

UK MINISTRY OF JUSTICE:
REVIEW OF THE LEGAL SERVICES REGULATORY FRAMEWORK
CALL FOR EVIDENCE

John Briton, Queensland Legal Services Commissioner, 30 August 2013

SUMMARY OF KEY POINTS

1. the regulation of the provision of legal services should become increasingly principles or outcomes-based, so that legislators and regulators specify the outcomes they expect lawyers and law firms to achieve rather than setting detailed prescriptive rules. This will free up lawyers and law firms to find the most effective and efficient means of achieving the desired outcomes in the circumstances of their particular law practice;
2. the system for dealing with complaints should be supplemented with regulatory tools that are genuinely preventative in character; are directed to ethical capacity building more so than policing and punishing; that engage all lawyers not merely a sub-set of lawyers and put the spotlight not only on lawyers but their law firms and their workplace cultures - on their 'ethical infrastructure';
3. the power to conduct compliance audits of law firm management systems and supervisory arrangements ticks all the boxes. It equips regulators with a regulatory tool which enables us to identify and target the law firms most at risk of non-compliance with their professional obligations - but just as importantly to engage with law firms in ways which encourage and enable them to identify gaps in their ethical infrastructure and to craft appropriate remedial strategies before regulatory intervention becomes necessary;
4. the compliance audit power should be expressed broadly. It should give us flexibility to craft audits of varying intensity and intrusiveness and to explore and new and innovative ways it might be used not only to identify risk but to match intrusiveness with risk along the way. It should come packaged however with a requirement that we exercise this like any other of our powers in ways that enable us to be held to account against transparent and clearly articulated principles and are proportionate and targeted to risk.
5. the regulatory community has never systematically addressed how we might position ourselves to identify the lawyers and law firms most at risk of non-compliance with their professional obligations. It is deeply encouraging that your Legal Services Board is making serious efforts to do just this. I hope we can piggy-back on that research in due course.
6. we need to consolidate the complaints, disciplinary and trust account investigation and compliance audit data and any other risk data we have available to us as regulators in a single data warehouse under a single point accountability;
7. the public interest requires that the single point of accountability be an independent statutory body or office-holder. Anything less would serve only to undermine public confidence in the regulation of lawyers' professional standards.

The Queensland Legal Services Commission (the Commission) has two fundamental and overlapping purposes under the *Legal Profession Act 2007* (the LPA). 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.

The Commission has been in existence for almost ten years now and it may be that some of what we have learned in implementing these aspects of the regulatory regime in Queensland can be of assistance to you in your review of the regulatory framework in your country (and I note that we have learned much by following developments in your country).

1. **One key thing we have learned is that the regulation of the provision of legal services should be principles or outcomes-based**, that is to say, that the regulatory framework should rely less than it does now on detailed, prescriptive rules and rely more on high-level, broadly stated rules or principles, and should focus far more on the outcomes it is designed to achieve than prescribing the means by which they should be achieved.

Principles-based regulation has a compelling logic to it. It 'is based on the idea that [law] firms and their managements are better placed than regulators to determine what processes and actions are required within their business to achieve a given regulatory objective. So regulators, instead of focussing on prescribing the processes or actions firms must take, should step back and define the outcomes they require firms to achieve. Firms and their managements will then be free to find the most efficient way of achieving the outcome required.'¹

2. A shift to principles-based regulation will however require regulators, lawyers and law firms to have a more open, on-going and constructive dialogue than is the case currently and to develop mutual trust and shared understandings of the conduct the principles require.²

¹ Julia Black, Martin Hopper and Christa Brand, *Making a success of principles-based regulation*, Law and Financial Markets Review, Volume 1, No 3, May 2007. Principles-based regulation has some potentially significant advantages: it will shorten and simplify the legislation and related regulations and rules and reduce its complexity, and should go a long way to ameliorate the profession's concerns about over-regulation; it will give lawyers and law firms flexibility to design and implement the processes and systems that will work best for them in the circumstances of their particular practice, and is hence more likely to produce behaviours that meet the regulatory objectives; it will promote substantive compliance with the underlying purposes of the regulatory principles by requiring lawyers and law firms to take responsibility for compliance and to think through how best to comply rather than to mechanically 'tick the boxes'; and it will limit the scope for lawyers and law firms to comply with the letter but not the spirit of the 'rules' or to find ways around them by means of 'creative' compliance with forms of words.

