

INCORPORATED LEGAL PRACTICE

UNDER *LEGAL PROFESSION LEGISLATION*

Updated October 2021



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1. INTRODUCTION

Note: *legal profession legislation* means:

- (a) the *Legal Profession Uniform Law Application Act 2014* and the local regulations, and
- (b) the *Legal Profession Uniform Law (NSW)*, and
- (c) the *Uniform Regulations* and the *Uniform Rules* as they apply in this jurisdiction

The following comments do not purport to be exhaustive and are intended only to provide a general, practical overview.

The *Legal Profession Uniform Law (NSW)* (the *Uniform Law*) prohibits an entity from engaging in legal practice in New South Wales unless it is a ‘qualified entity’. Included in the definition of a qualified entity is a law practice. An incorporated legal practice is included in the definition of law practice under s.6 of the *Uniform Law*.

Incorporated legal practices have been allowed in New South Wales in substantially the present form since the commencement of the *Legal Profession Amendment (Incorporated legal practices) Act 2000* on 1 July 2001.

Following the repeal of earlier legislation and the commencement of the *legal profession legislation* on 1 July 2015, a corporation that engages in legal practice in New South Wales now comes under the provisions of Part 3.7 of the *Uniform Law* and Part 3.7 of the *Legal Profession Uniform General Rules 2015* (the *Uniform Rules*) and Division 4 of the *Legal Profession Uniform Law Application Act 2014*.

1.1 What is an incorporated legal practice?

Incorporated legal practice (is defined at part 1.2 of the *Uniform Law* as a “corporation” that satisfies certain criteria. The criteria are as follows:

- (a) It is-
 - (i) a company within the meaning of the *Corporations Act 2001 (Corporations Act)*; or
 - (ii) a corporation, or a corporation of a kind, approved by the Council under section 114 or specified in the *Uniform Rules* for the purposes of this definition;
- (b) it has given notice under section 104 that it intends to engage in legal practice in Australia and that notice is still operative;
- (c) the legal services it provides or proposes to provide are not limited to either or both of the following services-
 - (i) in-house legal services for the corporation or a related entity;
 - (ii) services that are not legally required to be provided by an Australian legal practitioner and that are provided by an officer or employee who is not an Australian legal practitioner;
- (d) it is not excluded by the *Uniform Rules* from being an incorporated legal practice – but does not include a community legal service.

A corporation that engages in legal practice in New South Wales and which satisfies the criteria listed above is an incorporated legal practice.

An incorporated legal practice may, in addition to the provision of legal services, provide other services (s.103).

2. OBLIGATIONS ON THE ENTITY ITSELF

The obligations imposed by the *legal profession legislation* on a “law practice” apply to an incorporated legal practice in the same way as they would apply to a partnership or sole practice; obligations such as those concerning trust money and trust accounts, costs disclosure and assessment.

2.1 Corporation must give the Law Society written notices in approved form:

2.1.1 Before engaging in legal practice

An incorporated legal practice does not itself hold a practising certificate. Before a corporation may engage in legal practice in New South Wales as a law practice, it must give the Council of the Law Society (‘the **Council**’) at least 14 days written notice of its intention to do so (s.104(1) & r.28). Section 104(2) prohibits an entity from engaging in legal practice as a law practice unless this notice has been given.

2.1.2 Upon Termination of provision of legal services

An incorporated legal practice must give the *Council* written notice in the approved form within 14 days after it ceases to engage in legal practice: (s.104(3) & r.29).

2.2 Incorporated legal practice must have at least one Authorised Principal

An incorporated legal practice must have at least one authorised principal (s.105). “Authorised principal” is defined as a principal who is authorised by his or her Australian practising certificate to supervise others.

The authorised principal must also be a validly appointed director of the company. It is an offence if an incorporated legal practice does not have any authorised principal for a period exceeding 7 days (s.106(1)).

If an incorporated legal practice does not have an authorised principal for a period exceeding 7 days, the incorporated legal practice must notify the Council of that fact within 7 days. The incorporated legal practice must not provide legal services in this jurisdiction during any period it is non-compliant (s.106 (3)).

