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REGULATING FOR RISK

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We have two fundamental and overlapping purposes at the Queensland Legal Services Commission (LSC). One is to provide users of legal services a timely, effective, fair and reasonable means of redress for complaints. The second is to promote, monitor and enforce appropriate standards of conduct in the provision of legal services, including by initiating disciplinary action as appropriate. Those purposes serve an even more fundamental purpose: to help protect and promote public confidence in the legal system, the administration of justice and the rule of law.

I might add that there is nothing remarkable about this statement of our purposes. It could have been (and largely was) lifted straight out of our enabling legislation.

So what regulatory tools does the legislation give us to achieve these goals? We have three tools available to us under the Queensland *Legal Profession Act 2007* (the LPA). We will have the same three tools available to us under the draft *Legal Professional National Law* (the National Law) albeit tools which have been recalibrated in some new and interesting ways:

- **a system for dealing with complaints** (and initiating disciplinary proceedings as appropriate);
- **a system for conducting trust account investigations** (and appointing 'external interveners' as appropriate); and
- **a system for conducting compliance audits** of the compliance of law firms with their professional obligations and their management systems and supervisory arrangements.

THE SYSTEM FOR DEALING WITH COMPLAINTS

The system established under the LPA for dealing with complaints makes the LSC solely responsible for receiving complaints and deciding what action, if any, to take on a complaint. It allows us to refer complaints to the professional bodies for investigation, and we do, but they have no power to decide what action if any to take on those complaints. Rather they are required to report their findings and recommendations to the LSC for review and determination.

Architecture aside, the system varies little from state to state. It is a fundamentally important regulatory tool which gives aggrieved consumers a means of redress for complaints. Importantly - and these are welcome consumer protection reforms - the recalibrated system under the draft National Law will give consumers a significantly more effective and efficient means of redress.¹

However the system for dealing with complaints is now and will remain an ineffective and inefficient means of achieving the broader regulatory purposes of monitoring and enforcing appropriate standards of conduct in the provision of legal services and protecting consumers more generally. That is because systems for dealing with complaints however they may be calibrated are:

- inherently reactive rather than proactive and preventative in character;

¹ The draft National Law specifically allows complaints to be made against not only individual lawyers but also law firms – see sections 5.1.3; 5.2.3; 5.2.5; and 5.2.6. It will oblige the relevant regulatory authority to try to resolve consumer matters informally and as soon as practicable and, if they can't be resolved informally, it authorises the relevant regulatory authority to resolve them by making a binding determination that is 'fair and reasonable in all the circumstances'. That might include ordering lawyers to apologise, to fix a mistake at no cost to a complainant, to reduce or waive their fees, to pay compensation of up to \$25,000 or to undertake training or be supervised - see Part 5.3. It treats costs disputes as a species of consumer matter where the total costs are less than \$100,000 or the amount in dispute is less than \$10,000 - section 5.3.7. It also authorises the relevant regulatory authority to make a finding (subject to appeal) that a lawyer has engaged in unsatisfactory professional conduct and to make orders which include all the orders the authority may make in relation to consumer matters but also orders which caution or reprimand the lawyer, impose conditions on the lawyer's practising certificate or require the lawyer to pay a fine of up to \$25,000 - see section 5.4.5. These are important and welcome reforms.

- geared to policing the merest of minimum standards (the standard below which complainants can justifiably claim redress and/or lawyers can justifiably be held to account before the disciplinary bodies) rather than to promoting best practice;
- focussed disproportionately on solicitors to the relative exclusion of barristers, and by a factor of several times, and similarly on solicitors who work in sole practice and small law firms and in only certain 'retail' areas of law, so much so that the conduct of solicitors who work in medium sized and larger law firms and other, more 'commercial' areas of law is only nominally subject to regulatory scrutiny.² Yet we have no reason to assume that barristers are correspondingly more competent and ethical than solicitors, nor that solicitors who practice other areas of law in medium sized and larger law firms are correspondingly more competent and ethical than solicitors who practice 'retail' law in sole practice and small law firms.

Nor for that matter do we have any reason to assume that complaints identify all, or even most of the conduct of solicitors in sole practice and small law firms that falls short of appropriate standards, even of those solicitors who practice in the over represented areas of law; and

- unable to give us any good 'regulatory grip' on the root causes of complaints. We all know as complaints-handlers that:
 - many and perhaps most complaints are attributable not to shortcomings of the individual lawyers subject to complaint but of the law firms which employ them: to poor business practices and inadequate governance and supervisory arrangements and the like³; and, further, that

² We publish comprehensive complaints data in our annual reports which are readily accessible on the LSC's website at www.lsc.qld.gov.au. The data tells us year after year that solicitors are 2-3 times more likely per capita than barristers to be subject to complaint, and also that solicitors who do family law, residential conveyances, personal injuries and deceased estates work are many times more likely to find themselves subject to complaint than solicitors who do commercial litigation or banking or building and construction law. Similarly solicitors who work in sole practice or small law firms are many times more likely to find themselves subject to complaint than solicitors who work in medium sized and larger law practices.

