DIFFERENT STROKES FOR DIFFERENT FOLKS: REGULATION OF PUBLICLY FUNDED INCORPORATED LEGAL SERVICES

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Abstract

The exemption from compliance with the provisions that regulate incorporated legal practices in the Legal Profession Act 2007 *(Qld) by incorporated community legal services and incorporated Aboriginal and Torres Strait Islander legal services may have had good intentions, but the reality is that it has created a two tier quality control system for clients of legal service providers in Queensland. Clients of private incorporated firms have the benefit of a responsive regulatory system, whereas clients of publically funded incorporated legal services are excluded and operate within a complaints-driven model with all its inherent weakness. This paper considers whether the exemption granted to incorporated Aboriginal and Torres Strait Islander legal services creates an inequality in standards and risk protection available for clients of private law firms and those who use publicly funded legal services.*

I INTRODUCTION

Access to justice within the legal system, in terms of knowing the law and also being able to participate in the legal process, whether as victim, offender or interested other has long been a critical consideration in addressing the plight of the disadvantaged in our society. The obligation to provide access to justice is enshrined in Article 14 of the *International*

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Covenant on Civil and Political Rights.[2] The State must ensure the availability of legal representation for participants engaged in the legal system and guarantee a fair trial. The private legal profession serves the vast majority of the market; however, the State provides public funding of legal service providers such as Community Legal Centres, Aboriginal and Torres Strait Islander (ATSI) Legal Services serving family law, criminal law and native title areas of law, as well as statutorily created legal aid providers filling a significant space in the legal services landscape and ensuring our international obligations are met. The oversight of the quality of services provided for clients has, in the past, been regulated through the member bodies of the legal profession, legal ombudsmen, and through the Supreme Court. However, the legal services market has seen a range of recent changes which has resulted in changes to the regulatory regime for legal services.

The *Legal Profession Act 2007* (Qld) (the Act), introduced to the Queensland legal services, markets the opportunity for legal services to be delivered by corporations. Simultaneously the Act imposed a regulatory regime for ensuring incorporated legal service providers reduce the potential for corporate interests to subjugate the interests of clients. However, the legislative regime made provision for the exclusion of incorporated community legal services and incorporated ATSI legal services from the provisions of the Act which regulate the conduct of 'incorporated legal practices' (ILPs).

The rationale for incorporation of law firms was largely driven by commercial interests, but to allay the fears of the consumer advocates that the further commercialised orientation of legal services would be to the detriment of clients, the rationale was jointly framed as a commercial imperative with a consumer protection backdrop.

This paper considers whether the exemption granted to incorporated Aboriginal and Torres Strait Islander legal services specifically creates an inequality in standards and risk protection available for clients of private law firms and those who use publicly funded legal services. The rationale underpinning the re-regulation of the 'private' profession and specifically incorporated legal services is explored to identify a rationale for justifying an exemption. A comparison is made of comparable potential risks and challenges facing exempt legal service providers to

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[2] United Nations, International Covenant on Civil and Political Rights, G.A. Res 2200A (XXI), UN Doc. 6316 (1996).

develop the case for uniform regulation. Finally the paper considers some of the pragmatic challenges that inclusion in a uniform regime may hold for exempt legal service providers.

II Publicly Provided Legal Services

The delivery of legal services can broadly be segmented between private firms and publicly funded firms with the latter including statutory providers, such as Legal Aid Queensland,[3] community legal centres[4] and ATSI legal services serving either broad general client bases, such as the poor, or specifically targeted client markets, such as domestic violence or refugees. Most of these services are incorporated and funded by state or federal governments. The publicly funded providers fill a significant market gap, theoretically ensuring access to justice for a wide and disparate client base, including the mentally ill, immigrants and refugees, members of ethnic groups, minority groups, the poor, and the socially marginalised, albeit within the terms of their contractual mandate. The ATSI legal service providers serve a wide range of clients including victims of domestic violence, women and children, prisoners, and those who are unable to afford private representation in a range of legal arenas.

Most, if not all, clients of publicly funded ATSI legal services must meet two pre-conditions to receiving services: for services other than 'quick advice', clients must be sufficiently impecunious to meet the 'means test'; and their cases must have sufficient legal 'merit' that there is a strong chance the clients' cases can be pursued to a successful outcome. Each case or matter must be in an area of law for which the legal service is permitted to provide services.[5] Clients must be poor and have a winnable case.

The community legal services market segment, including the ATSI segment, is only a small proportion of the total Queensland legal services market employing only 0.02% of legal practitioners.[6] The ATSI

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3 Legal Aid Queensland is not considered in this paper as it is covered by specific legislation.

4 Community legal centres are not specifically considered in this paper, although many of the issues raised may be applicable.

5 See, eg, *Policy Directions for the Delivery of Legal Aid Services to Indigenous Australians* (2008) Canberra, Act: Commonwealth of Australia.

6 Queensland Legal Services Commissioner, *Annual Report of the Legal*

legal services may serve large geographical regions often in difficult circumstances, including the remotest of locations. For example, the Aboriginal and Torres Strait Islander Legal Service Ltd in Queensland provides legal services across the entire state with lawyers in the Mt Isa office servicing a region from Birdsville to the Gulf of Carpentaria.

Many ATSI legal services operate in extremely challenging environments and have to balance many competing interests such as:

- Limited resource availability, human and capital, including insufficient funding to provide adequate levels of service;[7]
- Providing support services for clients such as interpreters, transport, and temporary accommodation;[8]
- Lack of experienced lawyers;[9]
- Monopoly market conditions where there are no or limited alternative legal service providers to individual clients within a region;[10]

Services Commissioner 2007–2008.

7 Office of Evaluation and Audit (Indigenous Programs), *Evaluation of the Legal Aid for Indigenous Australians Program* (2008) 32; Chris Cunneen and Melanie Schwartz, 'Funding Aboriginal and Torres Strait Islander Legal Services: Issues of equity and access' (2008) 32(1) *Criminal Law Journal* 38, 47–53.

8 While this should be a responsibility of the court system, ATSILS have had to provide interpretation services through their employed Field Officers and also a range of other support services for their clients, which goes beyond legal representation. See also Cunneen and Schwartz ibid.