I am reminded of Sir Gerard Brennan's remark, quoted in Stephen Parker and Charles Sampford, *Legal Ethics and Legal Practice*, Oxford, 1995, at p.176, that 'if ethics were reduced to rules, a spiritless compliance would soon be replaced by skilful evasion.' Similarly Lord Hunt quotes a legal academic telling him that 'lawyers, being lawyers, can interpret rules and side step with skill those regulations they find to be difficult – that is what they are paid to do. Compliance in the legal profession offers unique challenges because lawyers are trained to find the holes in a system' – the *Hunt Review of the Regulation of Legal Services in England and Wales*, October 2009 (the Hunt Report) at pp.36-37.

² It will require 'rules of engagement' in which regulators, lawyers and law firms all 'move 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' (the

3. We have three tools available to us under the LPA to enable us to achieve our fundamental purposes and, in a principles-based regime, to implement the above 'rules of engagement': **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.
4. **The system for dealing with complaints** is a fundamentally important regulatory tool which gives aggrieved consumers a means of redress for complaints (but it should be recalibrated to give us more effective powers modelled on the powers that are available to your Legal Ombudsman to ensure that complainants who are legitimately aggrieved get the redress they are owed ³).

However the system for dealing with complaints however it may be recalibrated 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.

Systems for dealing with complaints however they may be calibrated are fundamentally reactive. They do little by way of prevention. They are geared to policing minimum standards not to promoting best practice. Crucially they direct regulatory attention disproportionately to sole practitioners and small law firms and lawyers who practice in 'retail' areas of law, so much so that the conduct of lawyers who work in medium sized and larger law firms and other, more 'commercial' areas of law is only nominally subject to regulatory scrutiny. ⁴

Furthermore systems for dealing with complaints give us little if any 'regulatory grip' on the root or underlying causes of complaints. Complaints typically describe an individual consumer's grievance(s) about the conduct of an individual lawyer in his or her dealings with their particular matter, and almost never about the lawyer's conduct more generally or any systemic malpractice.

Hunt Report at pp.77-78); in which lawyers and law firms adopt a policy of 'openness and engagement' and acknowledge and accept that 'there is a role for the regulator of leadership and guidance, and not just policing and punishing' (Black et al at pp.201-204 and the Hunt report at pp.77-78); and in which regulators adopt 'a cooperative and educative approach' to monitoring and enforcing standards of conduct, 'particularly with firms that are well intentioned but either ill-informed or simply confused as to what the principles require' (Black et al at p.195).

³ I am referring to powers which, if service or consumer complaints can't be resolved informally by negotiation, enable us to resolve them by making binding determinations that are fair and reasonable in all the circumstances of a complaint – powers to require lawyers to apologise, to fix a mistake at no cost to a complainant, to reduce or waive their fees, to pay compensation or to undertake training or be supervised, etc.

⁴ Our complaints data tells us year after year that solicitors who provide 'retail' legal services - family law, residential conveyances, personal injuries and deceased estates work and the like - are many times more likely to find themselves subject to complaint than solicitors who do commercial dispute work, mergers and acquisitions or banking or construction law and the like. 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.

Yet the reality well known to those of us who deal with complaints is that the conduct of lawyers is in large measure a function of the workplace cultures of the law firms where they work, and that most complaints are attributable ultimately not to the frailties of individual lawyers but to the frailties of their workplace cultures – to sloppy business practices, inadequate management systems and supervisory arrangements, poor service culture and a corporate ethos which is poorly aligned with the fundamental professional obligations expected of their lawyer employees. We know putting it another way that our challenge is not only to identify and deal with the ‘bad eggs’ in the profession but also and just as or even more importantly the ‘bad nests’.⁵

This obvious fact of human behaviour has consequences, not least for lawyers’ billing practices, for example. We need only to remind ourselves that law firms like other commercial enterprises exist to make a profit and that 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.⁶

5. I have argued that the system for dealing with complaints should be supplemented 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 put the focus not only on individual lawyers but also on law practices and their management

⁵ Consider this prosaic but yet typical 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 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.

⁶ 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.

systems and supervisory arrangements and workplace culture more generally - on their 'ethical infrastructure'.⁷

6. **The system for conducting trust account investigations** 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 subset of law firms. And it 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 that we make choices and be accountable for our choices about where, when and how we apply the resource at our disposal. Random audits may well have their place within a broader program but 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.