³ Let me give you a paradigmatic but not atypical example: we receive a number of phone calls from clients in personal injury matters complaining that a young lawyer in a medium sized regional law firm hasn't been returning their phone calls or keeping them up to date about the progress of their matters. We speak to the lawyer who tells us that he has too many files and isn't getting good supervision. We discover that he has missed statutory time frames in several of these matters and that they have been struck out. We speak to the lawyer's supervising partner who tells us it isn't true

- the conduct of individual lawyers subject to complaint is a function in part at least of the workplace cultures of the law firms which employ them, for better or worse. This obvious fact of human behaviour has consequences, not least for lawyers' billing practices, for example. The fact is that law firms like other commercial enterprises exist to make a profit and their workplace cultures invariably reflect their commercial among other motivations. Think of what can go wrong – think of the potential impacts on individual lawyers of unreasonable pressure to meet unrealistic billing targets, for example, or other like risk factors including performance against billing targets being, or even just being perceived to be the 'all important' performance measure for promotion and remuneration purposes.⁴

These are instructive facts. They tell us we should be directing our regulatory energies not only to identifying and dealing with the 'bad eggs' in the profession but also the 'bad nests' (or to change the image slightly, the 'bad incubators').

It follows in my view that the system for dealing with complaints should be supplemented accordingly with regulatory tools that are genuinely preventative in character; that are directed to ethical capacity-building more so than potential disciplinary consequences; that engage all lawyers and law firms rather than a mere sub-set of lawyers and law firms; and

that the young lawyer has too many files and denies that he hadn't been well supervised. In fact he tells us that the firm has an excellent supervision policy called an 'open door'. He tells us when we press him further that not only did he have an open door but that he had asked the young man in. He says he asked him if he needed any help and was told 'no' – and that he now knew the young man had lied to him and he was very annoyed, and what's more the young man hadn't met his billable hours targets since he started with the firm and had proved to be a great disappointment. We ask him, somewhat annoyed ourselves by now, whether he had ever reviewed any of the young man's files. He says 'no'. We discover on making further inquiries that 'the girls on the front desk' at the firm had been getting calls from clients well before they started ringing us telling them that the young man wasn't returning their calls and keeping them up to date with progress in their matters. We asked the 'girls' if they had reported the calls 'up the line'. They said 'no' – that the young lawyer was under a lot of pressure and wasn't very well, that their boss was quick to anger and that they 'didn't want to get him into trouble'. The net result of all this: several client's rights compromised, claims against the firm's professional indemnity insurance totalling several million dollars; and a young man who has suffered a breakdown and is nowhere to be found. Why? It is because, ultimately, the firm had totally inadequate governance and supervisory arrangements, and no effective policies and procedures for dealing with client complaints.

⁴ There is a significant organisational studies literature that examines how people's behaviour is influenced by their organisational environments and an empirical legal ethics literature also. The literature is canvassed in detail in Christine Parker, Adrian Evans, Linda Haller, Suzanne le Mire and Reid Mortensen, *The Ethical Infrastructure of Legal Practice In Larger Law Firms: Values, Policy, and Behaviour*, University of New South Wales Law Journal, 31(1), 158-188.

that put the focus not only on lawyers but also on law practices and their management systems and supervisory arrangements - on their 'ethical infrastructure'.⁵

Notably in this context we will have to make choices if we aspire to do more than simply react to complaints as they come in the front door: choices about where, about when and how we apply the resources at our disposal. And clearly we will have to be accountable for our choices, and be guided by transparent and well articulated principles - but more of that shortly.

THE SYSTEM FOR CONDUCTING TRUST ACCOUNT INVESTIGATIONS

The LPA gives the Queensland Law Society (QLS) responsibility for conducting trust account investigations (and related external interventions). It gives the QLS the unfettered power either 'on its own initiative or if asked by the commissioner' to 'investigate the affairs of a law practice... to find out whether the law practice has complied with or is complying with [its obligations in relation to handling trust monies] and to detect and prevent defaults.'⁶ The draft National Law gives the relevant regulatory authorities the same unfettered power, very similarly expressed.⁷

This is a tool that in imaginative hands has none of the weaknesses of the system for dealing with complaints. It can be used both reactively and proactively, in the absence of complaint or suspicion. It can be used both to police minimum standards and to promote best practice and it can be directed to all law firms, not merely to a mere subset of law firms. And it

⁵ Lord Hunt argued to similar effect following his recent and comprehensive review of the regulation of legal services in England and Wales (the *Hunt Review of the Regulation of Legal Services in England and Wales*, October 2009). He describes the 'principal theme' of his report to be that 'effective regulation of legal services must in future concentrate far more upon promoting good governance arrangements in firms' (p.47). He goes on to say, contrasting the current arrangements for the regulation of individual lawyers with proposed reforms which allow increasingly for the regulation of law practices, that 'it is no longer a question of which is better. It is a question of how best the two types of regulation can complement each other, whilst remaining proportionate and avoiding double regulation'(p.59). He concludes that 'there is a role for regulators of leadership and guidance and not just policing and punishing', and that we should move 'from a reactive approach, moving in after problems have occurred, to an active mindset, where the roots of potential problems are identified as far as possible in advance and failures often averted' (pp.77-78).

