

University of Queensland Alumni Lunchtime Lecture

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Legal Services Commissioner

THE BUSINESS OF ETHICS

Thank you for giving me the opportunity to speak to you today. It's a rare privilege given the calibre of the people who have spoken on these occasions previously and who have signed up to speak over the period ahead.

My job is to deal with complaints about the conduct of solicitors, barristers and law practice employees. The *Legal Profession Act 2007* (the Act) requires me to provide complainants a means of redress for their complaints, to investigate alleged unsatisfactory professional conduct and professional misconduct and, when the evidence warrants it, to prosecute apparent offenders. Lawyers who are subject to adverse findings can find themselves subject to penalties ranging from reprimands through fines and the like to being suspended or barred from practice.

I also have a role, albeit a limited role currently but quite likely a wider role in the future given proposed national reforms to the regulation of the legal profession to conduct 'compliance audits' of law firm management systems and supervisory arrangements.

I have a broader role of course along with legal educators, the professional bodies and others to help promote high standards of conduct in the delivery of legal services but the specific job within that broader co-operative effort to monitor and enforce compliance with appropriate professional standards of conduct. I'm in the ethics business, in effect.

It's a job that gives me an interesting window on the legal profession, all the more so given that I am not myself a lawyer. I get a close up look at the profession from the outside as it

were, uncluttered by professional allegiance. I want to share with you some of what I see and to develop some themes that have a wider application.

Some general observations

My first observation is that lawyers tend to talk about ethics as if it's the stuff of learned texts or judgments of the courts and disciplinary bodies, and sometimes as if it's just another area of substantive law, to be taught and learned like any other area of law. But that's a very narrow view of course and ethical lawyers will engage additionally and far more fundamentally with questions about 'how they lead your lives as lawyers, make decisions about their clients, their opponents, themselves and their families in their search to be good lawyers and good people.'¹ The same is true for all of us.

My second observation is that lawyers tend in their narrative about themselves to draw a distinction between the law as a profession and 'mere' business or commerce. The talk at ceremonial occasions and the textbooks are replete with rhetoric that makes a virtue of the high, even uniquely high ethical standards that apply to lawyers and contrasts them with the lesser standards expected of their counterparts in business more generally. It is said, for example, that lawyers will find themselves condemned by their peers for conduct that 'is condoned, or in a way admired, in other callings'.

The rhetoric to this effect is exhortation disguised as description, I suspect, and can be a bit overblown, but the exhortation has much to commend it and the description is at worst a good working hypothesis. It leaves me uneasy, however, and for two reasons.

One is few if any lawyers who get themselves in trouble with the disciplinary authorities find themselves in that position because they failed to meet any peculiarly high ethical standards that apply uniquely to lawyers. They find themselves there not because they breached any esoteric standard that they learned, or should have learned during their undergraduate or subsequent professional legal training in ethics but because they breached a simple and basic ethical standard, typically an ordinary and everyday standard of fairness and decency

¹ I have adapted this quote from Stephen Parker's introduction to the collection of essays he co-edited with Charles Sampford under the title *Legal Ethics and Legal Practice*, Oxford, 1995.

that applies equally to all of us in a civilized society – because they were greedy or told a lie or cheated or some such.

And secondly, the risk, if we ‘talk up’ the ethical obligations we’re entitled to expect of lawyers, is that we ‘talk down’ the ethical obligations we are entitled to expect of business people more generally - and for that matter of trades people, shopkeepers, school teachers and everyone else.

And of course the simple fact is that like everyone else I know I don’t want business people to be liars and cheats or to be motivated by unrestrained self-interest any more than I want lawyers to be. None of us want multi-national miners or for that matter the managers of local factories or plumbers to pour hazardous wastes into our, or anyone else’s rivers and creeks, for example. Nor do we want manufacturers to promote and sell dangerous products, or to disown responsibility if they do. Nor do we want company executives borrowing and using up their employee’s superannuation and other entitlements as if they were their own or financiers selling mortgage products to ordinary folk at the same time as hedging their bets on the futures market bankers or our elected representatives abusing their expenses and allowances. These are some contemporary examples but the list goes on.

In fact most of us want business people no less than lawyers not only not to behave badly but to behave well. We want journalists and editors to inform the public, for example, and not simply to sell newspapers. We want architects and builders to build things of beauty not simply to comply with the codes. This list goes on, too. Happily, we get at least some of what we want. We all want to wrap ourselves in glory, not only lawyers, and so leaders within these and other business sectors and occupational groups talk the talk and to varying degrees walk the walk to exhort themselves and their colleagues to noble purposes, or at least to hold the line.

