

## Professions and Risk

### Introduction

This article is concerned with the broader question of what risks professions encounter, and how the wider indicia and processes of professionalism – education, ethics, competence, mentoring, continuing professional development, supervision, insurance and discipline – might be identified and marshalled to improve the quality of services offered to clients and the professions' reputations. It is suggested that a combination of established professional practices and modern risk management processes might be seen in totality as professional 'regulation' or as a 'professional integrity system', for which there is also an article in this collection.

Another article in this collection, 'Risk Management and Improvement', discusses the creation and operation of risk management systems, which are just one component of overall professional 'regulation' or of a 'professional integrity system'.

Successful professional associations have robust systems for identifying risks professionals encounter, beyond a formal 'risk management system'. These associations help members to develop and improve the processes of professionalism to counter risks in their own practice, and to do so by prioritising and integrating the various traditional professional indicia. Statutory professional regulation may also add elements to such systems.

Notably, the Professional Standards Councils ('PSC') requires professional associations to report annually on the improvements made to their risk management systems.<sup>1</sup>

### Professions and Risk

For decades now, larger professional organisations have used compliance programs, which may be viewed as early versions of 'integrity systems'. For example, in the legal profession, compliance programs impose obligations of professionalism on firms, which now offer legal services using the corporate rather than traditional partnership structure. Practical features addressing professional risk daily are digitisation of record-keeping, continuing education and continuing professional development ('CPD'); ethical help-lines and ongoing monitoring; and dispute resolution and disciplinary procedures. Likewise, engineering and accounting firms have focused on promoting education and professional ethos to address the risks of divergent standards of professional education and ethical standards arising from the global mobility of professionals in those fields.<sup>2</sup>

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<sup>1</sup> See PSC, *Annual Report 2015–16* (September 2016) 23 <[https://www.psc.gov.au/sites/default/files/PSC Annual Report 2016 WEB.pdf](https://www.psc.gov.au/sites/default/files/PSC%20Annual%20Report%202016%20WEB.pdf)> (accessed 23 February 2018); PSC, *How We Monitor Professional Standards Schemes* <<https://www.psc.gov.au/professional-standards-schemes/how-we-monitor>> (accessed 23 February 2018).

<sup>2</sup> See, e.g., International Financial Reporting Standards, *International Accounting Standards Board* <<http://www.ifrs.org/groups/international-accounting-standards-board/>> (accessed 23 February 2018).

Having insufficient assets to pay a client claim is a professional risk. While raising standards of professional competence and ethicality should reduce this risk, Professional Indemnity Insurance ('PI Insurance') provides funds to redress consumer damage. It is distinctive of the professional's ability to keep the promise of the higher standards of professionalism. This is even more relevant since the Professional Standards legislation provides limited liability (rather than the unlimited personal liability of partnership) for members covered by PI Insurance. In some cases, statutory indemnity (for example, for hospitals) may even be provided.

Dispute resolution and disciplinary procedures illustrate how traditional professional processes can also be seen as risks. Complaints and disciplinary proceedings are traditionally taken against an individual professional, usually seen as one-off and having little firm-wide or profession-wide significance. In practice though it is frequently the case that an individual practitioner will repeat the same error across multiple client relationships. This may be because of professional habit, or mistaken assumption about practice. So, in the case of financial professionals, where one client is advised on a product or strategy, it is common to see the same advice in multiple cases. If that advice turns out to be incorrect then the error is replicated across many clients. The same can be seen in all professions, including medical settings. Here a symptom pattern is seen by one physician as indicative of an underlying cause, and so common prescription or treatment patterns are seen.

In this way, the professional's patterned thinking can itself be a professional risk.

At the larger scale end of the risk spectrum there is also a common theme of capacity failure for professionals as their business grows and changes. Regulatory risk assessment will always look at rapid change in business models or personnel as an indicator of potential compliance risk. So, for instance, a small professional practice (in any field) that suddenly and rapidly grows its client base will also be increasing its risk and client exposure. This may be so because the historical quality assurance arrangements of the small practice are unlikely to cope.

Professional associations might encourage firms to see individual complaints or changes in scale as part of a system of feedback to the firm (and the professional association). It is a flag and an early indicator of potential systemic risks, so that an appropriate response (education, learning improvement) can be instituted.

Seeing traditional professional elements in this way as professional 'regulation' or as an 'integrity system', demonstrates why some elements might be prioritised, how the elements work together and their dynamic effect on each other. It also makes clearer how professional practices and requirements operate at different levels: at the level of the professional individual, the firm level and the level of the professional association and profession more widely.