⁶ Section 263

⁷ Section 4.2.35

focuses squarely on their management systems and supervisory arrangements, albeit only in relation to their handling of trust monies.

The discretionary character of the power to conduct trust account investigations demands of us that we make choices and be accountable for our choices about where, about when and how we apply the resource at our disposal. Random audits may well have their place within a broader program but it seems to me for reasons I'll return to shortly that we should be guided by principles that require us to target the law firms most at risk of non-compliance and direct our resource there. And that of course requires us to have the capacity to make well informed and evidence-based risk assessments.

THE SYSTEM FOR CONDUCTING COMPLIANCE AUDITS

The LPA authorises both the LSC and the QLS to conduct compliance audits but in practice (and by mutual agreement) the responsibility is exercised solely by the LSC. It requires incorporated legal practices to have 'appropriate management systems' which enable them to provide legal services consistent with their professional obligations.⁸ It complements that obligation by giving the LSC the unfettered power to 'conduct an audit of an incorporated legal practice about the compliance of the practice, and of its officers and employees [with their professional obligations] and the management of the provision of legal services by the practice, including the supervision of officers and employees providing the services.'⁹

The power to conduct compliance audits is the power to conduct trust account investigations writ large. It is effectively the same power but directed to a law firm's compliance with all its professional obligations, not merely its obligations in relation to handling trust monies. It too is a tool that can be used both reactively and proactively, and both to police minimum standards and to promote best practice. It too is directed to all the law firms to which it applies, not just the small firms or firms that practice in only certain

⁸ Section 117 requires incorporated legal practices to have at least one legal practitioner director and makes legal practitioner directors personally liable for ensuring that their practices have appropriate management systems.

⁹ Section 130

areas of law, and it focuses squarely on their management systems and supervisory arrangements – on their ‘ethical infrastructure’.

These are great virtues. Not surprisingly some of us have been arguing for some time now that the power should be extended to apply not only to incorporated legal practices but to all law firms, incorporated or otherwise.¹⁰

The draft National Law takes a significant step in that direction. It requires not only incorporated legal practices but all law firms to have appropriate management systems¹¹ and gives us the power to conduct an audit of the compliance not only of incorporated legal practices but any law firm and its lawyers with their professional obligations.¹² It even gives us an entirely new power: the power when ‘it is reasonable to do so’ having investigated a complaint or conducted a trust account investigation or compliance audit to give a law firm a ‘management systems direction’ requiring it to have appropriate management systems.¹³

Regrettably however the draft National Law fetters the exercise of the compliance audit power by allowing us to conduct an audit only if ‘there are reasonable grounds to do so based on the conduct of the law practice or one or more of its associates or a complaint

¹⁰ I have, and so too my counterpart in New South Wales, Steve Mark. Notably the Chief Justice of Western Australia, the Hon Wayne Martin, argued the case persuasively at CORO 2009. His speech, *The Future of Regulating the Legal Profession: Is the Profession Over-Regulated*, is published on the website of Western Australia’s Supreme Court. He argued that the current regulatory framework puts ‘too much emphasis upon a policing / punitive model and insufficient emphasis upon other methods of encouraging appropriate standards of professional behaviour.’ He said ‘in my experience on the body which regulates the legal profession in this state’ - and all of us who deal with complaints have had this experience - ‘there were many occasions upon which we were effectively forced to watch from a distance the tragic trajectory of a legal practitioner whose conduct could be confidently predicted to deteriorate to the point where he or she would ultimately be struck off. Often it was like watching a train wreck in slow motion, powerless to do anything to stop it... In my opinion, the complaints and disciplinary function should not be the central focus of that part of the regulatory framework aimed at the encouragement and maintenance of proper standards of behaviour. I agree with those like NSW Legal Services Commissioner Mark who have suggested that greater emphasis be placed upon the creation of what has been described as an ethical infrastructure... What is needed is a focus on encouraging ethical behaviour and the provision of quality services rather than upon punishing non-compliant behaviour’.

¹¹ See sections 3.2.3 (responsibilities of principals) and 3.2.4 (liability of principals).

¹² Section 4.6.1

¹³ Section 4.6.2

against the law practice or one or more of its associates.’¹⁴ This is a big mistake, in my view, and a mistake which:

- robs us of an historic opportunity to ‘move away from a reactive approach - moving in after problems have occurred - to an active mindset, where the roots of potential problems are identified so far as possible in advance and failures often averted’¹⁵;
- ensures for all practical purposes that regulatory attention remains disproportionately directed to small law firms and lawyers who practice in only certain areas of law, to the extent that the conduct of lawyers who work in medium sized and larger law firms and other areas of law will remain only nominally subject to regulatory scrutiny¹⁶;
- compromises our ability to extend to all law firms the same program of compliance audits that has proved so effective in helping incorporated legal practices to identify their risk of non-compliance with their professional obligations, to take remedial action and to improve standards of conduct in their provision of legal services. It will effectively make that program voluntary¹⁷; and

¹⁴ Section 4.6.1

¹⁵ These are Lord Hunt’s words – see note 5, above.

