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Submission to the Law Society of Upper Canada

On Compliance Based Entity Regulation

As one of the largest law associations in the province outside of Toronto, the Waterloo Region Law Association ("WRLA") represents almost six hundred lawyers practicing in Kitchener, Waterloo, Cambridge and surrounding municipalities. A large majority of our members are lawyers in private practice, and most of those lawyers work as sole practitioners or in firms of less than ten lawyers. The remainder of the lawyers working in private practice work in larger regional, national and international firms.

At the direction of its board of trustees, the WRLA writes in response to the request for input from the Law Society's task force regarding the issue of compliance based entity regulation. We note, at the outset, that two distinct concepts are encompassed in the Consultation Paper, "Promoting Better Legal Practices": a) Entity regulation, and b) Compliance Based regulation. While presented together as a package, we suggest that they should be evaluated and considered separately.

While the WRLA is generally supportive of the proposed shift towards a new model for regulating the legal practice in Ontario, we agree with many others that, "the devil is in the details". There are still a number of practical issues to be resolved and details to be fleshed out and presented to the profession before the WRLA can be fully supportive and before any changes should be implemented.

Entity Regulation

We agree that entity regulation makes sense, and giving the Law Society authority over firms and corporate legal departments is an overdue development. Having a central registry of law firms is a good idea in theory, but we are concerned that the proposed information to be included in such a registry (as set out at page 19 of the Task Force's consultation paper) is overly broad and invasive.

Specifically, we oppose the proposed requirement to have law firms provide the location and particulars of all trust accounts and firm bank accounts to the Law Society **for the purposes of including such information in a publicly accessible registry**. It is one thing for the Law Society to require this information for its internal use, but posting it publicly infringes on firms' privacy rights and exposes them to unnecessary risk. We question what public protection interest would be served by including such information in a public registry.

We also have some reservations about posting an entity's discipline history on a publicly accessible registry. The actions of one non-compliant member of a firm might thereby tarnish the public reputation and standing of all members of the firm. We understand, and are not

unsympathetic to, the policy perspective behind such a move -- it would likely increase the vigilance of all firm members to find and solve problems within their entity before they become a matter of public record. On the other hand, it might also encourage the impulse to "cover up" or "paper over" problems in an effort to protect the entity's reputation from being put at risk by one non-compliant member, which would be contrary to the public interest and the direction LSUC wishes to take the profession.

Secondly, we have concerns about the level of responsibility that may be placed on the Designated Professional(s) ("DP") responsible for monitoring and reporting on the compliance of each entity. The reality of current private practice is that individual lawyers (particularly those who are well seasoned) have deeply entrenched and personal ways of doing things, and it can be a very frustrating experience to get them to pull together in the same direction. Many firms are, in essence, aggregations of sole practitioners all doing their own thing, within a larger firm setting.

It appears to us that failure to report accurately or appropriately on a particular legal entity's compliance efforts could result in personal disciplinary measures against the individual DP taking on that responsibility within his/her entity. Would the DP be allowed to rely upon and be shielded by certificates of compliance received from individual entity members?

This added responsibility, plus the lack of popularity often experienced by compliance officers or internal affairs officers in other types of compliance based professional organizations, suggest to us that it may be difficult to find volunteers for such a DP role.

Furthermore, it is difficult to see how this role could be effectively implemented in tiny entities such as sole practitioners and small firms of two or three lawyers. Unless sole practitioners and small firms are required, as part of such an initiative, to organize themselves in larger groupings or "chambers" for purposes of entity regulation, which can then designate someone to monitor and report on the compliance of the entire group, we question how the intended role of a DP can be meaningfully carried out for such smaller entities.

Compliance Based Regulation

One of the primary concerns the WRLA has with respect to a new Compliance Based regulatory system involves the cost of transitioning from a complaints based to a compliance based approach. Specifically, we note that no attempt at an estimate of the costs involved in such a transition have been provided by the Task Force in its consultation paper.

Even assuming that a Compliance Based regulatory approach will in fact reduce the number of complaints the Law Society receives on a long term basis, there will still be a period of transition during which the Law Society will necessarily have to continue dealing with its present volume of complaints and discipline, while also taking steps to implement a new compliance based regulatory system. It appears to us that this transition will take several years to fully implement, before a significant reduction in complaints is likely to be experienced. The

potential cost savings we are being promised as a profession are sometime down the road, but the costs of transitioning to this system will be experienced immediately.