I don’t want to be misunderstood. I do not mean to downplay the essential nobility of the professional ideals that the sometimes overblown rhetoric expresses – quite the contrary.

There are few if any other occupations that have as extensive and as well articulated a set of ethical obligations as the legal profession or that are as likely to punish, even exclude practitioners who transgress or that have an infrastructure in place including people in

positions like mine to enable them to do so. I am simply making the point that the standards of conduct that apply to lawyers are essentially the same ordinary and everyday standards of fairness and decency that apply equally to all of us, adapted to their particular professional circumstances.

That brings me to a third observation. The system for promoting, monitoring and enforcing standards of conduct in the legal profession delivery of legal services puts the spotlight on individual lawyers and on 'front end' controls – by seeking to control who can be admitted to the profession and then to practice, and by articulating detailed, prescriptive rules of conduct and, more recently, by mandating compulsory continuing professional development. It relies as good as exclusively on authorising regulators to receive and deal with complaints about the conduct of individual lawyers and to hold them to account when their conduct falls short of the mark. It lets law firms almost entirely off the hook.

And that brings me back to the business of ethics – the business of promoting, monitoring and enforcing compliance with standards of conduct.

The limitations of systems for dealing with complaints

Systems for dealing with complaints provide consumers a means of redress for complaints and as such are a fundamentally important regulatory tool. It is becoming increasingly clear to me however that they are an inherently limited, inefficient and ineffective tool for achieving the broader regulatory purpose of promoting, monitoring and enforcing standards of conduct and protecting consumers more generally.

I have no doubt this is true of the system for dealing with complaints about lawyers and I suspect it is equally true of systems for dealing with complaints more generally. That is because:

- firstly, systems for dealing with complaints are almost entirely reactive rather than proactive and preventative in character. They address past and not future behaviour, and they are all stick and no carrot. They do no more to encourage high standards of conduct than threaten disciplinary consequences for conduct that falls short of the mark.

- secondly, they are directed to the merest of minimum standards - the standards below which complainants can justifiably claim redress and / or practitioners can justifiably be held to account before the disciplinary bodies - rather than to best practice and continual improvement towards best practice. My gaze as the person who administers the system for dealing with complaints about lawyers focuses inherently on the prospect that conduct subject to complaint might amount to unsatisfactory professional conduct or worse, professional misconduct, and yet no one imagines for a moment that ethical lawyers will aspire to conduct themselves in a merely satisfactory manner. There is more to acting ethically than meeting the minimum standards, much less not getting caught contravening the standards.

- thirdly, they are highly selective in their application, at least in the case of the system for dealing with complaints about lawyers. The complaints data tells us year after year that lawyers who do residential conveyances and family law or personal injuries or deceased estates work are many times more likely to find themselves subject to complaint than lawyers who do commercial litigation or banking or building and construction law. Similarly lawyers who work as sole practitioners or in small law firms are many times more likely to find themselves subject to complaint than lawyers who work in medium sized and larger law firms, to the extent that the conduct of lawyers who work for medium-sized and larger law firms is only nominally subject to regulatory scrutiny.

Yet there is no reason to believe that lawyers who do commercial litigation and the like or who work for medium-sized and larger law firms are more ethical or have higher standards of conduct than lawyers who do family law or work in sole practice or small law firms. Nor do we have any reason to believe that consumers identify and bring to attention more than a fraction of the conduct that might justify a complaint thereby enabling the appropriate action to be taken. How then can we look the public in the eye and justify dedicating the totality of the resources at our disposal for monitoring and enforcing appropriate standards of conduct to dealing with complaints? We can't.

- fourthly, systems for dealing with complaints about the conduct of individual lawyers give regulators little if any regulatory grip on the underlying causes of complaints - they give regulators some limited (and as we've seen highly selective) capacity to identify and

deal with 'bad eggs' in the profession but they leave law firm 'nests' almost entirely off limits.

Why? Because they ignore the reality that law firms like other commercial enterprises have workplace cultures which shape the conduct of the people who work for them, for better or worse, and a reality that complaints-handlers (and professional indemnity insurers) know very well - that the bulk of complaints (and claims) can be put down not to incompetence or dishonesty on the part of individual lawyers but to sloppy business practices and inadequate management systems and supervisory arrangements on the part of their law firms.

It's striking given what we know about the impact workplace cultures have on behavior that the disciplinary framework in relation to lawyers leaves misconduct an almost exclusively personal responsibility of individual lawyers, irrespective of their workplace culture. I can see no good reason why law firms shouldn't be held to account for the dishonest, greedy, or otherwise unacceptable conduct of their employees if the evidence suggests that the firm condoned or tolerated such conduct, much less encouraged or expected it - and I can see lots of good reasons why they should be.