¹⁶ See note 2, above.

¹⁷ We have conducted 468 compliance audits of incorporated legal practices in Queensland since law firms were first allowed to incorporate on 1 July 2007. Importantly in this context we would have been empowered to conduct only 5 of them had our compliance audit power required us (as the draft National Law will require us) to have ‘reasonable grounds to do so 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.’

We have conducted 364 self-assessment audits. We ask every incorporated legal practice shortly after start up to complete a pro-forma survey which requires them to self-assess and rate the adequacy of their management systems against ten criteria. Similarly we have conducted 99 web-based surveys (which I will discuss in more detail later in the paper).

Self-assessment audits and web-based surveys are regulatory tools which enable law firms to identify the strengths and weaknesses of their management systems and to make any necessary improvements. All the research, the feedback we have sought and received from the law firms that have completed the audits and our own anecdotal evidence tells us that they do just that, and they have been positively received almost without exception. Furthermore they give us two useful tools which add powerfully to the risk data we have at our disposal.

Sadly, the draft National Law frames the compliance audit power so as to allow us to ask but preclude us from requiring law firms to conduct self-assessment audits and participate in web-based surveys (and other like low intensity compliance audits we might come up with). It makes them voluntary. The likely outcome: low risk firms will be the most likely and high risk firms will be the least likely to volunteer.

- robs us in so doing of important regulatory tools which at the same time as helping law firms identify their risk of non-compliance help us as regulators to identify the law firms most at risk of non-compliance and thus to plan well targeted remedial interventions.¹⁸

The power to conduct compliance audits was fettered to this effect presumably as a result of the ill-informed scare campaign waged by the professional associations and the large law firm group during the consultation phase prior to the release of the draft National Law in December 2010.¹⁹ They characterised the power as ‘intrusive’, ‘unnecessary’, ‘clearly unwarranted’ and ‘unjustified’, and as a power that would allow regulators to interfere in the internal affairs of a law practice ‘without just cause’.²⁰

This is a great pity. Professor Christine Parker (then of Melbourne University Law School) undertook comprehensive research in 2008 with the co-operation of my counterpart Commissioner in New South Wales to test the hypothesis that the regulatory requirement that incorporated legal practices keep and implement appropriate management systems and complete self-assessment audits results in improved standards of conduct in those firms. She reviewed the evidence in relation to all 631 incorporated legal practices that had completed a self-assessment audit at that time and found ‘compelling evidence’ that it did just that. The figures are striking. The complaint rate per practitioner per year for incorporated legal practices after self-assessment was one third the complaint rate before self-assessment, a reduction that is ‘statistically significant at the highest level’. Similarly the complaint rate per practitioner per year for incorporated legal practices after self-assessment was one third the complaint rate for traditionally structured firms (see C. Parker, T. Gordon and S. Mark, *Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales*, (2010) 37 *Journal of Law and Society*, 466-500). That is a great result for consumers, obviously, but also for the law firms concerned and for the reputation of the legal profession more generally.

¹⁸ Self-assessment audits and web-based surveys are both very useful tools which add powerfully to the risk data we have at our disposal. I discuss web-based surveys later in the paper and illustrate just how useful they can be in helping us identify the law firms most at risk of non-compliance with their professional obligations.

¹⁹ The power as formulated in the draft National Law published in December 2010 (and that remains unchanged in subsequent drafts) waters down the power as first formulated by the National Legal Profession Reform Taskforce in its *Business Structures* consultation paper dated 25 November 2009. The consultation paper envisaged regulators having the power to ‘conduct an audit [a compliance audit]... if [the regulator] considers it necessary to do so.’ The draft National Law qualifies the power by requiring regulators to have ‘reasonable grounds based on the conduct of or a complaint about a law practice or its associates.’ Interestingly the power as first articulated in the *Business Structures* paper was an already watered down version of the power that currently applies to incorporated legal practices. The LPA provides (at section 130) simply that we ‘may conduct an audit [a compliance audit] of an ILP about...’.

²⁰ The relevant submissions are all readily accessible at www.ag.gov.au/legalprofession. Interestingly neither the professional bodies nor the large law firm group saw fit to complain similarly about the power to conduct trust account investigations which could be similarly abused in the hands of an over zealous regulator. We might speculate that is because the power to conduct trust account investigations has sat traditionally with the professional bodies while the more recent enacted power to conduct compliance audits sits in practice with independent statutory bodies or office-holders.

It is not only a mistake to fetter the power in this way but completely unnecessary to protect law firms from unwarranted, unnecessary or disproportionate intrusion. Clearly no law firm should be subject to regulatory overreach of that (or any other) kind. That is not in dispute.