This approach properly nests within the wider obligations and aspirations of professionalism, including two of the PSC's key objectives: the adoption of appropriate risk management systems, and proper complaints and disciplinary procedures for consumer complaints. These objectives are intended to mesh with the professional association's encouragement of ongoing improvement. Rather than compartmentalising disciplinary or risk management processes, associations can engage with firms to understand and prevent breaches. Although complaints are directed against an individual member, they provide wider insights which can help target areas for change.

The overall result is to encourage heightened standards of competence, conflicts of interest, breach of ethical standards and standards of honesty. Drawing greater attention to the indicia of professions as well as more recent approaches such as risk management, in an overall integrity system, is fed by both internal and external sources. Internal inputs include governance improvements, record-keeping, data analysis, and developing new professional standards and the professional's own practice policies. External sources include changes in public and political expectations (for example, equitable briefing policies at the Bar), new ideas from CPD and recent determinations of external dispute and disciplinary bodies.

### **Drivers of the Increased Prominence of Professional Risk**

The process of identifying and prioritising risks has become a more prominent part of professional thinking. Some of the practices driving this are:

*Disputes and discipline.* In this context, disputes relate to consumer complaints about professional service, and discipline means demands for greater competence and ethicality. A major political driver of the PSC's existence under PSC legislation<sup>3</sup> is additional consumer protection above that offered by professional fiduciary duty. Professional disciplinary proceedings and sanctions, including expulsion, have become more prominent. A concern for more active enforcement of professional standards motivated the establishment of the Office of the Legal Services Commissioner ('OLSC'), which shares the concern of the PSC and OLSC to promote consumer protection in professional services.

Limited liability granted through PSC schemes. In order to secure limited liability under statute, professional associations must introduce systems to manage risks, raise competence and ethicality (for example, through ethics 'helplines' and greater emphasis upon CPD, which is the association's responsibility); obtain and maintain 'scheme status' under the PSC legislation which, in turn, feeds limited liability;<sup>4</sup> and members must obtain PI Insurance.<sup>5</sup>

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<sup>3</sup> See PSC, *Professional Standards Legislation* <<https://www.psc.gov.au/legislation>> (accessed 23 February 2018).

<sup>4</sup> PSC, *What are Professional Standards Schemes?* <[www.psc.gov.au/video-library/what-are-professional-standards-schemes](http://www.psc.gov.au/video-library/what-are-professional-standards-schemes)> (accessed 23 February 2018).

<sup>5</sup> *Thomson v Golden Destiny Investments Pty Ltd* [2015] NSWSC 1176, [630]-[634], cited in the related Professional Standards Legislation title.

In NSW, *Professional Standards Act 1994* (NSW) s 36 requires associations seeking approval for a scheme to furnish the PSC with 'a detailed list of the risk management strategies intended to be implemented in respect of its members, and ... how those strategies are intended to be implemented'.

The application process for creating a Professional Standards Scheme for an association is defined by statute.<sup>6</sup> In determining whether approval should be given, the PSC must consider the position of person(s) affected by limiting occupational liability, the risk management strategies of the relevant association, and the cost and availability of insurance against liability for members of that association.<sup>7</sup>

The scope of the limitation on professional liability depends upon the legislation and the Scheme, the terms of which may vary between associations.<sup>8</sup> Members may not contract out of Schemes or the legislation.<sup>9</sup>

*Incorporation of professional practice.* The incorporation of professional practice, along with limited liability, has led to a concentration of risks for professional associations. Some incorporated practices are very large, and even publicly listed.<sup>10</sup> Following incorporation, individual professionals and their personal wealth are no longer on the line.<sup>11</sup> This has caused large professional organisations to assimilate their internal governance processes to those of a corporation. These practices have also been adopted by large partnerships, some of which are now managed by executive boards.<sup>12</sup>

*The changing nature of clients and professional work.* Professional firms serve powerful clients on large-scale jobs which have systemic effects, such as the sale of NSW poles and wires.<sup>13</sup> Teamwork within professional organisations is required to tackle such specialised, complex projects. Team members have only partial responsibility for, and knowledge of, a project, which may reduce awareness of risks to ethics and other professional standards.<sup>14</sup> More generally, these jobs bring new dimensions and levels of professional risk from their provision of services which support 'mass markets' or expose mass populations to injury. This is a global phenomenon, and technology drives the 'spread' of these professional risks.<sup>15</sup>

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<sup>6</sup> These requirements are discussed further in the related title, 'Professional Standards Legislation'. See also Anna Durack, 'Professional Standards Legislation in Australia' (2014) *Precedent* 121.

<sup>7</sup> See, e.g., *Professional Standards Act 1994* (NSW) s 10(1)(b), (d), (f).

<sup>8</sup> *Professional Standards Act 1994* (NSW) s 5.