That is not necessarily an argument against taking this step, but the WRLA is concerned that the increased costs associated with such a transition will ultimately be borne by the members of the profession, through increased Law Society dues, fees or levies. This will disproportionately affect the sole practitioners and small firms which make up the majority of our membership, and indeed the majority of the entire profession engaged in private practice in Ontario. That has not been adequately addressed by the Task Force to date, and will inevitably become a major issue (if not addressed satisfactorily before the next Bencher election).

Many sole practitioners and lawyers in small firms are already extremely busy with the day to day administrative tasks of running their practices, and have little time to devote the necessary attention required to transition to a new type of compliance based regulatory environment, with its self-assessment tools and reporting responsibilities. Economic reality requires these practitioners to devote most of their time to actually serving their clients. Additional time taken up by a new regulatory approach will not be welcomed, regardless of its good intentions.

While it appears that the Task Force is at least aware of this issue, the WRLA would like to see more concrete, practical examples of how the Law Society would work with and assist sole practitioners and those in small firms to comply with such new regulatory requirements. Pointing us to existing self-assessment tools as examples of what this might look like is helpful, but no substitute for the actual templates and self-assessment tools the Law Society will inevitably have to develop as part of implementing such a regulatory approach.

We understand that LSUC does not wish to be "prescriptive" in setting out a particular approach to compliance, but the reality is that in the absence of concrete tools and templates, and clearly outlined expectations, most licensees and entities will be too busy trying to keep up with the demands of their clients to devote much effort to such an exercise. We are a profession that, by its hard wiring, is predisposed to respond best to an environment of clear expectations and rules, and standards which are objective rather than subjective.

Ambiguity (except when used deliberately and creatively to temporarily bridge an otherwise difficult gap between parties in dispute) is usually a lawyer's worst nightmare, as it simply creates the opportunity for conflict – or in this case, the opportunity for arguments and discipline hearings about what conduct is compliant and what is not. If the Law Society is serious about fundamentally changing its relationship with the profession to something that feels less adversarial and more assistive or educational, the level of guidance and tools provided to the profession needs to be considered more carefully.

The WRLA also believes it would be helpful to put some incentives in place to encourage and motivate sole/small firm practitioners. For example, the Law Society could develop CPD

programs eligible for professionalism hours that are focused on entity based regulation and on achieving compliance and success within the new regime. Another incentive may be to encourage more seasoned members of the profession to provide pro bono services as an alternative to attending substantive CPD hours and thereby moving away from stricter regulation of the profession and more toward self-regulation.

There may also be consideration for reducing the number of required professionalism CPD hours or providing CPD credit for time spent working with the Law Society to implement policies and procedures to bring small law practice entities into compliance with established practice management principles.

Finally, the WRLA is concerned with the lack of a concrete timeline regarding transition to a Compliance and Entity Based regulatory system, when these would come into effect, and how long such a transition would be expected to take.

From the WRLA's perspective, we are concerned that many of our members do not yet appreciate the nature and scope of the changes being proposed by the Task Force. These potential changes appear to be on a rather fast track, and short notice was given to the profession to consider and respond to this important issue. There has not been sufficient time for us to consult with our own membership or hold a thorough discussion of the issues and consider all of the practical consequences of implementing the proposed changes, and we rather suspect other local law associations will find themselves in the same position.

We therefore urge the Law Society to check back with the profession and provide much more detailed information and proposals, addressing the concerns we have raised, and provide a more reasonable time-line for consultation and response, before any final decision is taken to proceed down this path.

Conclusion

While the WRLA is not opposed in principle to the idea of moving from a complaints based regulatory approach to a compliance based model, nor is it opposed to having entities (firms and corporate/government law departments) be the subject of regulation, we believe that the changes being proposed need to be studied in more detail and at greater length. Concrete cost projections, time-lines and practice assistance aids specifically aimed at sole practitioners and small firms must be developed, before we can fully support such a change.

On behalf of the

Waterloo Region Law Association

Kelly Griffin, President