I've argued already that we have to make choices when we are exercising discretionary powers and that we should be held accountable for our choices against transparent and well articulated principles. Those principles should require us never to impose any needless regulatory burden on low risk firms but to direct our regulatory resource to where it is most needed and can have the most beneficial impact in the public interest. They should require us as regulators always to use our best efforts to target the law firms most at risk of non-compliance with their professional obligations and to direct our energies there.

The draft National Law could and should have included principles to that effect, and a principle requiring us to exercise the compliance audit power (and for that matter all and any of our coercive information gathering powers under the Law) in such a way as to keep the compliance costs to law firms proportionate to the value of the information sought to be obtained. That would be consistent with both government coercive information gathering best practice²¹ and the principles-based approach to regulation that is reflected elsewhere throughout the draft National Law.

Amending the draft National Law to that effect would require us to exercise an effective power responsibly rather than rob the power of its effectiveness. It would unchain us from our otherwise all but exclusively reactive approach to monitoring and enforcing appropriate professional standards. It would create a level playing field by exposing all law firms and not merely a sub-set of law firms to compliance audits. It would allow us to implement a program of compliance audits of varying intensity that match 'intrusiveness' with risk. It would allow us to continue to implement and to expand the program of compliance audits that has been so well accepted by incorporated legal practices and that have proved so effective.

²¹ The Administrative Review Council enunciated a best practice principle to this effect in its recent report on *The Coercive Information Gathering Powers of Government Agencies*, Report No. 48, May 2008.

GETTING THE BEST VALUE FROM THE TOOLS AT OUR DISPOSAL

What are we to make of all this? The lesson it seems to me is that the regulatory tools we have available to us, even the recalibrated tools we will have available to us under the draft National Law, are less than what they might be to enable us to fully and effectively monitor and enforce appropriate standards of conduct in the provision of legal services, and especially in the provision of 'commercial' legal services and legal services provided by medium sized and larger law firms. That is regrettable.

But we have to get on with it nonetheless. We will have to squeeze every bit of potential we can out of the regulatory tools we have at our disposal to get on to the front foot, to identify potential problems in advance and to prevent them. That will require us to be imaginative. It will also require us to make choices and to be accountable for the choices we make about where, when and how we apply the resources at our disposal. It will require us to spell out for the benefit of the profession and members of the public alike the principles and criteria we will have regard to in making those choices.

Obviously that means we have to be able to identify the firms most at risk of non-compliance. How? That's a question we have pondered from time to time but never as a regulatory community systematically addressed. I don't pretend to have the answer but there are some things we can do (I am using the royal 'we' now) that will put us in a position to make progress. I have two suggestions in particular – that we consolidate the regulatory data we already have available to us in a single data warehouse and that we systematically add to the data by inventing new and innovative regulatory tools designed to identify risk.

CONSOLIDATING OUR RISK DATA IN A SINGLE DATA WAREHOUSE

We have multiple regulators across Australia and even within each jurisdiction all keeping the regulatory data they're required to keep on their own multiple stand-alone databases. We have a dog's breakfast of regulatory data. We will never be able to make well informed and evidence based risk assessments while that remains the case, and accordingly never be

able to make the most effective and efficient proactive use of our scarce regulatory resource.

Of course multiple agencies can enter into information sharing agreements that entitle them to ask questions of each other and expect answers. We have largely done that. The real challenge however is not simply to enter into arrangements where 'I'll tell you what you want to know if you ask me' or 'I'll show you mine if you show me yours' but arrangements under which we share a common database or failing that upload our respective data into a shared data warehouse by an automated data feed. That would aggregate our respective data in a way that allows it to be sliced and diced and cross-referred and interrogated to produce both pre-programmed and ad hoc risk reports.²²

The consolidation and cross fertilisation I am referring to is not just a matter of hard data - data kept by the admitting authorities about suitability matters, for example; and data kept by the professional associations and other bodies which administer the practising certificate regime about show cause events and the like; data kept by the statutory and other bodies which deal with complaints about the number and frequency and kinds of complaints and the lawyers who are subject to complaint and failures to comply with statutory notices to produce, for example; data kept by the professional associations and other bodies which conduct trust account investigations about failures to lodge external examination reports on

²² I know that the Office of the Legal Services Commissioner in New South Wales has made substantial progress towards doing just this and that is good news. We have approached things differently in Queensland but made substantial progress also. The LSC has engineered a situation where we now share a data warehouse with the QLS and the BAQ that includes all the data the QLS keeps in relation to its administration of the practising certificate regime and all the complaints and compliance audit data. It will soon include also the trust account investigation and related data kept by the QLS and the practising certificate data kept by the BAQ. It could be readily adapted to include the data kept by the admitting authorities also. That would complete the circle. It would allow us to track a lawyer's progress from the moment he or she applies for admission. It would give us a complete and fully integrated database in connection with the regulation of the legal profession and provision of legal services.