<sup>9</sup> *Professional Standards Act 1994* (NSW) s 50.

<sup>10</sup> See, e.g., Slater and Gordon, 'Alternative Legal Business Structures' (Media Release, 9 June 2010)

<<https://www.slatergordon.com.au/media-centre/media-releases/alternative-business-structures-legal-profession>> (accessed 23 February 2018). See also Christine Parker, 'Peering over the Ethical Precipice: Incorporation, Listing and the Ethical Responsibilities of Law Firms' (Paper presented at The Future of the Global Law Firm Symposium, Georgetown Law Center, 17-18 April 2008) <[http://law.unimelb.edu.au/\\_data/assets/pdf\\_file/0009/1709838/70-Parker\\_paper11.pdf](http://law.unimelb.edu.au/_data/assets/pdf_file/0009/1709838/70-Parker_paper11.pdf)> (accessed 23 February 2018).

<sup>11</sup> Justine Rogers, Dimity Kingsford Smith and John Chellew, 'The Large Professional Service Firm: A New Force in the Regulatory Bargain' (2017) 40 *University of New South Wales Law Journal* 218, 233, 230 ff.

<sup>12</sup> Rogers, Kingsford Smith and Chellew, above n 11, 231.

<sup>13</sup> See James Robertson, 'NSW Closes its Poles and Wires Sale with \$3 billion Deal', *Sydney Morning Herald* (online), 11 May 2017 <<http://www.smh.com.au/nsw/nsw-closes-its-poles-and-wires-sale-with-3-billion-deal-20170511-gw2dqp.html>>.

<sup>14</sup> Rogers, Kingsford Smith and Chellew, above n 11, 233.

<sup>15</sup> Rogers, Kingsford Smith and Chellew, above n 11, 231–2.

*Employed professionals.* The culture of organisations influences the conduct of professionals within them.<sup>16</sup> This creates a compliance risk which may be derived from organisational culture, shielding professionals from being influenced by the professional association. In the UK legal profession, this risk has been addressed by the introduction of a requirement that 'alternative business structures' appoint a Head of Legal Practice, who must take 'reasonable steps' to ensure the practice complies with the statute and reporting obligations.<sup>17</sup> This was designed to encourage practices to develop their own ethics capacities, while the professional association and regulators become consultants and collaborators in some respects.<sup>18</sup> Prior to this reform, conduct standards for law firms were left to external forces such as litigation, the marketplace and practice regulations of government agencies –at the expense of professional self-regulation.<sup>19</sup> Large firms are likely to have the resources and the ability to implement ethical infrastructures and practice management systems.<sup>20</sup>

### **Professional Risk, Professional Self-Regulation, Statutory Regulation and Integrity Systems**

Individuality is a fundamental feature of the professional model, under which professional obligations fall on an individual member to serve the client and advance the public interest as well as integrate the public interest into their client service.

However, individual professionalism has its limits.<sup>21</sup> As the clientele of modern professionals now includes large corporations, professionals may owe their duties to a client whose interests are not of the personal, domestic and household kind typical of an individual. Instead those interests align with large transactions, manufacturing and service sector supply chains and mass markets rather than the individual.<sup>22</sup> In such cases, the client may wield significant power and influence over the professional, rather than the converse. This challenges the traditional professional ethos, which has been held by law to be fiduciary partly because professionals have historically enjoyed advantages of knowledge and power over their vulnerable clients.<sup>23</sup>

As a potential response to these developments in the landscape of professionalism, as well as to extend the benefits of professional associations beyond the professions, Sampford has developed an integrity systems approach.<sup>24</sup> Integrity systems adopt key indicia of professionalism and integrate them into a more fluid framework with applicability beyond the professions: for example, integrity systems may be adapted by banks to encourage improvement in relations with their customers. This approach may also be beneficial for those associations working towards greater professionalisation.

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<sup>16</sup> Rogers, Kingsford Smith and Chellew, above n 11, 231.

<sup>17</sup> Rogers, Kingsford Smith and Chellew, above n 11, 246.

<sup>18</sup> Rogers, Kingsford Smith and Chellew, above n 11, 246.

<sup>19</sup> Rogers, Kingsford Smith and Chellew, above n 11, 246.

<sup>20</sup> Rogers, Kingsford Smith and Chellew, above n 11, 259.

<sup>21</sup> Dimity Kingsford Smith, Thomas Clarke and Justine Rogers, 'Banking and the Limits of Professionalism' (2017) 40 *University of New South Wales Law Journal* 411.

<sup>22</sup> Rogers, Kingsford Smith and Chellew, above n 11, 241.

<sup>23</sup> See *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 96-7 (Mason J).