2.3 Contravention by law practice – disqualified or convicted person as lay associate.

An incorporated legal practice cannot have a lay associate whom any principal or other legal practitioner associate of the law practice knows to be a disqualified person or a person who has been convicted of a serious offence unless the lay associate is approved by the designated local regulatory authority (s.121).

2.4 Compliance Audit and Management System Direction

Where there are reasonable grounds for doing so, the NSW Commissioner or the Council may conduct (or appoint a suitably qualified person to conduct), an audit of the compliance of a law practice with legal profession legislation and other professional obligations. The reasonable grounds must be based on the conduct of the law practice or one or more of its associates or a complaint against the law practice or one or more of its associates. A report of a compliance audit is to be provided to the law practice concerned and may be provided to the designated local regulatory authority (s.256).

After the conduct of a compliance audit, examination or investigation, the NSW Commissioner or the *Council* may give a management system direction to a law practice if considered reasonable to do so.

A **management system direction** is a direction to a law practice or class of law practices to ensure that appropriate management systems are implemented and maintained to ensure the provision of legal services by the law practice is in accordance with legal profession legislation and other professional obligations. A management system direction may also direct a law practice to provide periodic reports to the NSW Commissioner or the Council on compliance with the system. An incorporated legal practice must comply with any management system direction given to it.

2.5 Professional Indemnity Insurance

An incorporated legal practice must not engage in legal practice in this jurisdiction unless the incorporated legal practice itself holds an approved insurance policy for this jurisdiction and the policy covers the legal practice in which it is engaged (s.212). The single provider of an approved insurance policy in this jurisdiction is Lawcover.

Although there is a requirement that an incorporated legal practice itself hold an approved insurance policy for this jurisdiction, every Australian legal practitioner engaging in legal practice or providing legal services through that incorporated legal practice must also be covered for their legal practice by the policy held by the incorporated legal practice (s211).

3. OBLIGATIONS ON PRINCIPALS

3.1 Responsibilities of Principals

Each principal of a law practice is responsible for ensuring that reasonable steps are taken to ensure that all legal practitioner associates of the law practice comply with their obligations under the *Uniform Law* and the *Uniform General Rules* and other professional obligations (s.34(1)(a) of the *Uniform Law*. Further it is the responsibility of each principal to take reasonable steps to ensure that the legal services provided by the law practice are provided in accordance with the *Uniform Law* and the *Uniform General Rules* (s.34 (1) (b) of the *Uniform Law*.

3.2 Liability of Principals

Where an incorporated legal practice has contravened a provision in the *Uniform Law* or the *Uniform General Rules* imposing an obligation on the practice, a principal of the incorporated legal practice is taken to have contravened the same provision in the following circumstances:

- (a) the principal knowingly authorised or permitted the contravention; or
- (b) the principal was in or ought reasonably to have been in a position to influence the conduct of the law practice in relation to its contravention of the provision and failed to take reasonable steps to prevent the contravention (s.35).

Such deemed contravention by a principal is capable of constituting unsatisfactory professional conduct or professional misconduct.

3.3 Storage of archived files (trust property¹)

Rule 14 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (Solicitors' Conduct rules)* requires a solicitor with **designated responsibility**² for a client's matter, to ensure that upon completion or termination of the law practice's engagement, that the client or former client or another person authorised by the client or former client is given any client documents unless there is an effective lien.

A solicitor with **designated responsibility** or law practice may destroy client documents after a period of 7 years has elapsed since the completion or termination of the engagement, except where there are client instructions or legislation to the contrary.

3.4 What happens to archived files when a law practice ceases to provide legal services?

In these circumstances the former **principal/s** of former law practices³ are responsible for the storage of archived files of the former law practice as they are by definition, the **solicitor with designated responsibility** for a client's matter.

