



May 27, 2016

**Call for Input on Compliance-Based Entity Regulation**

**Policy Secretariat**

**The Law Society of Upper Canada**

130 Queen St. W.

Toronto, ON

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Dear Policy Secretariat:

**RE: COMPLIANCE BASED ENTITY REGULATION**

The Toronto Lawyers' Association would like to take this opportunity to provide submissions with respect to the Law Society of Upper Canada's proposal to institute compliance-based entity regulation of lawyers and paralegals. We understand that at the last Convocation, the LSUC has determined that it will proceed with the next steps towards this change.

The Toronto Lawyers' Association is the voice of Toronto's lawyers. We represent over 3,000 lawyers who practice in all areas of the law and whose law practice entities run the gamut from sole practitioner to the largest national and international firms.

The TLA applauds the proposal to introduce a proactive approach to regulation that focusses on establishing best practices in law firm management from the outset, rather than continued reliance on a reactive, discipline-based regulatory system. Entity regulation should result in less individual non-compliance, since practices and procedures will be in place for the benefit of all licensees within the firm, whatever size it may be. To that end, the TLA agrees that establishing bespoke best practices and procedures that address each aspect of managing the business of a law practice, and that are commensurate with the risk profile and the unique nature of differing legal service providers' business models and practice areas should result in better law practice management and hence fewer complaints and claims.

We note that the proposal for compliance-based regulation is premised upon the LSUC identifying practice management principles and goals and setting expectations in broad parameters. The LSUC will also take responsibility for providing the necessary tools to assist lawyers and paralegals in understanding, implementing and maintaining these principles and in meeting expectations. In doing so, the LSUC should ensure that the

principles, goals and expectations reasonably reflect the reporting entity's risk profile, i.e. the principles, goals and expectations cannot be "one size fits all", but should reflect the fact that different types of firms and different practice areas raise different issues and mandate different approaches to sufficient compliance.

The importance of making these resources readily accessible and understandable to all licensees cannot be over-emphasized. Law practice management is not taught in law school or in the paralegal training programs. The articling and bar admission programs are much shorter, and may or may not include the opportunity to learn or observe these best practices. Hence, it cannot be assumed that, when first licensed, good practice management skills are part of the practitioners' toolkit. Rather, these skills must be learned, for the most part, after the lawyer or paralegal has started to carry on business. The TLA urges the LSUC to expend the necessary resources to provide education tools in both electronic and hard copy formats, which can be accessed not only through the LSUC but also throughout the province at local practice resource centres.

It is not surprising, then, that the vast majority of complaints concern sole and small firm practitioners. In these environments, fewer checks and balances are in place to identify, evaluate, correct or prevent poor practices. While the obligation to report on compliance may encourage lawyers to reflect on, critically assess and consider improvements to their existing systems; this may not be sufficient to effect substantial changes. This is particularly true if the reporting lawyer is of the view that her or his practises are adequate, is unable or unwilling to self-identify deficiencies, and/or has inadequate exposure to alternative or better modes of practice. A self-evaluation toolkit such as that provided by the OBA is, by its very nature, only as effective as the user.

Here, the TLA, along with the other members of the Federation of Ontario Law Associations, could be of particular assistance. Law practice centres (law libraries) are well-placed to act as centres from which lawyers will be able to access the LSUC resources for creating, updating or modifying their firm's best practices. Hands-on programs (perhaps an annual or semi-annual symposium that would qualify for professionalism CPD?) that teach the principles and goals of compliance-based regulation could be delivered at law practice centres. These programs could discuss not only how to avoid practice management problems, but could also provide a forum for lawyers to collaboratively develop appropriate practices and procedures in their particular business operations. Attendance at such a symposium could be directed as part of the continuum of responses to lawyers or paralegals whose ethical and practice management practices are found wanting. Working in a cooperative and collegial environment with other like-minded lawyers to craft best practices would enhance and improve the law practices of sole and small firm practitioners in particular, since it would provide opportunities for idea sharing and introduce alternative solutions and perspectives. Collaboratively formulating best practice management programs will foster mentoring of more junior lawyers, open discussions, and broadly assist in alleviating some of the practice management issues that can arise where lawyers are practicing in isolation.