<sup>24</sup> Charles Sampford, 'Global Transparency' (Discussion Paper for the 13<sup>th</sup> International Anti-corruption Conference, Transparency International, 2008); see also N Preston, C Sampford and C Connors,

## The Concept of an Integrity System and its Application to Quasi-Professional Settings

Under Sampford's integrity systems approach,<sup>25</sup> certain groups of persons or service providers may be required to comply with traditional hallmarks of *professionals*, such as specific educational qualifications; keeping up to date with information and CPD; upholding certain standards and codes of conduct; and being subject to disciplinary measures and expulsion. The equivalent of the 'professional association' in these integrity systems is an employer or organisation, rather than a profession.

Sampford's model acknowledges that organisations are important potential repositories and dischargers of obligations. Large law and accounting firms, for example, are cultural microcosms that can significantly impact the people working within them.<sup>26</sup>

This also applies to organisations such as hospitals. While some employees (doctors) are professionals, others may not be, such as data processors who have custody of, and are responsible for, sensitive personal information of vulnerable patients. Accordingly, it may be appropriate to implement an integrity system. Importantly, an integrity system may extend beyond established professional indicia, for example by implementing risk management systems or mandating obligations to consumers.

Sampford thus argues that an integrity systems approach can bring a profession-like set of values to organisations or employers<sup>27</sup> such as banks, hospitals, universities, the police force or perhaps even the justice system (beyond simply the lawyers operating within it). Transparency International, which deals with corruption, is a case study of successful implementation of integrity systems.<sup>28</sup>

## Integrating Integrity Systems Analysis Back into Professions

As discussed above, integrity systems can be applied outside the professions. However, the elements of integrity system thinking could also be reversed back into professions. In this context, 'regulation' is understood in its broader sense as a 'system', and the focus is on the firm, association and profession as a whole – rather than at the level of the individual. The point is to move away from thinking that risks are dealt with only by the risk management system. In fact, all elements have the potential to address risks (to varying degrees – hence the prioritisation of those elements).

This is a controversial thesis that sees everything as 'risk' and less from the normative perspective taken by the traditional professional approach. It is part of the increasing prevalence of 'management' in professional practice and moves away from the moral and ethical language of, for example, 'responsibility'.<sup>29</sup> This is driven by some of the developments we have mentioned already: the scale of large professional firms, their

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<sup>25</sup> Sampford, Smith and Brown, above n 24.

<sup>26</sup> See Rogers, Kingsford Smith and Chellew, above n 11, 220, citing John Flood, 'The Re-landscaping of the Legal Profession: Large Law Firms and Professional Re-regulation' (2011) 59 *Current Sociology* 507.

<sup>27</sup> See the discussion in the related title, 'Integrity Systems', under the heading 'Integrity Systems for Professions'.

<sup>28</sup> Sampford, 'Global Transparency', above n 24.

<sup>29</sup> Rogers, Kingsford Smith and Chellew, above n 11, 245, 241 nn 157–8.

clients and the far-reaching implications of professional work. It is also driven by a recognition of the collective nature of professional practice, and the perceived unfairness of making individuals responsible for the negative consequences caused by large organisations.<sup>30</sup>

Integrity systems are constructed differently to professions but are directed towards the same conclusion of a higher, more protective standard for consumers than the caveat emptor standard in contract law. They may pose a solution to some of the problems identified in Rogers, Kingsford Smith and Chellew's analysis of the impact that large firms have on the professions,<sup>31</sup> as well as the problems that may arise from having large firms as professional clients, discussed above.

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<sup>30</sup> Rogers, Kingsford Smith and Chellew, above n 11, 245.

<sup>31</sup> Rogers, Kingsford Smith and Chellew, above n 11, 221, citing Daniel Muzio and Ian Kirkpatrick, 'Introduction: Professions and Organizations – A Conceptual Framework' (2011) 59 *Current Sociology* 389, 391–3.

## Summary

This title proceeded in three parts. The first part described the types and features of professional risk and used dispute resolution and complaints mechanisms as an example to illustrate how the traditional indicia of professions can be thought of as part of a wider ‘integrity system’. On this view, professionals can prioritise the different indicia of professionalism based on how each indicator can be used to manage risk.

The second part analysed some practices and trends causing professionals to emphasise the identification and prioritisation of risks. They include limited liability under Professional Standards Legislation, incorporation, and the changing nature of professional work.

The third part introduced Sampford’s ‘integrity systems’ approach and its application beyond the professions. It also considered how integrity systems thinking could be re-integrated into professions, such that all elements of professional practice, beyond formal risk management systems, have the potential to address risks.

Written by: Dimity Kingsford Smith, Wee-An Tan and Deen Sanders  
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