3.5 Incorporated legal practices (in liquidation)

If an incorporated legal practice has given notice to the *Council* that it will no longer engage in legal practice because managers/ liquidators have been appointed to the company then the company ceases to be an incorporated legal practice for the purposes of *legal profession legislation*. The incorporated legal practice is, however, a **former law practice** for the purpose of s132 of the *Uniform Law*.

In these circumstances, it is not the appointed managers or liquidators who have designated responsibility for the storage of archived files of a former incorporated legal practice it is the former principal/s of the former incorporated legal practice.

Note: under s6 of the *Uniform Law* a principal of an incorporated legal practice is defined as an Australian legal practitioner who holds and Australian practising certificate authorising the holder to engage in legal practice as a principal of a law practice; AND is a validly appointed director of the company.

¹ Under section 128 of the *Uniform Law* **trust property** means property entrusted to a law practice in the course of or in connection with the provision of legal services by the practice for or on behalf of another person, but does not include trust money.

² **Solicitor with designated responsibility** means the solicitor ultimately responsible for a client's matter or the solicitor responsible for supervising the solicitor that has carriage of a client's matter. The solicitor with designated responsibility **is the principal or principals of the law practice.**

³ s132 of the *Uniform Law* applies in relation to **former law practices and former principals** and associates of law practices in relation to conduct occurring while they were respectively law practices, principals and associates in the same way as it applies to law practices, principals and associates, and so applies with any necessary modifications.

3.6 Advertising

Rule 36 of the *Solicitors' Conduct rules* prohibits false or misleading advertising and states that a solicitor or principal of a law practice must ensure that any advertising, marketing or promotion in connection with the solicitor or law practice is not false or misleading or deceptive or likely to mislead or deceive.

3.7 Stationery - Business Name

Rule 9 of the *Legal Profession Uniform Legal Practice (Solicitors) Rules 2015 (the Practice Rules)* states:

A solicitor must cause the firm or business name of the solicitor or firm to be mentioned in legible characters on all communications written in the course of legal practice by the solicitor.

In addition to this the *Corporations Act* imposes disclosure obligations on every company in Australia. Section 153 of the *Corporations Act* dictates that a company's ACN should appear on all of its public documents and negotiable instruments. Items on which it should appear include:

- Business letterheads
- Statements of account including invoices
- Receipts which are not machine produced
- Cheques, promissory notes and bills of exchange
- Written advertisements making a specific offer which is capable of being accepted

For those incorporated legal practices where the entity itself participates in, and/or has practitioners who participate in, The Law Society of New South Wales Professional Standards Scheme, please refer to page 13 of this guide for specific information about limitation of liability disclosure on law practice stationery and websites.

3.8 Conflict of Interest

Australian legal practitioners who are officers or employees of an incorporated legal practice are also subject to the common law duty not to act in any matters where there is a conflict of interest with the incorporated legal practice.

Principals should also consider: -

3.9 Shareholder Agreements

Before commencing an incorporated legal practice, prospective principals should consider obtaining legal and or financial advice about establishing a Shareholders' Agreement to address issues which may not be covered by their company's constitution or the *Corporations Act*. Many of the issues which arise between partners in partnerships may also need to be addressed by prospective principals of incorporated legal practices.

3.10 Nominating a Personal Representative

Sole principals of incorporated legal practices are vulnerable to disruption if they are suddenly unable to manage their practice due to illness, injury or death.

To address this vulnerability the *Law Society* recommends that sole principals have a contingency plan to nominate a personal representative and alternate who would be responsible for conducting and, if necessary, disposing of the incorporated legal practice if the principal is unable to do so.

Where there is no contingency plan in place and a sole principal is suddenly unable to manage the practice due to illness, injury or death, the Law Society may need to appoint a Manager under the *Uniform Law*. This can be a lengthy, disruptive and often costly process.