9 Ibid. There are many outstanding and passionate lawyers working in community legal services, but their ability to attract the experienced lawyers is limited by the salary levels, which are often not competitive with private practice. See John Boersig, 'Wage Disparity Between Indigenous and non-Indigenous Legal Service Providers' (2001) *Indigenous Law Bulletin* 81; Australian Law Reform Commission, *Equality Before the Law: Justice for Women*, Report 61 Part 1, (2005) para 5.18. For further evidence of concerns about the levels of experience of lawyers, see Tina Previtera and John Lock, 'Fly in/Fly out Justice — an Imperfect Journey' (2007) 1 *The Verdict (Queensland Law Society)* 28, 34.

10 Monopoly markets exist in many remote areas. In the absence of competition service standards can be allowed to drop, evidenced through decisions such as allocating inexperienced lawyers, failure to supervise, failure to progress matters expeditiously, etc., potentially giving rise to breaches of

- Deficiencies in the corporate governance infrastructure, including capacity and skills of decision makers. There are many other issues which can impact upon corporate governance with potential adverse consequences for legal service delivery and standards. Most are related to skills, capability, resources, and local politics rather than any overt unethical drivers.[11]

Clients of these services, irrespective of their socio-economic position or their conception of identity, warrant high quality and reliable access to justice and the confidence to know that there is a standard of acceptable performance and means by which this can be monitored and regulated. It is contended that omitting incorporated ATSI legal services from the ILP provisions creates a less-than-satisfactory position in terms of quality control.

III Re-regulation of the Legal Profession

Further regulation of the legal profession in Queensland in 2007 was part of a national reform program to regulate the legal profession in a nationally consistent manner. The *Model Rules of Professional Conduct and Practice* were developed by the Law Council of Australia as a template for each member body of the Law Council to adopt with a view to ensuring greater uniformity in the regulation of legal practitioners throughout Australia.[12] The most significant change, in line with the national approach, was the reduction in the regulatory role of the professional associations, such as the Queensland Bar Association and the Queensland Law Society with respect to their own members and

duties owed to clients and the court in ensuring appropriate administration of justice.

[11] See for a review of governance in indigenous corporations under the *Aboriginal Councils and Associations Act.* See Corrs Chambers Westgarth et al., *A Modern Statute For Indigenous Corporations: Reforming The Aboriginal Councils And Associations Act Final Report of the Review of the Aboriginal Councils & Associations Act 1976* (Cth) *for Office of the Registrar of Aboriginal Corporations* (2002), 5 and Chapter 12, which identified a number of issues which impact upon the corporate governance of indigenous corporations, some of which are addressed in the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth), but not necessarily in corporations incorporated under the *Corporations Act 2001* (Cth).

[12] Law Council of Australia, *Model Rules of Professional Conduct and Practice* (2002).

the installation of an independent Legal Services Commissioner with a mandate, and the regulatory infrastructure, to oversee the standards of service of the profession. The redevelopment of the regulatory regime sought to balance competing interests: the economic efficiency and lower transaction cost imperative for private firms on the one hand, and at the same time ensuring no erosion in standards of professionalism with potential adverse consequences for clients on the other.

The decision to permit the incorporation of legal practices, and the ability to operate as a multi-disciplinary firm, mark a shift in regulatory policy for the legal profession. Providing access to a corporate structure can facilitate capital acquisition and growth as well as a range of other potential commercial efficiencies that are arguably less available under partnership or sole proprietor structures. However, incorporation also creates the potential for commercial profit-making imperatives to outweigh the professional obligations owed by legal practitioners to their clients, and to the Court. The commercial imperative for business efficiency was manifest in the justifications for a national regulatory regime, but also a 'consumer' protection imperative was acknowledged with specific reference noted in many of the formative public policy deliberations.[13] This was also captured in Queensland which specifically states the purpose of the Act:

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[13] *Queensland, National Competition Policy Review Legal Practice Legislation Competition Impact Statement (2003)* 3. The stated objectives for reforming the profession were: to reduce the risks consumers face in legal services markets by ensuring that suppliers of legal services deliver them in a competent and ethical manner (the consumer protection objective); to ensure consumers can obtain redress for costs imposed through the incompetence or dishonesty of legal practitioners (the compensation objective); and to facilitate the administration of justice and the rule of law (the justice objective). Also see the *Law Council of Australia, National Practice National Legal Profession Model Bill & Model Regulations <http://www.lawcouncil.asn.au/natpractice/currentstatus.html>* at 29 May 2007. Stated aims were 'encouraging competition leading to greater choice and other benefits for consumers. Enabling integrated delivery of legal services on an Australia-wide basis, which is commensurate with existing and future market demand for legal services. Streamlining State and Territory regulation to allow lawyers to practice "seamlessly" within Australia. Enabling Australian law firms to compete on a national and international basis and market themselves to international companies looking to invest in Australia'.

(a) to provide for the regulation of legal practice in this jurisdiction in the interests of the administration of justice and for the protection of consumers of the services of the legal profession and the public generally; [and]

(b) to facilitate the regulation of legal practice on a national basis across State borders.[14]

The balancing of the competing interests was achieved through a range of regulatory strategies, which, considered as a holistic model, implement a responsive regulatory regime.[15] The regime introduces an enforcement pyramid approach with the base 'persuasion' incentives to compel compliance provided through less prescriptive requirements, such as the creation of the role of Legal Practitioner Director and the self-regulatory approach to ensuring compliance with the Act. However, failure to comply can result in civil penalty provisions, which are more deterrent in nature, but repeated non-compliance escalates to a culminating sanction including 'license suspension' or being 'struck off the Roll' and losing the right to practise law. Essential to this model in the absence of mandatory compliance is the requirement for adequate or at least threatened monitoring. Non-compliance action is dealt with under the discipline provisions of the Act by the Legal Services Commission and the Supreme Court.[16]

While the Act contains a range of provisions which expressly deal with the regulation of incorporated legal practices, the corporation is not specifically subject to sanction with responsibility resting upon the Legal Practitioner Director. This effectively ignores the culpability of firm-wide structures that may lead to inappropriate behaviour.[17]

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14 *Legal Profession Act 2007* (Qld) s 3.

