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Balancing Scales: Fair & expeditious regulation of the legal profession

Independent self-regulation of solicitors in New South Wales

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THE LAW SOCIETY OF NEW SOUTH WALES

Does independent legal regulation matter?

"Independent self-regulating professional associations are essential to the independence of lawyers and to the maintenance of the rule of law."

The Hon Susan Kiefel AC
Chief Justice of Australia
IBA Conference
Sydney, 8 October 2017

Regulatory purposes in the beginning

- When the Sydney Law Library Society became the NSW Law Society in 1842, it sought to promote “fair and honourable practice amongst members of the profession” while also preserving the interests and retaining the confidence of the public
- 20 later in 1862, the Law Society’s objects were updated to include “preserving the integrity of the solicitors’ branch” and “suppressing illegal or dishonourable practice”

A long and ongoing history in regulation

- Early in the 20th century the Law Society of NSW described the maintenance of high standards of professional conduct as its “primary purpose and duty”
- Indeed, one of the major factors in pushing for incorporation in 1884 was the view that this would place the Law Society of NSW in a better position to mirror the English Law Society, which had a central role in the admission and discipline of practitioners
- Regulation of the legal profession is in our Law Society’s DNA

Independent legal regulation in NSW

1828: Supreme Court granted powers of admission and regulation over the NSW profession

1935: Amendments to the *Legal Practitioners Act* grants the Law Society of NSW powers comparable to those of the English Law Society (i.e. PCs, conduct & discipline)

1994: Establishment of the Office of Legal Services Commissioner creates a co-regulatory system with the Law Society of NSW

Three decades of challenge

- Throughout the 1970s, 1980s and 1990s the NSW legal profession was criticised by the government and broader community for its perceived failure to adequately self-regulate and a lack of consumer orientation
- The NSW Law Reform Commission launched an initial inquiry that lasted from 1976 to 1984, which challenged – amongst other things – whether NSW lawyers should self-regulate
- That was part of a 20-year reform process which forced the NSW profession into significant changes

Establishment of a co-regulatory system

- By 1993 the NSW Law Reform Commission was again studying the profession at the request of the Attorney General
- Commission's recommendations included creating an "independent" legal services regulator to receive all formal complaints against solicitors and barristers, and then refer them to the Law Society, or Bar Association for investigation and disciplinary action
- In 1994, the NSW Legal Services Commissioner was established to act in that role – this created the co-regulatory environment in which we still operate today

Why a degree of self-regulation is important

- A profession will involve a professional association with rules and requirements that regulate the conduct of its individual members – the independence implicit in this self-regulation is at the heart of the concept of a profession
- Independence of the legal profession is fundamental to democracy and the rule of law
- Can government appointed “independent” regulators fully understand the nuances of legal practice, and make decisions that are completely free of political influence over the longer term?

Legal independence without self-regulation

- The IBA, in its 2016 report on *Independence of the Legal Profession* suggested a key indicator of independence is “effective independent regulation of the profession”
- Effective self-regulation can be achieved through different regulatory arrangements – from pure self-regulation to some form of co-regulatory arrangement such as we have in NSW
- A complete lack of self-regulation can have a negative impact on the independence of lawyers – in that it increases the risk that regulatory bodies could possibly end up serving the state

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