Further information about how to nominate a personal representative and an alternate is available on the following link:- www.lawsociety.com.au/contingency-plan-sole-principals

3.11 Professional indemnity insurance

For information about compulsory professional indemnity insurance for a new incorporated legal practice contact LawCover:- www.lawcover.com.au/

4. SHARING RECEIPTS

Subject to the *Uniform Law* and to the conditions on his or her Australian practising certificate, an Australian legal practitioner is not prevented from being a partner, director, officer or employee of a law practice merely because of one or more of the following: -

- (a) the business of the law practice includes the provision of both legal services and other services;
- (b) one or more other persons are lay associates of the law practice;
- (c) the practitioner shares receipts, revenue or other income from the provision of his or her legal services with the law practice or one or more lay associates of the law practice (s.37)

“**lay associate**” is defined in s.6 of the Uniform Law as a person who is not an Australian legal practitioner and who is:

- (a) an associate of the law practice; or
- (b) a consultant to the law practice (however described) who provides services related to legal services to the law practice, other than services of a kind specified in the Uniform General Rules for the purposes of this definition; or
- (c) a person who shares receipts, revenue or other income arising from the law practice.

5. PROVISION OF OTHER SERVICES

An incorporated legal practice may provide any other lawful service or conduct any other lawful business but an incorporated legal practice (or any law practice) or a related entity must not promote or operate a managed investment scheme (s.103 & s.258 of the *Uniform Law*).

*Rule 8 of the Practice Rules*⁴ must be observed when a law practice, including an incorporated legal practice, engages in the conduct of another business.

Australian legal practitioners who are officers or employees of the incorporated legal practice must ensure that the other business is not of such a nature that it would be likely to impair, or conflict with, the practitioner's duties to clients in the conduct of the practice. They are also required to maintain separate and independent files, records and accounts in respect of the legal practice, and the other business. Australian legal practitioners who are officers or employees of an incorporated legal practice must cease to act for a client if the practitioner's independent service of the client's interest is reasonably likely to be affected by the practitioner's interest in the other business.

Disclosure obligations

There are additional disclosure obligations on incorporated legal practices where the practice provides both legal and other services and a person engages the law practice to provide services that the person might reasonably assume to be legal services (s.107 of the *Uniform Law*).

Rule 31 of the *Uniform General Rules* sets out that written notice to the person must be made:

- (a) setting out the legal services to be provided; and
- (b) stating whether or not all of the services are to be provided by an Australian legal practitioner; and
- (c) if some or all of the services are not to be provided by an Australian legal practitioner, identifying those services and indicating the status or qualifications of the person or persons who are to provide the services; and
- (d) stating that the *Uniform Law* and the *Uniform General Rules* apply to the provision of legal services but do not apply to the provision of non-legal services.

4 8.1 A solicitor who engages in the conduct of another business concurrently, but not directly in association, with the conduct of the solicitor's legal practice must:

- 8.1.1 ensure that the other business is not of such a nature that the solicitor's involvement in it would be likely to impair, or conflict with, the solicitor's duties to clients in the conduct of the practice, and
- 8.1.2 maintain separate and independent files, records and accounts in respect of the legal practice, and the other business, and
- 8.1.3 disclose the solicitor's financial or other interest in that business to any client of the solicitor, who in the course of dealing with the solicitor, deals with the other business, and
- 8.1.4 cease to act for the client if the solicitor's independent service of the client's interest is reasonably likely to be affected by the solicitor's interest in the other business.

8.2 For the purposes of this rule, a solicitor is taken to engage in the conduct of another business where the solicitor, or an associate:

- 8.2.1 is entitled, at law or in equity, to an interest in the assets of the business which is significant or of relatively substantial value; or
- 8.2.2 exercises any material control over the conduct and operation of the business; or
- 8.2.3 has an entitlement to a share of the income of the business which is substantial having regard to the total income which is derived from it.

