

Current Issues at the LPCC

INCORPORATED LEGAL PRACTICES

The number of incorporated legal practices (ILPs) in Western Australia has continued to grow since incorporation became permitted. At present, there are approximately 430 ILPs in Western Australia.

It is important that practitioners familiarise themselves with Part 7 of the *Legal Profession Act 2008* (Act) before causing an ILP to engage in legal practice both to ensure that the ILP gives appropriate notification to the Legal Practice Board (Board) of its intention to engage in legal practice and to ensure that legal practitioner directors are aware of the additional responsibilities on them beyond those they have as a principal of a firm.

If practitioners are contemplating commencing practice in the form of an ILP they should refer to s102 which requires an ILP to give written notice to the Board in an approved form of its intention to do so (see LPB Form 7 — which is available for download on the Board's website: www.lpbwa.org.au). If an ILP commences to engage in legal practice without giving the required notice, the ILP is in default until notification is provided to the Board in the form of a completed LPB Form 8.

The consequences of the failure to give the Board the required notice are twofold, firstly the ILP is liable to prosecution (s102(2)) and secondly the ILP is not entitled to recover any amount, and any person may recover from the ILP as a debt due any amount paid to the ILP, for anything the ILP did in contravention of s102(2) (s102(5) & (6)).

The Board has a discretion whether or not to prosecute the ILP. However, it does not have any power to exempt an ILP from the effect of sub-sections 102(5) & (6). The Board's view is that a legal practitioner director of the ILP in default has a responsibility under s105 to ensure that the clients and former clients of the ILP are informed of their rights to seek recovery.

The responsibilities of legal practitioner directors are set out in Part 7 of the Act. Only some of those responsibilities are highlighted in this article and practitioners should ensure they are conversant with all the requirements which apply to them.

A legal practitioner director of an ILP (defined in s98 to mean a director of an ILP who is an Australian legal practitioner holding an unrestricted practising certificate):

- is responsible for the management of the legal services provided by the ILP (s105(2)) — this responsibility is similar, if not the same, as all principals have to oversee the management of their firms;

- must ensure that appropriate management systems are implemented and maintained to enable the provision of legal services by the ILP in accordance with the professional obligations of legal practitioners and other obligations imposed under the Act (s105(3)) — those professional obligations include duties to the Supreme Court, obligations in connection with conflicts of interest, duties to clients, including disclosure and ethical rules required to be observed by practitioners (s98);
- must take all reasonable action to ensure breaches of professional obligations do not occur if it ought reasonably to be apparent that the provision of legal services of the ILP will result in breaches and, if breaches do occur, take appropriate remedial action in relation to those breaches (s105(4)).

The Act also provides that a legal practitioner director:

- may be found to have engaged in unsatisfactory professional conduct or professional misconduct in respect of unsatisfactory professional conduct or professional misconduct of a practitioner employed by the ILP unless the director establishes that he or she took all reasonable steps to ensure that the employed practitioner did not engage in such conduct (s106(1)&(2));
- must ensure that all reasonable action available to the director is taken to deal with any unsatisfactory professional conduct or professional misconduct of a legal practitioner employed by the ILP (s106(3)).

It follows that if a complaint is received about the conduct of an employed solicitor of an ILP, the Committee will also consider whether the legal practitioner directors of the ILP have taken all reasonable steps to ensure that the employed solicitor did not engage in such conduct.

Clearly, if the legal practitioner directors have implemented and maintained appropriate management systems to ensure their employed solicitors provided legal services in accordance with their professional obligations, that would be persuasive evidence that they have taken 'all reasonable steps' to ensure that employed solicitors did not engage in such conduct. But what constitutes 'appropriate management systems'?

There is no definition of the term 'appropriate management systems' in the Act. A good guide to what the Committee would take into consideration when assessing whether the ILP has appropriate management systems is if they have management systems which address the following 10 objectives which are used in other states as part of a self-assessment audit for ILPs:

- competent work practices to avoid negligence
- effective, timely and courteous communication
- the timely delivery, review and follow-up of legal services to avoid delay
- acceptable processes for liens and file transfers
- providing for a shared understanding and appropriate documentation from commencement through to termination of engagement covering costs disclosure, billing practices and termination of engagement
- timely identification and resolution of conflicts of interest
- safe and secure records management
- timely compliance with undertakings, orders and rulings
- the effective supervision of the practice and its staff
- avoidance of any failure to account for trust monies.

If non-legal practitioner directors are involved in the management of an ILP, the Committee will pay particular attention to whether there are policies and systems in place to ensure that the legal work of the practice is undertaken without compromising the professional and ethical obligations of legal practitioners and that the promotion of the practice is undertaken in a manner which is consistent with ethical practice.

Regulatory bodies in New South Wales and Victoria have developed self-assessment documents to assist legal practitioner directors in those states to assess 'appropriate management systems'. The documents provide useful guidance as to the key concepts to consider when addressing the above 10 objectives together with examples of possible evidence or systems likely to lead to compliance. The ILP self-assessment documents can be found at www.olsc.nsw.gov.au or www.lsb.gov.au

Both the Committee and the Board have the power to conduct audits of ILPs of compliance with: the requirements of Part 7, regulations and legal profession rules which relate specifically to ILPs and the management of the provision of legal services by the ILP (including the supervision of officers and employees providing the services) — s118. These audits may be conducted whether or not a complaint has been made.

CONTACT DETAILS OF THE COMMITTEE

All practices are asked to check their documentation (particularly costs disclosure and invoices) to ensure they contain the correct contact details for the Committee. The Committee has recently seen documents from different practices which contain an incorrect email address for the Committee and/or incorrect website address. The Committee's email address is: lpcc@lpbwa.com and the website is www.lpbwa.org.au



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