perform basic legal administrative functions, whereas today, complex legal research, due diligence, contract management and negotiation, and intellectual property services are also being exported.<sup>73</sup> As the use

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<sup>68</sup> Civil Justice Council, Online Dispute Resolution Advisory Group, *Online Dispute Resolution for Low Value Civil Claims*, February 2015, <https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf>

<sup>69</sup> John O. McGinnis & Russell G. Pearce, *The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services*, 82 *Fordham L. Rev.* 3041 (2014)

<sup>70</sup> Lex Machina, *What we do*, <https://lexmachina.com/what-we-do/>

<sup>71</sup> Juristat, *Helping Patent Professionals Predict the Future*, 21 January 2015, <https://juristat.com/blog-2/page/3/>

<sup>72</sup> The algorithm predicts six decades of behavior of thirty Justices appointed by thirteen Presidents: Daniel Katz, Michael Bommarito II, Josh Blackman, *Predicting the Behavior of the Supreme Court of the United States: A General Approach*, July 2014, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2463244](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2463244)

<sup>73</sup> See for example, M.C Regan Jr & P.T. Heenan (2010) *Supply Chains and Porous Boundaries: The Disaggregation of Legal Services*, *Fordham Law Review*, 78(5), pp.2137, 2139, 2140

of outsourcing continues to flourish, the work of lawyers, paralegals, legal secretaries, and litigation support personnel are all under challenge<sup>74</sup>.

### Non-lawyer providers of legal services

In addition to these “challenges” the use of limited licence non-lawyers to provide legal services alongside lawyers has increased.<sup>75</sup> In Ontario, licensed paralegals are entitled to represent someone in Small Claims Court; in the Ontario Court of Justice under the Provincial Offences Act; on summary conviction offences where the maximum penalty does not exceed six months’ imprisonment; and, before administrative tribunals, including the Financial Services Commission of Ontario. A person with a paralegal licence in Ontario can give legal advice concerning legal interests, rights or responsibilities with respect to a proceeding or the subject matter of a proceeding; draft or assist with drafting documents for use in a proceeding and negotiate on behalf of a person who is a party to a proceeding in the above forums.

Paralegals who are licensed by the Law Society are also eligible to provide certain legal services in the field of immigration law. Licensed paralegals can appear before the Immigration and Refugee Board (IRB) to represent a client or clients in an IRB hearing, and can provide legal services to clients for matters relating to an IRB hearing. Drafting of documents or other legal services practices that are not related to an IRB hearing remain outside of a Paralegal’s scope of practice.

Washington State created a category of limited licence legal technicians who are permitted to provide a limited range of legal services that were previously reserved for lawyers. The rule is designed to assist otherwise self-represented litigants better navigate the court system.<sup>76</sup> Washington’s legal technicians can, among other things, fill out legal forms, review and explain pleadings, and apprise clients of procedures and timelines. The new rule explicitly prohibits legal technicians from engaging in a variety of other activities, however, including “[r]epresent[ing] a client in court proceedings, formal administrative adjudicative proceedings, or other formal dispute resolution process,” “[n]egotiat[ing] the client’s legal rights or responsibilities, or communicat[ing] with another person the client’s position or convey[ing] to the client the position of another party...”<sup>77</sup>

The Rule also imposes licensure requirements. Applicants must have a college degree in “paralegal/legal assistant studies” and a “minimum of two years’ experience as a paralegal/legal assistant doing substantive law-related work under the supervision of a lawyer” or a “post-baccalaureate certificate program in paralegal/legal assistant studies” and “three years’ experience as a paralegal/legal assistant doing substantive law-related work under the supervision of a lawyer...”<sup>78</sup> Like lawyers, they also must pass a competency exam and will be subject to continuing education requirements. Limited license legal technicians will also be held to the “standard of care of a Washington lawyer,” and “ethical standards” that will be created for them.

California and New York are also examining this concept. The California State Bar Board Committee on Regulation, Admission and Discipline Oversight created the California State Bar’s Limited License Working Group, which on June 17, 2013 recommended that California offer limited-practice licenses to non-lawyers.<sup>79</sup> In New York, Chief Judge Jonathan Lippman formed the Committee on Non-

<sup>74</sup> M. Ross, *Legal Process Outsourcing and the Technological Revolution in Legal Services Delivery*, CIO Review, 8 December 2014, <http://www.integreon.com/pdf/blog/CIO%20Review%20by%20Mark%20Ross.pdf>

<sup>75</sup> J.P. Sahl, *Cracks in the Profession’s Monopoly Armor*, 82 Fordham L. Rev. 2635 (2014), p. 2654-2661; See generally L.A. Rigertas, *The Legal Profession’s Monopoly: Failing to Protect Consumers*, 82 Fordham L. Rev. 2683 (2014); L.C. Levin, *The Monopoly Myth and Other Tales About The Superiority of Lawyers*, 82 Fordham L. Rev. 2611 (2014), p.2630-2633

<sup>76</sup> The Supreme Court of Washington, *In the Matter of the Adoption of New APR 28 – Limited Practice Rule for Limited License Legal Technicians Order NO. 25700-A-1005*, filed June 15, 2012