6. DISQUALIFICATION OF ENTITIES FROM PROVIDING LEGAL SERVICES

The designated tribunal may, under s.120 of the *Uniform Law*, make an order disqualifying an entity that is or was a law practice from providing all or specified legal services on the following grounds:

- (a) that a legal practitioner associate of the law practice has been found guilty of professional misconduct under a law of this jurisdiction or another jurisdiction;
- (b) that the law practice (or a related body corporate) has contravened s.121 (contravention by law practice – disqualified or convicted person as lay associate);
- (c) that the law practice has failed to comply with a management system direction under s.257;
- (d) that the law practice or a related entity has contravened s.258 (prohibited services and business – managed investment scheme)

7. GENERAL TRUST ACCOUNT PROVISIONS

A law practice, including an incorporated legal practice, must notify the *Council* of the opening or closure of a general trust account. Forms for this purpose are on the Law Society's Forms Directory at www.lawsociety.com.au/resources/publications/forms-directory

Note - A general trust account can only be maintained with an **approved** authorised deposit taking institution ("Approved ADI"). A list of Approved ADI's is published on the Law Society website.

Practice Management software

Information about Trust Accounting software is available on the Law Society's website at: www.lawsociety.com.au/practising-law-in-NSW/trust-money-and-fidelity-funds

8. TRANSFER OF A PRACTICE

Practitioners commencing an incorporated legal practice may already operate another type of law practice (such as a sole practitioner or a law firm) and intend to transfer the existing law practice to the newly established incorporated legal practice.

In these circumstances practitioners are reminded of the requirements of rule 6 of the Practice Rules - '*Transfer of a Solicitor's Practice*').

How to transfer client documents, files and safe custody documents (trust property)

8.1 How to transfer client documents

Where a practitioner operates an existing practice, before client documents are transferred to the newly established incorporated legal practice the practitioner/s must provide each client with at least 14 days prior notice in writing of the intention to transfer client documents, files and safe custody documents (known as trust property) to the incorporated legal practice unless a contrary direction is received from the client.

Practitioners must also advise clients of their right to give a contrary direction in relation to the conduct of their affairs and the delivery of their documents

8.2 How to transfer trust monies

Where a practitioner holds trust monies on behalf of a client, the practitioner must advise the client of the balance of money held on the client's behalf and the practitioner's intention to transfer the relevant account (trust monies) to the trust account of the newly established incorporated legal practice, unless a contrary direction is received (see rule 6.2 of the Practice Rules).

Practitioners must also advise clients of their right to give a contrary direction as to the manner in which the practitioner should deal with the account (trust monies) on their behalf.

9. UPDATING PARTICULARS

All practitioners have a statutory obligation to notify the *Council* in writing of any change in their practising particulars (as disclosed in the practitioner's last application for grant or renewal of a local practising certificate) within 7 days after the change occurs (see [clause 61 of the *Legal Profession Uniform Law Application Regulation 2015*](#)). This may be done by completing the relevant form that can be found in the 'Forms Directory' on the Law Society website.

10. THE LAW SOCIETY OF NEW SOUTH WALES PROFESSIONAL STANDARDS SCHEME

The Law Society has continuously administered Schemes as an exclusive benefit for its members in private practice since 1996. These Schemes are specifically designed to promote professional standards, enhance consumer protection and to enable private practice members to limit their civil liability to selected amounts provided they meet the Scheme requirements.

The current Law Society of New South Wales Professional Standards Scheme (**the Scheme**) has been approved by the Professional Standards Councils to operate from 22 November 2018 until 21 November 2023. Further information about the Scheme can be found [here](#) or download a copy of the [Scheme Brochure](#) from our website.

Under the approved Scheme, private practice Solicitor Members, Life Members and incorporated legal practice Members are required to either apply for registration of participation in, or exemption from, the Scheme. Limitation caps are set out in the [Scheme Instrument](#) – and include the option to apply for a Higher Discretionary Cap for specific cases and/or clients. The Law Society administers this participation and exemption process through the relevant law practice.

There are two changes to both the benefits under this current Scheme and its operation. For the first time, the incorporated legal practice entity itself may apply for participation in or exemption from the Scheme (provided the incorporated legal practice entity is eligible) and mutual recognition of the Scheme has also been approved. You can read more about this in the [Scheme e-Brochure](#). Applications may be made through our [online Scheme portal](#).