7. **The system for conducting compliance audits** is the system to conduct trust account investigations writ large. It is effectively the same system but directed to a law firm's compliance with all its professional obligations, not merely its obligations in relation to handling trust monies.

It is a system that applies currently only in relation to incorporated legal practices. The LPA has enabled law firms since 1 July 2007 to provide legal services under a company structure, as incorporated legal practices (or ILPs). Six years on just over a third of all Queensland law firms do business as ILPs. Incorporation is the business structure of choice for start-up law firms. Notably ILPs have a very similar profile to unincorporated practices in terms of their size, areas of practice and the like.

The LPA requires us to regulate the provision of legal services by incorporated legal practices in the same way we regulate the provision of legal services by any other law firm - by responding to complaints and, if we suspect all is not as it should be, by initiating 'own motion' investigations. Notably, however, it requires incorporated legal practices to have at least one legal practitioner director and imposes obligations on legal practitioner directors over and above their usual professional obligations as lawyers. It requires them:

- to 'keep and implement appropriate management systems to enable the provision of legal services by the practice under the professional obligations of Australian legal practitioners';

⁷ Lord Hunt argued to similar effect in the Hunt Report. He described 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).

- to take ‘all reasonable action’ to ensure that lawyers who work for the firm comply with their professional obligations; and
- to take ‘appropriate remedial action’ should lawyers who work for the firm fail to comply with their professional obligations.⁸

Thus the LPA holds legal practitioner directors responsible for ensuring that their firms have the ‘ethical infrastructure’ they require in the circumstances of their own particular practice - the supervisory arrangements, policies both spoken and unspoken, work practices, incentives and disincentives and ‘ways things are done around here’ - to provide competent and ethical legal services. It supplements the traditional forms of regulation which focus on the conduct of individual lawyers with a form of entity-based regulation which focuses on the conduct of their firm.

Crucially, the LPA authorises us to conduct an audit (a ‘compliance audit’) of an incorporated legal practice about ‘the compliance of the practice and of its officers and employees’ with their obligations under the LPA and ‘the management of [its] provision of legal services including the supervision of the officers and employees providing the services.’ It authorises us to conduct an audit ‘whether or not a complaint has been made’ and gives us if needs be all the same powers and more that it gives us to investigate complaints.

8. I have argued that **the system for dealing with complaints should be supplemented with regulatory tools that are genuinely preventative in character; are directed to ethical capacity building more so than policing and punishing; that engage all lawyers not merely a sub-set of lawyers and put the spotlight not only on lawyers but their law firms and workplace cultures more generally – on their ‘ethical infrastructure’.**
9. The regulatory regime that applies to incorporated legal practice in Australia ticks all the boxes and should be extended to all law firms, whatever their business structure. In Queensland we conduct three kinds of compliance audit of varying degrees of intensity: self-assessment audits; web-based surveys (or ethics checks); and on-site reviews.
10. We require the legal practitioner directors of every ILP shortly after its commencement to complete a pro forma **self-assessment audit** form which asks them to rate their management systems and supervisory arrangements against 10 performance criteria. The form is almost invariably completed and lodged electronically via a portal (www.lpportal.org.au) which enables legal practitioner directors to access their firm’s complaints history and hence to complete their self-assessment audit having regard to that risk information.

We evaluate the information we are given; engage in conversations with legal practitioner directors as appropriate about any apparent gaps in their systems and processes; and we ask them periodically to conduct follow-up audits to document their progress. Self-assessment audits, in other words, are ‘gap analyses’ or ‘management reviews’ that serve as a baseline for future improvements to the firm’s management systems and supervisory arrangements.

⁸ These obligations are effectively a local expression of the obligations set out in Chapter 7 of the Code of Conduct promulgated by your Solicitors Regulation Authority (and obligations which in our case, regrettably, apply only to incorporated legal practices).

We know from the feedback we get from incorporated legal practices which have completed a self-assessment audit and from refereed research that the simple act of requiring legal practitioner directors to take time out to stock-take just how well their management systems and supervisory arrangements support their firm and its people to deliver competent and ethical legal services - the simple act of prompting them to reflect on the adequacy of their ethical infrastructure - significantly improves standards of conduct within their practice.