15 John Braithwaite and Ian Ayres, *Responsive Regulation: Transcending the Deregulation Debate* (1992); John Braithwaite, *Restorative Justice and Responsive Regulation* (2002) 30.

16 Christine Parker, 'Law Firms Incorporated: How Incorporation Could and Should Make Firms More Ethically Responsible' (2004) 23 *The University of Queensland Law Journal* 347–380.

17 Ibid.

A *Legal Practitioner Director*

The statutory creation of a designated Legal Practitioner Director is an overt effort to ensure that responsibility for practise standards is assigned to a person.[18] Appointment of a Legal Practitioner Director is mandatory for all incorporated legal practices, other than those that are exempt. A Legal Practitioner Director must be a lawyer with an unrestricted principal's practising certificate,[19] which in turn requires the practitioner to have undertaken a course in law practice management and hold the required professional indemnity insurance.[20] The role of the Legal Practitioner Director is to ensure that management systems are in place and to take all reasonable steps to ensure there are no breaches of professional obligations, or no repeated breaches, and to ensure any breach is remedied.[21] The term 'professional obligations' is defined in the Act to include:

> (a) duties to the Supreme Court; and
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> (b) obligations in connection with conflicts of interest; and
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> (c) duties to clients, including disclosure; and
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> (d) ethical rules the legal practitioner must observe.[22]

The duties owed by legal practitioners are largely duties owed by individual legal practitioners with the individual lawyer being the focus of professional responsibility.[23]

A validly appointed Legal Practitioner Director is also an officer of the corporation, and subject to those duties that company directors must meet. This appears to be an attempt to ensure that the position is not taken as a mere token appointment, and to sheet home some degree of obligation on the corporation by ensuring the Legal Practitioner Director is a participant in the corporate governance decision making. While this approach can appear to be a compromise short of mandating

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18 *Legal Profession Act 2007* (Qld) Part 2.5. The *Legal Practitioner Director* provisions include s 117 and s 110.

19 *Legal Profession Act 2007* (Qld) s 119(6) provides for the unrestricted practicing certificate requirement.

20 *Queensland Law Society Administration Rule 2005* (Qld).

21 *Legal Profession Act 2007* (Qld) s 117.

22 *Legal Profession Act 2007* (Qld) s 110.

23 Parker, above n 16, 365.

accountability by the corporation, it does create some degree of accountability to ensure clients are protected through a blended model loosely entwining the professional obligations of legal practitioners and corporate governance.

To reinforce the role and duties of the Legal Practitioner Director to safeguard the upholding of professional obligations, the ILP provisions make it an offence to induce a contravention of the Act or any legal practitioner's professional obligations or risk a fine.[24] Inducing of a Legal Practitioner Director to breach their obligations also results in a penalty fine. These express prohibitions are designed to ensure Legal Practitioner Directors privilege the professional obligations and regulatory obligations ahead of the corporate or commercial imperatives of the corporation.

The Legal Practitioner Directors will have met their duty if they take all reasonable actions to prevent a breach.[25] Non-conformance exposes the Legal Practitioner Directors to a range of sanctions. They are also made vicariously liable for professional conduct of employed lawyers.[26]

The Supreme Court is also empowered under the Act to disqualify a person from managing an ILP, including persons who have been disqualified under the Corporations Act[27] where the court considers disqualification justified.[28]

B *Legal Services Commission*

The Act creates the institution of the Legal Services Commission[29] as an

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24 *Legal Profession Act 2007* (Qld) s 143. The penalty is 300 penalty units.

25 *Legal Profession Act 2007* (Qld) s 117(4) and s 127.

26 *Legal Profession Act 2007* (Qld) s 118.

27 *Corporations Act 2002* (Cth) s 206C — a person has contravened a corporation/scheme civil penalty provision; s 206D — a person managing two or more corporations that have failed where creditors were not fully paid and the manner in which the corporation was managed was wholly or partly responsible for the corporation failing; s 206 E — a person twice having been an officer of a body corporate that has contravened this Act while they were an officer of the body corporate and each time the person has failed to take reasonable steps to prevent the contravention or breached directors duties; s 206 F — ASIC disqualifies arising from insolvency.

28 *Legal Profession Act 2007* (Qld) s 133.

29 Ibid Part 7.1

independent body to investigate complaints against legal practitioners and to ensure compliance with the Act by ILPs.[30] The Legal Services Commission undertakes audits to assess compliance with the ILP regulatory requirements and the management of the provision of legal services by the incorporated legal practice, including the supervision of officers and employees providing the services.[31]

With respect to ILPs, the intention in the legislation is to move beyond a reactive complaints-driven regulatory approach to a proactive model which includes not only complaints handling but also other regulatory devices to encourage voluntarily compliance with the Act by ILPs and to assess actual compliance, with the aim being to improve the quality of legal practice governance for the benefit of clients.

C *Professional Obligations*

Central to the 2007 legislative regime is the upholding of the professional obligations by individual legal practitioners. Regulation of the Legal Practitioner Director and the imposition upon the holder of that role is the obligation to take reasonable steps to ensure that adherence to the professional obligations serve as a proxy to regulate the corporate conduct. This creates a potential tension for the corporation and the Legal Practitioner Director between the fiduciary and statutory duties of directors owed to the company as a whole, and the obligations of the Legal Practitioner Director to ensure professional obligations are not breached. While on the face of it the professional obligations may be entirely consistent with the duties of directors this may not always be the case, particularly where a corporation has to balance decisions made in the best interest of the company, such as allocation of limited resources, with the best interests of a particular client in terms of service standards.[32] A Legal Practitioner Director will have complied with their duty if they meet their onus to take *reasonable* actions to prevent a breach. This is not entirely satisfactory from a client perspective as it privileges a commercial outcome.

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30 Ibid Chapter 4.

31 *Legal Profession Act 2007* (Qld) s 130.

32 An example could be failing to adequately supervise inexperienced staff as a result of insufficient experienced staff, with the potential to erode the administration of justice, breaching a duty owed to the Court.