The Scheme relies upon, but does not displace your PII

The Scheme is not an insurance scheme and does not displace the requirements for insurable solicitors to obtain insurance under the approved policy in NSW. You can read more about this in our [FAQs](#).

Disclosure to clients of your limitation of liability

The *Professional Standards Act 1994 (NSW)* (**the Act**) and subordinate regulation require that if a person's occupational liability is limited under the Act, then all documents given by that person to a client or prospective client that promote or advertise that person's occupation must carry notification of that limitation of liability (**the Disclosure Notification**). The prescribed statement is set out in Clause 9 of the Regulation.

INCORPORATED LEGAL PRACTICES

Please note that there are some matters to consider if your law practice is an incorporated legal practice. [One of the most important ones pertains to how an incorporated legal practice discloses its limitation of liability to clients and this will depend upon whether the incorporated legal practice itself is a Scheme participant or only its legal practitioners.](#) Further information for incorporated legal practices may be accessed [here](#).

Please do not hesitate to contact the Scheme team on (02) 9926 0189 or by email at scheme@lawsociety.com.au should you have any questions.

‘LAW SOCIETY JOURNAL’ ARTICLES:

- ‘Setting up an Incorporated legal practice under the Uniform Law in NSW?’ by Frances Moffitt (Sept. 2020)
lsj.com.au/articles/setting-up-an-incorporated-legal-practice-under-the-uniform-law-in-nsw/
- ‘Three compliance considerations for staff recruitment’ by Glenda Carry (Oct. 2019)
lsj.com.au/articles/three-compliance-considerations-for-staff-recruitment/
- ‘Cyber fraud – be aware and stay alert’ by Frances Moffitt (Dec. 2019)
lsj.com.au/articles/cyber-fraud-be-aware-and-stay-alert/
- ‘Better business management for a sustainable practice’ by Glenda Carry (June 2019)
lsj.com.au/articles/better-business-management-for-a-sustainable-practice/
- ‘Principals take note: a clear compliance management system is your responsibility’ by Frances Moffitt (April 2019)
lsj.com.au/articles/principals-take-note-a-clear-compliance-management-system-is-your-responsibility/
- ‘Contingency and succession planning: a sole principal’s plan for the unexpected’ by Frances Moffitt (Feb 2019)
lsj.com.au/articles/contingency-and-succession-planning-a-sole-principals-plan-for-the-unexpected/
- ‘Solicitor consultants: have you considered the terms of your practising certificate?’ by Glenda Carry and Frances Moffitt (Feb 2020)
lsj.com.au/articles/solicitor-consultants-have-you-considered-the-terms-of-your-practising-certificate/
- ‘Solicitor consultants: have you considered your insurance cover’ by Janice Purvis and Jen McMillan (Feb. 2020)
lsj.com.au/articles/solicitor-consultants-have-you-considered-your-insurance-cover/
- ‘Principals: why it’s important to set the right tone’ by Frances Moffitt (Dec 2016)
lsj.com.au/articles/principals-why-its-so-important-to-set-the-right-tone/
- ‘Are you supervising as you should? Your staff & your practice depend on it’ by Glenda Carry (May 2016)
lsj.com.au/articles/are-you-supervising-as-you-should-your-staff-your-practice-depend-on-it/
- ‘Five steps to effective delegation’ by Glenda Carry (March 2019)
lsj.com.au/articles/five-steps-to-effective-delegation/

HELPFUL REFERENCES AND LINKS

- Checklist for establishing an incorporated legal practice (this will be hyperlinked to the checklist when it is approved)
- The Law Society Compliance Review Toolkit available for download at:
www.lawsociety.com.au/sites/default/files/2018-03/Compliance%20review_0.pdf
- Contingency planning for sole principals – planning for the unexpected - nominate your personal representative
www.lawsociety.com.au/contingency-plan-sole-principals
- Download our Cyber Risk Management Checklist
www.lawsociety.com.au/practising-law-in-NSW/ethics-and-compliance/regulatory-compliance

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