Comprehensive empirical research undertaken several years ago in New South Wales (which allowed law practices to incorporate in 2001) demonstrated both that the complaint rate per practitioner per year for incorporated legal practices was one third the complaint rate for unincorporated legal practices and that the complaint rate per practitioner per year for incorporated legal practices after their self-assessment audit was one third their complaint rate before the audit. The multivariate analysis of the data provided 'compelling evidence' that the reduction in the rate of complaints was attributable not to other factors such as the size, location or areas of practice but to having conducted a self-assessment audit.⁹

11. We have built on the insights we learned from conducting self-assessment audits by developing what we hope will become a varied and growing suite of short, sharp **web-based 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 invite law firms generally from time to time to participate in an ethics check but equally require ILPs to participate as a form of compliance audit.

We have developed and run five ethics checks surveys to date - a workplace culture check, a complaints management systems check, billing practices checks for both small firms and medium-sized and large law firms and a supervision practices check. We have designed them deliberately to be ethical capacity building tools - 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

⁹ See C. Parker, T. Gordon and S. Mark, *Research Report: Assessing the Impact of Management-Based Regulation on NSW Incorporated Legal Practices*. The report is accessible on both our website and the website of our counterpart Commission in New South Wales and has also been published under the title *Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales*, *Journal of Law and Society* 37, no.3 (2010): 466-500. Professor Susan Fortney of Hofstra University Law School has recently conducted follow-up research and will publish her findings shortly.

its people, whether they're followed through in practice and the values and attitudes its people bring to their work.¹⁰

The results not only enable law firms to identify the strengths and weakness of their ethical infrastructure and if needs be to plan appropriate remedial action but also, crucially, they add significantly to the risk data at our disposal and so enable us as regulators to plan what further action if any we wish to take, including for example a more intensive on-site review (see below). I will give a concrete example shortly (the billing practices check for medium-sized and larger law firms).

Notably we publish and continually update both the aggregated and (de-identified) firm by firm results on the Commission's website. 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 culture. Publishing that information serves a broader public interest also, by exposing aspects of law firm culture to public scrutiny.¹¹

12. **On-site reviews** comprise tailor-made combinations of traditional 'desk top' policy and procedure reviews; web-based surveys; analyses of the firms' complaints history; interviews with their principals, supervisors and employees 'down the line'; reviews of selected or randomly selected client files, in-house complaints registers and the like; and potentially mystery or 'shadow' shopping - having 'pretend' consumers deal with the firm and behave exactly as a genuine client might behave and report their experience.

Clearly on-site reviews by their very nature are a resource intensive exercise both from the law firm's point of view and ours. It follows that we conduct audits of this more intensive kind much less frequently than web-based surveys and only on an 'as needs' basis - on the basis of a risk assessment that gives us reasonable grounds to believe that a firm or some aspects of its practice are or are likely to be non-compliant with its professional obligations.

13. I have identified some deficiencies in the regulatory tools we have available to us to achieve our fundamental purposes and suggested ways we might mitigate those deficiencies, including most importantly by broadening our compliance audit power to

¹⁰ Go to www.lsc.qld.gov.au, click on the Ethics Checks box on the menu bar and follow the prompts from there. I note that the surveys have attracted favourable international attention, including in a research report commissioned by the Legal Services Board of England and Wales to identify tools which can enable regulators to better understand ethical risk; better target regulation; and better support ethical environments and cultures within legal services providers (*Designing Ethics Indicators for Legal Services Provision*, September 2012).

¹¹ 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, 399-441; Christine Parker and Linda Haller, *Inside Running: Internal Complaints Management and Regulation in the Legal Profession*, Monash University Law Review, volume 36, no. 3, 2010, 217-249; and Christine Parker and David Ruschena, *The Pressures of Billable Hours: Lessons From A Survey of Billing Practices Inside Law Firms*, University of St Thomas Law Journal, 2011, 9(2), 618-663.

include not only ILPs but all law firms. That would enable us increasingly to identify and target the law firms most at risk of non-compliance with their professional obligations and to craft remedial strategies which match intrusiveness with risk. That is clearly very important.

14. Of course **we have to make choices when we are exercising discretionary powers including to conduct compliance audits and we should be held accountable for our choices against transparent and well articulated principles.**

Those principles should require us to exercise our powers in ways that are proportionate and targeted to risk. We should never as regulators exercise any of our powers in ways that are unduly intrusive or that impose unjustifiable compliance costs or needless regulatory burden.