D *Management of the Legal Services*

While the regime for regulating ILPs is not entirely satisfactory and is clearly designed in the shadow of the commercial realities of modern private legal practice, the extent of the reach of the Legal Practitioner Director to manage the legal practice does offer further client protection than would be available in their absence. The extent of the obligations upon a Legal Practitioner Director to manage the legal services extends beyond tokenism and requires the Legal Practitioner Director to be cognisant of day-to-day management.

The term 'management of the legal services' has not been defined in the Act. However, the Legal Services Commissioner in NSW considers that it 'probably does not extend beyond those general responsibilities that partners have to the general management of their partnership'.[33] The extent of partner responsibility to participate in management is defined in the *Partnership Act 1891* (Qld) which provides every partner the right to participate in the management of the business.[34] This right of participation facilitates the mitigation of a partner's potential exposure to unlimited liability. This right to participate in management of a partnership extends to oversight of the conduct of employed solicitors and staff.[35] The Commissioner's comments could be seen as reading down the obligations of the Legal Practitioner Director; however, it actually reinforces the notion that management of the legal services extends beyond a governance level of corporate responsibility and includes a right to ensure that management systems are in place and to facilitate active involvement in day-to-day management. This would imply that the Legal Practitioner Director should actually be an executive of the corporation, rather than a non-executive director. This would accord with the intent of the legislation to ensure that effective consumer protection systems are in place and operational.

E *Effectiveness of the Regulatory Model*

Notwithstanding some of the limitations of the regulatory model for ILPs already referred to, what is in place is a transitional process which

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33 Steven Mark and Molly Hutcherson, 'New Structures for Legal Practices and the Challenges They Bring for Regulators' (Paper presented at the 14th Commonwealth Law Conference 2005, London, September 2005), 2.

34 s 27(1)(e).

35 Jeff Shaw, 'Incorporation of Legal Practices under the Corporations Law' (1999) 37 *Law Society Journal* 66.

has built some regulatory infrastructure designed to enhance the access to and quality of justice, in the form of legal representation available to clients.

According to recent research that examined the legal practice regulatory regime in New South Wales, which is virtually identical to the Queensland model, ILPs subjected to the regulatory model saw positive results in terms of improved client satisfaction.[36] A key outcome was the success of compliance system self-assessment by ILPs in reducing the number of complaints by consumers. The research found compelling evidence that the regulatory approach requiring implementation of appropriate management systems at the firm level made a significant difference to ethical management systems and ethical behaviour. The self-assessment regime resulted in a significant drop in complaint numbers.[37] The report authors did note that there could be a range of reasons for this, including the fact that ILPs could be a self-selecting group of more ethical and better managed firms or are managed by lawyers that think more strategically about best practice processes.

Success of a responsive regulatory model approach, as is the case here, depends on the robustness of the entire regime and is more than just the sum of the parts. In effect the overall improvement in orientation towards client service standards, measured by reduced complaints, goes beyond just regulating individual conduct and flows from the holistic nature of the regulatory model.[38] While there are acknowledged shortfalls in the crafting of the regime, as a whole it is better than the former complaint-driven model.

IV Exemptions for Community Legal Services

Incorporated Aboriginal and Torres Strait Islander legal services are exempt from compliance with the incorporated legal practice

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[36] Christine Parker, Steve Mark, and Tahlia Gordon. '*Research Report: Assessing the Impact of Management-Based Regulation on NSW Incorporated Legal Practices'* (2008) Sydney, NSW: Melbourne Law School and Office of the Legal Services Commissioner.

[37] Ibid 55.

[38] See the following on the topic or responsive regulation: John Braithwaite and Ian Ayres, *Responsive Regulation: Transcending the Deregulation Debate* (1992); Parker n 16.

provisions.[39] Accordingly there is no requirement to appoint a Legal Practitioner Director, nor for any designated person to undertake the same or similar duties and responsibilities as a Legal Practitioner Director. The regulator model is based largely on redressing complaints against individual practitioners rather than consideration of firm activity and has no requirement for the development of a systemic approach to management or complaint handling.

There are no reasons provided in Hansard or the Explanatory Memorandum for the exemption. However, in the explanatory notes to the Legal Profession Bill 2004 (Qld), which made provisions for ILPs, but which were never enacted, it was stated:

> Under clause 86[40] a corporation that provides legal services is not an incorporated legal practice if the corporation is prescribed under a regulation as a corporation that is not an incorporated legal practice. This exempting power is included to ensure that the incorporated legal practice provisions do not have an unintended consequence for a class of corporation to which it is inappropriate that it applies.

Why it is 'inappropriate' for the provisions to apply is unstated.

The author could find no other public records justifying any continuation in a differential approach between incorporated legal practices in the private and community sectors.

Queensland is not alone in exempting incorporated community and ATSI legal services from ILP compliance. All states, except South Australia, have developed models which deal with what should be exempt and what, if any, approaches should be taken to provide some comfort that the exempt corporations will operate to acceptable professional standards. Options utilised include granting exemption only to not-for-profit community and ATSI legal services, as in Queensland's case;[41] requiring exempt corporations to appoint a supervising legal practitioner

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39 *Legal Profession Act 2007* (Qld) s 111(3) and *Legal Profession Regulations 2007* (Qld) r 10.

40 Section 110 in the 2007 Act, which provides for defining a corporation by Regulation.

41 Although there are some minor differences about the impact of collection of fees from clients on non-profit status between jurisdictions.

or someone responsible for supervision;[42] and, in some cases, requiring supervising legal practitioners to meet minimum qualification requirements.[43] These efforts appear to be more afterthoughts with limited appreciation of the consequence of exemption.