We have also developed a portal both to pull information in (through online lodgements of forms and the like) but also to push information out. We have made the first tentative steps towards giving lawyers, law firms and members of the public access to appropriately de-identified information. We currently give incorporated legal practices access to data describing in full the complaints we have dealt about the conduct of lawyers in their employ, for example, and will soon extend that access to all law firms. That is a whole other story, but heralds a new era of unprecedented transparency and accountability. The portal can be accessed at www.lpportal.org.au. We suggest you watch the demonstration video.

time without reasonable excuse or the appointment of external interveners; and data kept by the statutory bodies which conduct compliance audits about incongruous outcomes of self-assessment audits.

We need equally to share and cross-fertilise the 'soft' and more impressionistic data that complaints handlers, trust account investigators and compliance auditors learn as they ply their trade, and the hunches and working hypotheses they form as they follow their nose. As I see it that requires for monitoring and enforcement purposes that responsibility for dealing with complaints and for conducting trust account investigations and compliance audits to be consolidated at the local level in one regulatory body under a single management structure – or alternatively, if the day to day operational responsibilities are shared between an independent statutory body or office-holder and the professional bodies, under a single point accountability for their oversight, supervision and control.

The three functions are complementary. They are all investigative and intelligence gathering functions and all directed to the same ultimate purpose of promoting, monitoring and enforcing appropriate standards of conduct. The information and perspective gained in the exercise of any one of them should be readily available to inform the exercise of any of the others. It is a folly in my view to imagine we can achieve this degree of cross-fertilisation by leaving responsibility for these complementary functions scattered across multiple agencies and management structures. It requires single point accountability and good management and a lot of good luck even then.

The single point of accountability should in my view be an independent statutory body or office-holder. Notably the draft National Law in the version that was given to COAG and published on 15 December 2010 achieved precisely this. It required the National Legal Services Commissioner to delegate responsibility for the exercise of his or her 'special functions' (viz., his or her functions in relation to complaints, trust account investigations and compliance audits) to local representatives in each of the states and territories and, while it allowed a local representative to further delegate those functions to professional

associations, it required the local representative to be 'an independent statutory body (not being a professional legal association) or an independent statutory office holder.'²³

The draft National Law in its latest incarnation - the version that was published on 9 September 2011 but is dated 31 May 2011 – beats a retreat. It amends the earlier version to limit the requirement for the local representative to be an independent statutory body or office holder to the Commissioner's special functions in relation to complaints and discipline.²⁴ That is regrettable in my view and a lost opportunity for reasons both principled and pragmatic.²⁵

I am pleased to say however from a Queensland perspective that the LSC and the QLS are agreed subject to being able to negotiate satisfactory transitional arrangements that the QLS will relinquish its current monitoring and enforcement roles. We have agreed subject to this caveat that the LSC will assume sole regulatory responsibility for receiving and dealing with complaints and conducting trust account investigations and compliance audits and perform all three functions entirely in-house.²⁶

²³ Section 8.3.5

²⁴ The amendment comes at section 8.3.5(4).

²⁵ The amendment came as a surprise and is a great disappointment for reasons both of process and substance. Stakeholders were given to understand that the 2010 draft National Law would be amended after it was given to COAG only to fix any technical anomalies. We were given to understand that there would be no substantive amendments to the underpinning policies or architecture that had been exhaustively debated from late 2009 through 2010.

The 2011 version of the National Law includes a number of such amendments but this particular amendment crosses the line. It represents no mere technical detail but a fundamental policy and architectural shift. Let's be clear about it: the amendment envisages the Commissioner delegating direct responsibility for these fundamental consumer protection functions not to independent statutory bodies or officer holders who exist to serve the public interest but to professional associations which exist to serve the interests of their members. It compromises the National Law's consumer protection purposes and squanders a rare opportunity to promote public confidence in the provision of legal services. Furthermore and for the reasons I have outlined it complicates the already complex task of multiple agencies achieving a shared and fully integrated data base.

²⁶ I hasten to add that different considerations apply to dealing with complaints about barristers. We will discuss with the BAQ how we can best between us deal with those complaints.

I hasten to add also that the QLS has no intention of vacating the professional standards 'space' but believes it will contribute most effectively by providing membership services that encourage and support its members to run successful businesses that deliver competent, ethical and profitable legal services.

ADDING TO THE RISK DATA AT OUR DISPOSAL

It is important that we give ourselves the structural capacity to collate and cross-reference and interrogate the totality of the regulatory data we have at our disposal but we need to be mindful of its limitations. It reflects the tools at our disposal. It follows from my earlier remarks that it points a bright light disproportionately on small law firms and the lawyers who work for them and who practice in only certain areas of law, and that it spotlights behavioural symptoms more so than their underlying cultural causes – greed perhaps, and unreasonable pressure to meet unrealistic billing targets.

I am reminded of a cartoon I saw as a child which showed a man on a very dark night searching for his lost keys on the footpath under a bright street lamp. A passer-by asks him where he lost them and he points down the road, explaining that he was looking under the lamp because the light was better. The moral: we need to find ways to shine a light on the risk data that we know we don't know and to add that data to the mix.