15. **The regulatory community has never systematically addressed how we might position ourselves to identify the lawyers and law firms most at risk of non-compliance with their professional obligations. It is profoundly encouraging that your Legal Services Board is making serious efforts to do just this,** by commissioning research to identify tools which 'can enable regulators and legal services providers to better understand ethical risk, better target regulation and better support ethical environments and cultures within legal services providers'.¹² I hope we can piggy-back on the results of that research in due course.

16. I don't pretend to have an answer to how we can better identify the lawyers and law firms most at risk of non-compliance but I have two suggestions - that we consolidate the regulatory data we already have available to us in a single data warehouse and (as mentioned above) that we systematically explore the potential of new and innovative regulatory tools including compliance audits.

17. **We need to find ways to consolidate our complaints, trust account investigation, compliance audit data and any other risk data we have available to us in a single data warehouse.** We have multiple regulators across Australia including within each state and territory all of which keep the regulatory data they are required to keep on their own 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

¹² *Designing Ethics Indicators for Legal Services Provision*, Richard Moorhead, Victoria Hinchly, Christine Parker, David Kershaw and Soren Holm, September 2012. The researchers give the Queensland Legal Services Commission an honourable mention, not least for our work in developing our series of ethics checks (pages 12-13).

reports – the data kept by the admitting authorities about suitability matters, for example; and data kept in the administration of the practising certificate regime; data kept by the 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 bodies which conduct trust account investigations about failures to lodge external examination reports on time without reasonable excuse or the appointment of external interveners; and data kept by the bodies which conduct compliance audits about the outcomes of the various sub-species of audit.

We need equally to find ways 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 in Australia at least that responsibility for dealing with complaints and for conducting disciplinary and trust account investigations and compliance audits be consolidated at the local level in one regulatory body under a single management structure.

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.

18. The public interest requires in my view that **the single point of accountability be an independent statutory body or office-holder and anything less would serve only to undermine public confidence in the regulation of lawyers’ professional standards.**

There is a clear conflict between lawyers’ interests and the public interest inherent in lawyer’s representative bodies having any significant role to monitor and enforce (as opposed to set) their members’ professional standards. The conflict is easily overstated – lawyers have no interest in seeing colleagues who have been dishonest or similarly unethical dealt with less than firmly – but on the other hand it is stark in matters to do with lawyers’ billing practices and costs, and by no means merely ‘theoretical’ but in my local experience real, actual and demonstrable.

19. 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.
20. **Thus we need to devise ways to add to the risk data at our disposal.** I have mentioned already that we have developed a regulatory tool in Queensland which goes some way to achieving this purpose and, happily, a tool which simultaneously helps law firms themselves by serving a demonstrable ethical capacity building purpose - our web-based surveys or ethics checks.

21. I will briefly describe the billing practices check for medium-sized and larger law firms by way of example. I note by way of background that we receive more complaints about legal costs – both consumer or service complaints and disciplinary complaints - than any other single issue.

This ethics check (like our other ethic checks) 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 their 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? 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 your firm's fee earners 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.

A total of 40 Queensland law firms which employ 7 or more practising certificate holders completed the survey in 2010 and we gave the results to Professor Christine Parker of Melbourne University Law School for detailed statistical analysis. She examined among other things the extent to which the survey respondents 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.¹³ They include the following:

- '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';
- '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';

¹³ Christine Parker and David Ruschena, *The Pressures of Billable Hours: Lessons From A Survey of Billing Practices Inside Law Firms*, University of St Thomas Law Journal, 2011, 9(2), 618-663.

- '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'.

22. One thing for sure: **the results of the billing practices check gave each participating law firm important and useful information about their employees' values, attitudes and perceptions about the firm's ethical climate, all of it 'risk data' which positioned the firms' leaders to decide whether they should take remedial action.**

Clearly that remedial action for some 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.

23. 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.

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 ILPs. 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, working collaboratively with them to craft some appropriate remedial action.

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 – but no power to use the tool except on an entirely voluntary basis with firms other than ILPs. More is the pity.

24. Thus **the power to conduct compliance audits of the management systems and supervisory arrangements of law firms is an essential ingredient of any effective regulatory regime. The power should be expressed broadly, to give us room to explore new and innovative ways it might be used not only identify risk but to match intrusiveness with risk along the way. It should for that very reason however come packaged with a requirement that we exercise this like any other of our powers in ways that are accountable, proportionate and targeted to risk.**

We should never as regulators exercise any of our powers in ways that are unduly intrusive or that impose unjustifiable compliance costs or needless regulatory burden. We should always as regulators 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.

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