In Victoria, exemption is provided for *community legal centres*, but there is a requirement that a community legal centre must employ one or more *supervising legal practitioners* to be responsible for the provision of legal services at the community legal centre.[44] The supervising legal practitioner must be an Australian legal practitioner who holds a practising certificate as a principal of a law practice and may be on the board of management or an employee.[45] A community legal centre means a body formed for the purpose of providing legal advice, aid or assistance, the profit or other income of which is not divided among or received by the members except by way of genuine remuneration.[46] Regulations may provide for the 'the duties, obligations and liabilities of supervising legal practitioners and other Australian legal practitioners employed or engaged by community legal centres'.[47]

In New South Wales an exemption has been granted to complying community legal centres.[48] The complying community legal centre must employ at least one person who is an Australian legal practitioner and is generally responsible for the provision of those legal services

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42 Victoria (*Legal Profession Act 2004* (Vic) s 2.9.2(1)); Northern Territory (*Legal Profession Act 2006* (NT) s 227(d)); New South Wales requires a practitioner to be 'generally responsible for the provision of those legal services' (*Legal Profession Act 2004* (NSW) s 240(1)(d)).

43 Victoria — must be principal of a law practice and may be on the board of management or an employee (*Legal Profession Act 2004* (Vic) s 2.9.2(5)); Northern Territory — must hold an unrestricted practising certificate (*Legal Profession Act 2006* (NT) s 228); NSW — no requirement other than being an Australian legal practitioner (*Legal Profession Act 2004* (NSW) s 240(1)(d)); Western Australia — no requirement or supervision.

44 *Legal Profession Act 2004* (Vic) s 2.9.2(1).

45 *Legal Profession Act 2004* (Vic) s 2.9.2(5).

46 *Legal Profession Act 2004* (Vic) s 1.2.1.

47 *Legal Profession Act 2004* (Vic) s 2.9.5(1)(b) — there are currently no requirements regulated.

48 *Legal Profession Act 2004* (NSW) s 14(2)(d) and see s 134(2)(c) — 'a complying community legal practice is not an incorporated legal practice'.

(whether or not the person has an unrestricted practising certificate).[49] There is no restriction on the complying community legal centres from earning fees.[50] Northern Territory also provides exemptions for complying community legal centres from holding a practising certificate and being an ILP.[51] The complying community legal centres must employ a qualified legal practitioner who is responsible for the provision of the legal services, referred to as a supervising legal practitioner.[52] They must also be an Australian legal practitioner who holds an unrestricted practising certificate.[53] In Western Australia an exemption from classification as an ILP is provided to a corporation that does not 'receive any form of, or have an expectation of, a fee, gain or reward for the legal services it provides'[54] or one that is exempt by regulation.[55] An exemption is provided in the Regulations for not-for-profit community legal centres.[56] There is no requirement for the legal services to be supervised by a legal practitioner. South Australia did not enact the Legal Profession Bill 2006, which Bill has now lapsed. Tasmanian legislation provides exemption for '[a]corporation [that] does not receive any form of, or have any expectation of, a fee, gain or reward for the legal services it provides' or is exempt by regulation complying community legal centres.[57]

A *Risks for Clients*

The consequences of exemption of ATSI legal services from the ILP regime raises the question of whether clients are being provided a lesser standard of justice in terms of their access to justice.

One major concern is that exempt ILPs have no obligation to meet the same regulatory standards as non-exempt ILPs, and their clients may well be condemned to a reactive complaints-driven model. In supporting the new regulatory framework, which requires self-assessment and the

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49 *Legal Profession Act 2004* (NSW) s 240(1)(d).

50 *Legal Profession Act 2004* (NSW) s 240(2).

51 *Legal Profession Act 2006* (NT) s 227.

52 *Legal Profession Act 2006* (NT) s 227(d).

53 *Legal Profession Act 2006* (NT) s 228.

54 *Legal Practitioners Act 2008* (WA) s 99(2)(a).

55 *Legal Practitioners Act 2008* (WA) s 99(2)(d).

56 *Legal Practitioners Regulations 2009* (WA) Reg 19.

57 *Legal Practitioners Act 2008* (Tas) s 112 (2)(a) and (d).

potential for system audits, John Britton, the Queensland Legal Services Commissioner, in a speech to the Queensland Law Society Symposium in 2009, said, 'The problem is that complaints-driven regimes for monitoring and enforcing standards of conduct have significant and inherent weaknesses.'

He outlined four reasons for this statement: complaints-driven regimes are 'almost entirely reactive'; complaints-driven processes are highly selective in their application; they focus on minimum standards; and they focus on individual conduct and ignore the reality that their conduct is a function in part at least of the workplace cultures of the law firms within which legal practitioners work.[58]

Do the risks posed to clients of incorporated ATSI legal services warrant regulatory intervention? In the absence of any justification for exempting them, consideration of the rationale behind improved regulation of standards for private law firms, and thus incorporated legal practices, may provide some insight.

One of the core drivers behind the re-regulation of the private legal profession was significant consumer disaffection with the legal profession in the early 1990s and the lack of confidence in the Queensland Law Society's handling of complaints against lawyers.[59] Clients suffered losses arising from maladministration of, and fraud on trust accounts, and many were victims of failed mortgage schemes operated by legal practitioners. There were also concerns about the administration of indemnity funds designed to provide compensation for victims of these unethical, negligent or incompetent practises. The fact that the professional member bodies were charged with regulation of the legal profession offered little comfort, and charges were made

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[58] J Briton, 'The Changing Face of Lawyer Regulation' (2009). (Paper presented at the 47th Annual Vincents' QLS symposium. from <http://www.lsc.qld.gov.au/speeches/QLS_Symposium_2009.pdf>).

[59] For the case for reform see Parker above n 16; Reid Mortensen and Linda Haller, 'Legal Professional Reform In Queensland' (2004) 23 *The University of Queensland Law Journal*, 280–288; Linda Haller, 'Imperfect Practice Under the Legal Profession Act' 2004, (2004) 23 *The University of Queensland Law Journal* 411; and for NSW perspectives see Steven Mark and Molly Hutcherson, 'New Structures for Legal Practices and the Challenges They Bring for Regulators' (Paper presented at the 14th Commonwealth Law Conference, London, September 2005).

of conflicts of interests between their obligations to their members and their duties to the client public. There was significant adverse press coverage that fuelled the calls for reform.[60] A number of high profile legal actions against lawyers was grist for the proverbial media mill and provided evidence that could not be ignored by politicians. The timing also coincided with the dismantling of protectionist barriers across a range of industries under the guise of a national competition reform agenda. This created a climate where reform of the legal profession became a political imperative.