We have developed a regulatory tool in Queensland which allows us to do just that, and happily a tool which simultaneously serves a demonstrable ethical capacity building purpose.

a) web based surveys, or ethic checks

We have developed what we hope will become a varied and growing suite of short, sharp online surveys or 'ethics checks' which enable law firms to audit or review the strength of their ethical infrastructure - not only their formal policies and procedures and management arrangements but also and in particular the unwritten rules and 'the ways we do things around here' that shape what actually happens in practice.

We have designed them deliberately to prompt not only a law firm's leaders but all its people to engage with and reflect on key ethical issues that arise in the everyday practice of law; to prompt both spontaneous and organised discussion within the workplace about those issues; to enable the firm to gauge the adequacy of its ethical infrastructure in relation to those issues and to identify and remediate any weaknesses or gaps that require attention.

Individuals are most welcome to complete the surveys but they work best when everyone at a law firm takes part, or in larger firms at least a good sample of each of the different levels and classifications of their people and people from its different branch offices if it has them. That gives the firm a window on the ways its policies and systems are perceived and implemented 'down the line' by the different levels and locations of its people, whether they're followed through in practice and the values and attitudes its people bring to their work.

We have developed and run four ethic checks surveys to date - a workplace culture check, a complaints management systems check, a billing practices check for medium to large law firms and a supervision practices check. A total of 32 law firms and 562 of their people participated in the workplace culture check; 90 firms and exactly 1000 of their people in the complaints management systems check; 40 firms and 517 of their people in the billing practices check; and 16 firms and 434 of their people in the supervision practices check: a total of 178 firms and 2,513 of their people (although the numbers double count several firms which participated in more than one survey).

Notably the surveys can serve as a form of compliance audit. The 90 firms that participated in the complaints management systems check were all incorporated legal practices and all completed the survey as a form of compliance audit. The firms that participated in the other surveys did so entirely of their own volition.

We publish and continually update both the aggregated and (de-identified) firm by firm results on the LSC's website.²⁷ We include 'cross-tabulations' which compare the aggregated results according to the individual respondents' gender, length of post-admission experience and employment status within their firms and which compare the results for participating firms according to their size and business structure. That is a rich source of information about lawyers' values, attitudes and behaviours and law firm

²⁷ Go to www.lsc.qld.gov.au, click on the Ethics Checks box on the menu bar and follow the prompts from there.

culture. Publishing that information serves a broader public interest also, by exposing aspects of law firm culture to public scrutiny.²⁸

I should add that we routinely ask the principals of the participating law firms for their feedback after they've completed a survey. We are profoundly encouraged by their response. We have published what they had to say on the website also, entirely in their own words. They tell us, cutting a longer story short, that the surveys have served exactly the ethical capacity building we hoped they might.

b) the billing practices check, for example

The billing practice check for medium to large law firms is structured similarly to the other surveys. It begins with a series of demographic questions which identify certain characteristics of the individual respondents - their age, gender, length of post admission experience, employment status within the firm, and the like – and so allows us to compare their answers against these criteria. It goes on to ask a series of straightforward factual questions relevant to the firm's billing practices. The questions include, for example:

- do you have a billable hours target? What is it?
- does your firm measure its clients' satisfaction with its costs disclosure and billing?
- does your firm have policies and procedures in relation to (for example) reviewing fee earner time sheets; reviewing accounts rendered; billing for travel, research, internal conferences, supervision and file reviews; for dealing with staff and/or client complaints about its billing practices?

²⁸ Importantly in this regard the survey results lend themselves to disinterested scholarly analysis. Our academic partners have analysed the results of the workplace culture check, the complaints management systems check and the billing practices check and published their findings in various legal journals, and are analysing the results of the supervision practices check as we speak. See Christine Parker and Lyn Aitken, (2011) *The Queensland Workplace Culture Check: Learning from Reflection on Ethics Inside Law Firms*, Georgetown Journal of Legal Ethics, volume 24, issue 2, pp.399-441; Christine Parker and Linda Haller, *Inside Running: Internal Complaints Management and Regulation in the Legal Profession*, (2011, forthcoming), Monash University Law Review; Christine Parker and David Ruschena, *The Pressures of Billable Hours: Lessons From A Survey of Billing Practices Inside Law Firms*, (2011, forthcoming), St Thomas Law Review.

- does your firm measure the accuracy of its fee earner's costs estimates?
- does your firm have a system for ensuring its fee earners give timely ongoing costs disclosure?
- does your firm have a system for rewarding fee earners who exceed their billable hours targets?
- are the billing practices of fee earners in your firm audited for compliance with their professional obligations before the payment of any bonuses or promotions?
- have you ever had concerns about the billing practices of other fee earners in your firm?
- have you ever observed in your firm any instances of bill padding for work not actually performed? If so, what did you do about?

Finally it asks a series of questions involving different billing scenarios and whether for example the survey respondents agree or disagree with a course of action described in the scenario.