The TLA also recommends that the LSUC maintain substantial flexibility in assessing what policies and procedures are appropriate for different law practices. It should not lose sight of the stated intention that practitioners should have both autonomy and flexibility in deciding what policies and procedures should be adopted to achieve compliance, and in demonstrating that those policies are effective. Particularly, the TLA

is concerned that moving to compliance-based regulation should not result in a dual set of rules and requirements that are strictly enforced through disciplinary procedures (i.e. both the rules of professional conduct and a second set of intractable rules regarding practice management).

The TLA recommends that the LSUC commit to establishing a graduated response to non-compliance, emphasizing working with the lawyers and paralegals to educate them on best practices, and help the practitioners to put sufficient and maintainable ethical and business practice measures in place. Simply lacking sufficient practice management measures should not *de facto* result in disciplinary action, or be the basis for a finding of professional misconduct. Rather, discipline should only be the final resort after a practitioner has demonstrated an intentional refusal to put adequate policies and procedures into effect or has repeatedly failed to adhere to the policies or procedures established by the firm, i.e. when the lawyer or paralegal's conduct otherwise reflects a breach of the rules of professional conduct.

The TLA strongly recommends against an incremental approach to rolling out compliance-based regulation of lawyers and paralegals in private practice. As the LSUC's own consultation paper identifies, the entities against whom the majority of complaints are lodged are sole and small practitioners, and the complaints mostly relate to client services and practice management – the very issues which compliance-based regulation is meant to address. Excluding those who are at the greatest risk of being the subject of a complaint will defeat the purpose of the paradigm shift that the LSUC is espousing. However, the reporting requirements imposed by the LSUC should not be overly burdensome administratively, nor should they result in redundant or repetitive reporting obligations.

Similarly, compliance based regulation should also apply to government, in-house and clinic lawyers or paralegals. All licensees should be held to equal standards and the LSUC should expect the same quality of practice and procedure from all practitioners. Since the LSUC is recommending flexibility and autonomy in establishing appropriate practices and procedures based upon the nature of the licensee's practice, there is no principled basis for excluding those outside of private practice from compliance with best practices. Compliance-based regulation will protect and benefit the public served by government, in-house and clinic legal professionals just as it will benefit those served by private practitioners.

Entity regulation is also a welcome change from individual lawyer regulation. It properly recognizes that compliance with the rules of professional conduct and/or best practice management should not focus on the individual legal practitioner; but must encompass the entire business unit through which the legal services are delivered. The TLA agrees with the LSUC recommendation to move to entity regulation for the reasons it has articulated. Entity regulation will reduce LSUC expense in administration of reporting, and ensures that the law practice, as a whole, is meeting the LSUC's compliance expectations. It is important, of course, that the reporting burdens placed on individual lawyers and paralegals be reduced and not result in redundancies or duplication. The TLA recommends that the LSUC invest the necessary resources to establish online reporting that will remove any redundancies or duplication of reporting requirements.

Of necessity, at any firm of more than one, some person will have to be the designate for reporting to the LSUC on behalf of the entity. That person may or may not be the same person or persons who establish and maintain the management systems. There is no reason why both responsibilities should fall to the same person. Allocation of responsibilities should be left to the reporting entity to determine, in keeping with the goal of maintaining flexibility in the best management practices adopted by each firm. The person designated with reporting to the LSUC should also be the person to whom the LSUC communicates to ensure continuity and clarity in dealings between the regulator and the entity. Outside of the sole practitioner, there are clear benefits to having one designated communication point. Particularly, this should result in a firm-wide response to any practice deficiencies identified through complaints against any member of a firm, which otherwise might remain buried or ignored at the firm macro level. That said, the person who assumes the mantle of being the designate should not be assuming additional disciplinary risks arising from firm-wide non-compliance.

With respect to the question of entity registration, it would appear that entity registration is a necessary corollary of entity regulation. Absent registration, the LSUC cannot know what entities it is governing. Naming the members of the entity is no different than the current requirement imposed upon lawyers to provide the LSUC with their business address. In the view of the TLA, there is no need to also include the names of employees. Employees remain the responsibility of the reporting entity and that entity will, as part of its compliance, put into place policies and procedures that encompass the work performed by employees as necessary.

Thank you for considering our submissions on this important proposed change in regulation of licensees. We welcome the opportunity to expand on any of these ideas and to work proactively with the LSUC as it moves into the next phase of consultation with the profession in formulating the requisite regulations and changes.

Yours very truly,

A handwritten signature in cursive script, appearing to read "S. Mullings".

Stephen Mullings  
President  
Toronto Lawyers Association