The reform agenda hung on the twin planks of 'consumer' protection and lower delivery cost for transborder legal services, hopefully with a price reduction for consumers.

B *Grievance Type and Forum for Complaints*

Grievances and consumer complaints arising from services delivered by incorporated community or ATSI legal services are usually dealt with internally at the first instance. Dissatisfied complainants are advised to send their complaint to the government funding body for the service provider.[61] It is standard practise, at least with respect to the Commonwealth Attorney General's Department, for complaints made to the funding body to be referred back to the body's board for investigation and resolution.[62] This approach is circular and lacks transparency. It has the same fundamental systemic flaws which bedevilled the Queensland legal profession's self management of complaints, which justified the reform and the institution of the independent Legal Services Commission. In many remote regions where the legal service provider, and potentially the lawyer against whom a complaint is made, is the only provider, there is potential for complaints to not be made for fear of losing the only available legal representation.

In the *Review of the Commonwealth Community Legal Services Program* in 2008 it was noted that there were actually few formal complaints made to the review panel about the performance of community legal centres. Likewise a review of the Indigenous Legal Aid Program funded by the Commonwealth Attorney General's Department found low levels

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60 Mortensen and Haller, above n 59, 281.

61 *Review of the Commonwealth Community Legal Services Program* (2008) Canberra, Act: Commonwealth of Australia, 42.

62 Ibid 51.

of complaints.[63] One cannot know whether this is due to there being no dissatisfaction or whether complaints were simply not made. If reliance is placed on the explanations that there are simply few complaints then this could lead to the conclusion that there may be fewer risks to clients and therefore less urgency to regulate. However, if complaints are suppressed by the complexity and jeopardy that the complaints process creates, then surely this is a source of concern, going to the heart of the rule of law and the administration of justice.

Clients of incorporated community and ATSI legal services are left with a substandard complaints system as the following comments of the Office of Evaluation and Audits review of the Indigenous Legal Aid program attest:

> There is a need for improved [legal service] Provider processes for development of client satisfaction surveys and conduct and reporting of self audits against Service Standards. However, in both these cases, improved AGD [Attorney General's Department] policy guidance is required. [64]

The issue of transparency and integrity in complaints processes are paramount to secure reliable data, but more so to ensure confidence in the robustness of legal service delivery in the quest for justice. The inadequacies of the system for managing complaints only further underpin the need for incorporated community and ATSI legal services to be brought within the ILP statutory scheme.

C *Consequences*

Clients of incorporated ATSI legal services in most cases are seeking representation with respect to criminal law issues, family disputes, and violence related matters. In the event of a breach of professional obligations or a service delivery failure by a legal service provider, the consequences for clients can be extremely dire, and in no way less serious than for clients of a private provider. Given the socio-economic profile of clients that many legal services provide services to, the consequence of something as simple as a fine can cause significant economic hardship. At the extreme end of service failure is the potential for being incarcerated. Sadly, there are many cases of defendants being remanded

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63 Office of Evaluation and Audit (Indigenous Programs), *Evaluation of the Legal Aid for Indigenous Australians Program* (2008).

64 Ibid.

in custody for extended periods of time, with their cases delayed for a significant period, sometimes resulting in a custodial period in excess of the sentence ultimately imposed.[65] The issue of adequacy of legal representation for indigenous people goes to the heart of questions of access, equity, and the rule of law.[66] These service delivery challenges have not all gone unnoticed. Former Cairns Magistrate, Tina Previtera, referring to Magistrate court circuits in the remote Cape York area noted:

> Magistrates have also had concerns with the level of experience of certain of the legal representatives for defendants. This particularly occurred when the legal services were amalgamated in early 2005. These concerns were expressed universally by magistrates in the region and resulted in representations being made by The Chief Magistrate on our behalf. The Federal Attorney General also intervened.[67]

D *Systemic and Governance Risks*

Complaints-driven regulatory regimes *camouflage* the potential for systemic and underlying causes of risk for clients which may be attributable to corporate decisions, rather than individual legal practitioners. The potential for governance related risks in a legal service is increased if the governance body does not have sufficient financial and human resources combined with the requisite managerial expertise. It has been argued that the funding of the community legal services

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65 See eg, Jessica Johnston, 'System Failed Him', *Townsville Bulletin* (Townsville), 2009. A man was remanded in custody for 572 days waiting to be sentenced after pleading guilty to charges relating to burglary, driving and drug offences. His case was conducted by an Aboriginal and Torres Strait Islander Legal Service. Unless issues of this type are brought to the attention of the press, they remain largely invisible.

66 Cunneen and Schwartz above n 7. See also '*Erosion of Legal Representation in the Australian Justice System: A research project and report undertaken by the Law Council of Australia in conjunction with the Australian Institute of Judicial Administration, National Legal Aid, Aboriginal and Torres Strait Islander Legal Services*' (Law Council of Australia, 2004), 60–75, where it was made clear that there was a link between adequacy of funding and quality of legal service delivered by practitioners providing Legal Aid funded services.

67 Previtera above n 9.

sector has not kept up with demand for services.[68] Consequently, this has created significant pressure on service providers as the demand and the consequence of limited resources impacts service delivery.[69] Service delivery standards are often affected by governance processes such as delivering services in a way that meet contractual requirements. However, in doing so, legal service providers had to deal with a range of issues, such as attracting and retaining legal staff,[70] quality of strategic planning and performance reporting, quality assurance on legal service delivery case work, structured development, and mentoring of junior lawyers, as well as legal service policies and procedures and related training.[71] Few of these issues can be attributed to or regulated through individual practitioners, but if the ATSI Legal Services were regulated

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68 Cunneen and Schwartz above n 7. With respect to reduced funding for civil law services see Tony Woodyatt, *Submission to Queensland Law Society: A proposal for* '*voluntary practicing certificates*' *in Queensland* (2006), 3. *Community Legal Centres Across Australia. An Investment Worth Protecting: Funding Submission to Commonwealth Government 2007–2010* (2008), 1, where they argue that 'CLCs have experienced an 18% reduction in funding over the last 10 years in real terms.'