We wrote to the managing partners and legal practitioner directors of all 172 Queensland law firms that employ 7 or more practising certificate holders to invite them to participate in the survey. We were delighted that 40 firms chose to accept the invitation. We gave the raw results to our friends at Griffith University²⁹ for detailed statistical analysis and gave the 'refined' results to Professor Christine Parker and David Ruschena of Melbourne University Law School for further analysis.

Parker and Ruschena examined among other things the extent to which the survey respondents report that their firms use time-based billing; the extent to which they perceived their firms to use their performance against their billable hours targets to assess and motivate their performance; and the extent to which they perceived their firm's billing practices put them under ethical pressure. Their findings make interesting reading indeed.³⁰ They include the following:

²⁹ We are indebted to April Chrzanowski for her invaluable assistance in undertaking that analysis.

³⁰ See note 28, above.

- 'employed lawyers are much more likely to believe that performance measurement and management is solely determined by the amount earned, while partners see performance assessment as based on a range of factors including the amount earned, competence, efficiency, and ethics';
- '18% of respondents reported that their firm audited fee earners' billing practices before the firm paid bonuses; 23% reported that their firm did not audit fee earners' billing practices; and 59% did not know either way. There was a very large difference between partners and employed lawyers: 41% of partners but only 10% of employed lawyers said their firms audited a fee earner's billing practices before paying a bonus; 47% of partners said they did not. The difference is statistically significant for all items.'
- 'partners were less likely than employed lawyers to agree that time billing results in lawyers competing against each other; that time billing fails to discourage excessive duplication; that time billing adversely affects the quality of mentoring; and that time billing encourages cutting corners when there is pressure to meet a budget. The differences between partners' and employed lawyers' responses were statistically significant';
- 'the majority of partners agreed with the statement that 'it feels as if there is pressure to bill from the management of the practice', but partners expressed less agreement than other lawyers. The difference in variation between the two groups is statistically significant';
- 'if we consider a clear majority to be 25% or less or 75% or more reporting the same way, then respondents from 18 of the 25 firms could not agree about whether an internal discipline policy for improper billing existed; respondents from 14 of the 25 firms could not agree whether the firm had a policy in place for detecting improper billing practices; respondents from 11 of the 25 firms could not agree whether the firm had appointed a specifically designated ethics partner; and respondents from 11 of the 25 firms could not agree whether the firm offered scheduled training on ethics issues';
- 'in 11 of the 25 firms, more than half of the lawyer respondents reported that they had had concerns about the billing practices of others within the firm'; and

- 'in 11 of the 25 firms, more than 20% of the lawyers reported that they had actually observed instances of bill padding. This includes 5 firms where more than 40% of the lawyers said they had observed bill padding. However in no firm had more than half of the lawyers observed bill padding.'

They conclude not surprisingly given these results that the survey reveals 'a series of clear phenomena that influence lawyers' working environments in ways that push them towards unethical behaviour'.

One thing for sure: the survey results gave the participating law firms important and useful information about their employees' values, attitudes and perceptions about the firm's ethical climate, all of it 'risk data' that positioned the firms' leaders to decide whether they should take remedial action. Clearly that remedial action for some at least of the participating firms might include spelling out for the benefit of their employees exactly what the firm's true performance measures are, implementing transparent processes for assessing its lawyers' performance against those measures and devising strategies to communicate those arrangements to their lawyers and so counter perceptions to the contrary. For others it might include ensuring that their employees are fully aware of their firm's discipline procedures and its procedures for detecting improper billing practices.

The results gave us as the relevant regulatory authority that same information, some of it quite disturbing. It is disturbing for example to learn that more than half of the lawyer respondents in 11 of the 25 firms reported that they had had concerns about the billing practices of others within the firm, that more than 20% of the lawyers in 11 of the 25 firms and more than 40% of the lawyers in 5 of those firms reported that they had actually observed instances of bill padding. Remember by the way that these are all medium sized and larger law firms that are only rarely subject to complaint.

But here's the thing: the survey was entirely voluntary in the absence of a compliance audit power in relation to law firms other than incorporated legal practices. We could do no more than invite unincorporated practices to participate on the condition of

anonymity. Thus we can't for example identify the 5 firms more than 40% of whose people reported having actually observed bill padding.

That leaves us in the unhappy situation of knowing that there are a number of medium sized to large law firms out there we can reasonably assume to be at ethical risk. We know that we should be making further inquiries of those firms to gauge the extent of the risk and, depending on what we discover, crafting some appropriate remedial action. We can even imagine giving them a management systems direction if only we had the powers now that we anticipate having under the National Law.

We can't do any of those things however, because we can't identify the firms. We have what has proved to be a highly effective risk assessment tool at our disposal – a tool that could hardly be described as 'unnecessary' or 'intrusive' and that adds greatly to the risk data we have available to us, all the more so in relation to medium sized and larger law firms like these firms that are disproportionately under represented in the complaints data. We have no power however to use the tool except on an entirely voluntary basis. More is the pity.