<sup>77</sup> Washington Admission to Practice Rule (APR) 28(H)

<sup>78</sup> Washington Admission to Practice Rule (APR) 28(D)

<sup>79</sup> The working group recommended that people without a law degree be authorized to provide “discrete, technical, limited scope of law activities in non-complicated legal matters in 1) creditor/debtor law; 2) family law; 3) landlord/tenant law; 4) immigration law”: See Memorandum from Staff, Limited License Working Group, Legal Aid Association of California to Members, Limited License Working Group., Legal Aid Association of California, 17 June 2013, <http://perma.cc/7WZ7-NE7Y>

Lawyers and the Justice Gap in early 2013 to study the use of non-lawyers to provide some assistance in simple legal matters. That committee was expected to make recommendations for a pilot program to focus in the areas of housing, elder law, and consumer credit before the end of 2013.<sup>80</sup>

The breath and range of new services being provided to enable consumers to access the legal system is impressive. Many of the enterprises involved in the delivery of such services have invested considerable funds developing products to provide consumers with services that were once beyond their means. It should be of concern to the legal profession that these ‘disruptors’ are by and large operating outside of the regulatory structures designed to protect consumers of legal services. The Legal Services Board in the United Kingdom, for example, estimates that unregulated businesses already account for some 20-30% of turnover in the UK legal services sector.<sup>81</sup> Consumers utilising these services do so with little, if any, regulatory protection and this poses obvious risks.

Non-lawyer ownership of law firms, on the other hand, as has been discussed in this paper, are able to be regulated effectively balancing the need to encourage innovation and competition with appropriate consumer protection. The regulatory frameworks in Australia, England and Wales regarding external investment in law firms are specifically designed to protect consumers from risk.

## Conclusion

“There are ethical and unethical lawyers, just as there are ethical and unethical ‘non-lawyers’. Until the legal professions rid their ranks of the unethical, the high horse of professional ethics is not a secure vantage point from which to resist ownership by those outside the ranks. By siding with the status quo and suggesting that the case for change is not made out, opponents of external ownership conveniently side-step their own need to justify a restrictive practice whose public interest foundations and justification are tenuous and for which the supporting case in the 21st century has also not convincingly been made out.”<sup>82</sup>

No matter where you stand on the spectrum of views about the way in which law firms should be managed and owned, the evidence is that changes in the ownership structures of law firms are more likely to enhance rather than diminish the ability of the legal profession to be part of the solution to improving access to the legal system. Embracing the liberalisation of ownership structures as has been achieved in Australia, England and Wales provides for more agile business models that are better capitalised and resourced. This has been achieved without the erosion of the values upon which the legal profession has been established.

It was just on 80 years ago that two young idealistic lawyers from Melbourne in Australia, Bill Slater & Hugh Gordon founded Slater and Gordon, to ensure those injured in industrial accidents and their widows got access to the legal system. Despite Hugh’s death in 1941 at age 34 while flying his 30<sup>th</sup> mission for the allies over Europe, the firm has traded in that name since and will soon be the largest consumer law firm in the world employing over 5,000 people in Australia and the UK.

Bill Slater who continued in practice also had a successful parliamentary career. He was an advocate for woman’s rights and in 1942 Slater and Gordon became one of the very few law firms in Australia to hire women as graduates. Even for the most accomplished female graduates securing Articles was very difficult at the time.

The employment of women in the law and the idea of a law firm based on a mission of delivering affordable legal services to working people caused a great deal of discomfort in Melbourne’s legal profession of the 1930’s to 1950’s. The law was the domain of men and according to the “chaps” in the profession – unless as a typist the law was not a proper place for women.

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<sup>80</sup> Joel Stashenko, *Non-lawyers May Be Given Role in Closing ‘Justice Gap,’* N.Y. L.J., May 29, 2013, at 1

<sup>81</sup> Legal Services Board, *Regulatory Information Review*, September 2011

<sup>82</sup> S.Mayson, *External ownership and the forked tongue of ethics*, May 2012,

<http://stephenmayson.com/2012/04/13/external-ownership-and-the-forked-tongue-of-ethics/>

By a long, slow and ongoing process of evolutionary change our profession has had its horizons expanded by the many great woman lawyers, jurists and law firm leaders now in its ranks.

It is hoped that those jurisdictions considering the question of non-lawyer ownership will not take the same slow evolutionary path. The cost of not embracing change will impair rather than enhance the ability of the legal profession to improve access to the legal system. Seizing the moment will be critical, in order for law firms to continue to be relevant to meeting the growing legal needs of the community they exist to serve.

In the years ahead, it is hoped that opposition from within the legal profession to non-lawyer ownership of law firms will fade, just as prejudices about women working in the law have faded with time.

Society has changed, the market and consumer expectations are changing. Globalisation, technology and the expectations, aspirations and skills of those entering the legal profession are also changing. Regardless of the attachment of many to traditional ways of viewing the practice of law, just as we could not afford to ignore the talents of women, the legal profession must not ignore the contribution non-lawyer ownership of law firms can make as but one element in its mission to encourage both higher professional standards and improve access to the legal system.

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