69 Ibid and also M. Rix, 'Legal Aid, the Community Legal Sector and Access to Justice: What has been the Record of the Australian Government?' (Paper presented at the Proceedings of the International Symposium on Public Governance and Leadership: Managing Governance Changes Drivers for Re-constituting Leadership, University of Plymouth, United Kingdom, 24–25 May 2007); Review of the Commonwealth Community Legal Services Program (2008) Canberra, Act: Commonwealth of Australia p47 citing Australian Council of Social, Services, *Community Sector Survey: 2007 National Report, Paper 145*, February 2007; National Association of Community Legal Centres Submission to the Review, '*Erosion of Legal Representation in the Australian Justice System: A research project and report undertaken by the Law Council of Australia in conjunction with the Australian Institute of Judicial Administration, National Legal Aid, Aboriginal and Torres Strait Islander Legal Services*' (Law Council of Australia, 2004).

70 'Fact Sheet: Recruitment and retention of legal practitioners in rural, regional and remote (RRR) areas of Australia' (Law Council of Australia, 2009).

71 Office of Evaluation and Audit (Indigenous Programs), *Evaluation of the Legal Aid for Indigenous Australians Program* (2008). P5. The author's experience as a Legal Practice Manager (Principal Legal Officer) for a large ATSI legal service has provided significant confidential evidence of service quality erosion.

ILPs there would be a requirement to develop operational service quality systems.

The quality and functionality of the relationship between legal practitioners and their boards in ATSI legal services can often be strained, with a policy battle between the legal practitioner's preferences not aligning with the policy decisions of the management boards. Sadly, this is not a new issue for indigenous corporations operating in professional areas as they struggle with balancing self-determination with the shortage of skills which requires the hiring of non-indigenous professionals who operate with different cultural orientations and worldviews.[72] The issues and rationales which underpin the tension between legal practitioners working under the control of non-legally qualified managers or boards highlight many of the structural challenges that continue to beset the governance and delivery of services to indigenous Australians.

E *Accountability and Transparency*

Accountability and transparency considerations must include the question of how incorporated community and ATSI legal services are held accountable for their actions in circumstances where they have breached the professional obligations under the Act. There are presently three means whereby incorporated community and ATSI legal services can be held accountable: firstly, through regulation of individual legal practitioners; secondly, self- regulation by the members of the corporation pursuant to their powers to remove directors; and finally, through the contractual mechanisms imposed by the funding body which are considered in turn below.

1 *Regulation of Individual Legal Practitioners*

Legal practitioners have responsibilities under the Act and also as officers of the court. Complaints can be made against a legal practitioner to the Legal Services Commission. The Legal Services Commission can also make its own enquiries of individual legal practitioner conduct, or do so on referral from the Law Society or Bar Association, providing a relatively rigorous avenue for instigating investigation of individual practitioner conduct.

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[72] Gregory Lyons, 'Aboriginal Legal Services' in Peter Hanks and Bryan Keon-Cohen (eds), *Aborigines and the Law: Essays in Memory of Elizabeth Eggleston* (1984) 142. The author has supporting anecdotal evidence received while providing governance training to indigenous groups.

2 *Self-regulation by the Members of Incorporated Providers*

Under a corporation's incorporating legislation, and relevant common law, a corporation and its officers owe fiduciary and statutory duties to the company. They do not owe a corporate level duty to clients. Aggrieved clients have avenues for redress through the legal system for breach of contract, claims in tort or through other statutory remedies, provided that they have the means and wherewithal to bring an action, with appropriate representation. Members of corporations have some limited means of enforcing accountability of a board of directors by seeking the removal of individual board members or in not re-electing them. Members have no right to participate in the management of the corporation. Corporate regulators also have power to take action with respect to breaches of corporate duties. A corporate regulator has no power to take action for breach of the professional duties included in the Act; their jurisdiction is limited to only those issues which fall within the incorporating legislation.

3 *Contractual Regulation*

Publicly funded incorporated community and ATSI legal services are subject to the terms of their agreements with the funding body in so far as they regulate service delivery. Contractual regulation provides accountability to the funder, not to the client. The terms of the funding contract can provide for a range of reporting and accountability measures, including service delivery standards, generally drafted to ensure contractual compliance based on efficiency and effectiveness parameters. However, the quality of performance monitoring has come under criticism for not providing enough assurance to the funding agency about the quality of services delivered and providing insufficient contractual guidance to contracted legal services.[73] This raises the potential that, in the absence of rigorous audit and monitoring, the contracted party will opportunistically neglect compliance or at least reduce the priority emphasis in pursuit of other competing priorities. This is a classic agency problem in competitively negotiated contracts.[74]

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[73] Office of Evaluation and Audit (Indigenous Programs), *Evaluation of the Legal Aid for Indigenous Australians Program* (2008) 3–4.

[74] David M. Van Slyke, 'Agents or Stewards: Using Theory to Understand the Government-Nonprofit Social Service Contracting Relationship' (2007) 17(2) *Journal of Public Administration Research and Theory* 157.

All three regulatory approaches demonstrate limited capacity to monitor or compel corporations to prioritise client service standards ahead of other corporate priorities. There is an array of real risks that can have a significant impact on clients of community and ATSI legal services and any assumptions that they have less potential for failure and/or service failure should be considered unwarranted.

V Adaptation to the New Regime

Given that the ILP regulatory regime is in place and operational, what are the challenges for transitioning incorporated ATSI legal services to the ILP regulatory regime? Three key dimensions that warrant consideration are (i) resources availability and capacity, (ii) corporate governance level dimensions for legal services and (iii) political and aspirational dimensions of the affected stakeholders.

A *Resources Availability and Capacity*

A transition to the ILP regulatory regime would require the appointment of a Legal Practitioner Director. In many community legal services the Principal Legal Officer would meet the regulatory requirements to be appointed a Legal Practitioner Director and is already undertaking a similar role with full support of their board. What remains presently absent, however, is that, notwithstanding that the Principal Legal Officer may be performing the role of a Legal Practitioner Director, there remains no oversight by the Legal Services Commission. This is a crucial part of the holistic regulatory regime. The Principal Legal Officer may require additional practice management training to meet the requirements for obtaining an unrestricted principal's certificate. This should be considered advantageous to the provider rather than a hurdle.

In those situations where legal services do not have the capacity to attract suitably qualified legal practitioners to hold the office of a Legal Practitioner Director then the regulation has performed its task and identified a risk. In these cases consideration is required for the appointment of alternative delivery options by compliant providers.

B *Corporate Governance Level Dimensions*

Statutory requirements for a new director may require remodelling of governance structures in some corporations. In some incorporated community and ATSI legal services, eligibility for board membership

is based on ethnicity, geographic representation, such as representing members from a prescribed location, and/or organisational membership. Compliance with the Act would pose a number of political tensions, particularly for legal services that have difficulty recruiting eligible Legal Practitioner Directors who meet the director eligibility requirements of the corporation. While challenging, it is not insurmountable. By way of example, ATSI corporations incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) have the option to appoint non-indigenous directors through specific constitutional amendments provided Aboriginal or Torres Strait Islander directors are in the majority.[75] Corporations incorporated under the *Corporations Act 2001* (Cth) have no legal barriers other than requiring a resolution of members to support an amendment to the Constitution. This may prove a challenge. However, in the absence of an appointment of a Legal Practitioner Director by the legal service provider, the Act provides that one will be appointed by the Queensland Law Society.[76]

C *Political and Aspirational Dimensions*

The issue of mandatory appointment to the board of a person who may not traditionally have been considered eligible to hold such a role will prompt discussion about the historical and continued justification or relevance of identity specific community and ATSI legal services. This is an issue which warrants deeper consideration than can be offered in this paper but a few comments are offered.

Starting from the premise that all clients warrant equitable regulatory standards then considerations about issues such as autonomy and community ownership and control must be made with service standards as the primary consideration. If any contention is offered that the ILP regime is mutually exclusive with political aspirations for community autonomy or self-determination, and if it is accepted that the ILP regulatory regime provides a superior structural approach to risk mitigation for consumers of legal services, then retention of an opaque complaints driven model would seem counterproductive, ill-conceived and disadvantageous to those who are to be served. The use

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[75] *Corporations (Aboriginal and Torres Strait Islander) Act 2006* s 246–1(3) and s 246–5.

[76] *Legal Profession Act 2007* (Qld) s 140 provides that provisions in the Act prevail over the constitution or other constituent documents of the ILP, thus reducing the urgency, but not the requirement, for effective governance.

of incorporated community or ATSI legal services as the vehicle through which self-determination is implemented is merely a symptom of an underlying cause for discontent. Simply, this is the lack of a coordinated, available and legitimate representational body for the constituent group to address their aspirational needs.[77] It is important that there be a clear identification and demarcation between dealing with causes and dealing with symptoms. Politicisation of community and ATSI legal services has been a feature of the past.[78] They have filled a void in both the ability to participate in genuine discipline-specific dialogue and representation of constituent groups. Some of these organisations will continue to have that role but in doing so should ensure that consumer protection standards are not subordinated to the other causes. This is the exact rationale behind the ILP provisions, to ensure commercial interests do not subjugate the public interest, i.e. professional ethical standards of conduct by lawyers.

The application of the ILP provisions to all incorporated legal services providers, private and public, in no way threatens the capacity to deliver services to the standards that consumers expect or deserve. Approached sensitively and innovatively, it can lay the groundwork for greater risk protection, improved access to justice and confidence in the administration of justice, and build additional institutional capacity. There is a case to be made at a political level that lack of resources and funding in real terms should not justify different standards, but that resources should be increased to secure parity in standards for all clients.

VI Conclusion

The exemption of community and ATSI legal services from the Incorporated Legal Practice provisions of the *Legal Profession Act 2007* (Qld) is not justified. Exemption results in double standards for different clients based on socio-economic status. Exemption privileges clients who can pay for legal services over those who rely upon publically funded incorporated community and ATSI legal services. Exemption perpetuates structural inequities for minority groups which

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77 For ATSI people, hopefully the new national indigenous representative body known as the *National Congress of Australia's First Peoples* will fill this void.

78 Lyons, above n 72

have become so culturally imbibed into our societal structures that we lose the ability to recognise them. Further, the exemption of segments of the legal services market from the ILP regime fails to account for the potential risks and consequences for clients who do not warrant any less scrutiny of the standards of service and 'consumer' protection afforded by the State than other clients. If anything they warrant greater degree of vigilance and support due to their vulnerable position.

Clients of incorporated community and ATSI legal services who rely on an out-dated regulatory infrastructure are placing their faith in the significant goodwill and capacity of individuals and not in a robust system, notwithstanding the weaknesses of the ILP regime. The benefits of the ILP regulatory regime cannot be replicated by Government funding bodies operating through commercial and confidential service contracts. Government is not independent and do not have the capacity, nor the goodwill of the public, to function as an independent body as does the Legal Services Commission.

Application of the ILP regulatory regime to incorporated ATSI legal services will have some transitional hurdles, as was the case for private law firms that moved to that model of practice. Many service providers are well positioned to make the transition because they already operate at high quality management standards, but others do not. Because clients of many of these services do not have the expertise or opportunity to evaluate service standards, they trust that appropriate regulation is in place to mitigate potential risk and that they receive the level of access to justice and high quality administration of justice as every other Australian. Now the task is to ensure their trust is well placed.

The Council of Australian Governments (COAG) agreed on 30 April 2009 to establish a National Legal Profession Reform Project Taskforce and to consider further reform to the legal profession including making recommendations on regulatory structures required to achieve uniformity of regulatory practice.[79] This provides a significant opportunity for the concerns raised to be redressed and for access to justice and uniform

[79] Council of Australian Governments (COAG) National Legal Profession Reform, Discussion paper: The Regulatory Framework: A National Legal Profession <http://www.ag.gov.au/www/agd/agd.nsf/Page/ConsultationsreformsandreviewsCouncilofAustralianGovernments(COAG)NationalLegalProfessionReform> at 19 January 2010.

standards of services to be a paramount outcome to ensure the highest standards of service delivery for all clients, irrespective of socio-economic status.