The lesson in all this for me is that the business of ethics should put a much greater emphasis than it has in the past on holding law firms to account for any shortcomings in their delivery of legal services, and at least as much emphasis as we put now on holding individual lawyers to account. I suspect that the same lesson applies not only to law firms but to businesses and organisations more generally. We should give a great deal more thought than we have in the past to their management systems and supervisory arrangements and the myriad other factors that shape how they deliver their services - to what some commentators call their 'ethical infrastructures'.

We're going to hear a lot more of that term. It should have pride of place at the very front and centre of our regulatory regime. And it very likely will in the regulatory regime that applies to the delivery of legal services, and in the not too distant future if the proposed national reforms to the regulation of the profession deliver as expected.

The concept extends beyond a firm's written policies and procedures. Clearly it's important that firms have policies and procedures that explicitly promote compliance with ethical standards but a firm's policies and procedures describe only its intentions, or in the worst case scenario only what its leaders say its intentions are, and may bear little if any resemblance to what actually happens in practice – and hence a firm's ethical infrastructure extends well beyond a firm's policies and procedures to its workplace culture more generally.

It includes the unwritten 'rules', the 'ways we do things around here', the values, practices, management behaviours and incentives and disincentives explicitly stated or otherwise that motivate and sustain its people to conduct themselves ethically - or alternatively that leave them to their own ethical devices or worse, by actually encouraging them to conduct themselves unethically.

So what does this mean for the business of ethics? How will it be done? I can tell you how it will likely be done in the regulatory regime that applies to the delivery of legal services, and indeed how we're already doing it.

The regulation of the future

I mentioned at the outset that I had a limited role to conduct 'compliance audits' of law firm management systems and supervisory arrangements. It is a limited role because I have compliance audit powers only in relation to incorporated legal practices – this is to say, that small but steadily growing minority (currently about 18%) of law firms that have chosen since the option first became open to them on 1 July 2007 to engage in legal practice as companies.

The Act requires incorporated legal practices to have at least one legal practitioner director and it imposes obligations on legal practitioner directors over and above their ordinary professional obligations as lawyers, not least 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', to take 'all reasonable action' to ensure that practitioners employed by the practice comply with their professional obligations, and to take 'appropriate remedial action' in the event that they don't.

Crucially, the Act empowers us to audit incorporated legal practices to monitor their compliance with their obligations in these respects and in particular to audit their ‘management of the provision of legal services... including the supervision of the officers and employees providing the services’, and it allows us to conduct an audit ‘whether or not a complaint has been made.’²

To my mind that same framework should apply not only to incorporated legal practices but all law firms, and indeed I believe that is the single most effective reform we could make to better protect consumers of legal services and to better promote, monitor and enforce high standards of conduct in the delivery of legal services.³ I’m pleased to say it’s a likely outcome of the current round of national legal profession reforms (but time will tell). I’ve told you the policy-based arguments why I’ve come to that view but, as we’ll see, there’s an increasingly powerful evidence-based argument as well.

The Act gives me powers to conduct compliance audits of incorporated legal practices but is silent about how we should go about them. An audit is ‘a review or examination of any aspect of the operations of [a] person or body’⁴ and a compliance audit by that measure is a review of a firm’s ethical performance - of the firm’s and its employees’ compliance with their corporate and professional obligations and the appropriateness of its ethical infrastructure. Our compliance audit power is a power to conduct ethics audits, in effect. We conduct three kinds of compliance audits, as follows:

a) internal, or self-assessment audits

We expect the legal practitioner directors of every incorporated legal practice to audit their practice’s management systems and supervisory arrangements soon after the corporation has given the required notice of its intention to commence legal practice.

² *Legal Profession Act 2007*, ss.118-130

³ I have argued the case in papers I gave at the Third International Legal Ethics Conference (ILEC3) in July 2008, at the QLS Symposium in March 2009, at the Australian Legal Practice Management Association Annual Conference in August 2009 and again at the QLS Symposium in March 2010, all of which are published on the Commission’s website (www.lsc.qld.gov.au).

⁴ Australian National Audit Office, *General Guidance on the Conduct of Performance Audits*, July 2003.

We expect them to complete a pro forma self-assessment audit form – a form they can now complete on-line - which asks them to assess how effectively their governance arrangements meet ‘the ten objectives of a sound legal practice’, viz.:

- competent work practices to avoid negligence
- effective, timely and courteous communication
- timely delivery, review and follow up of legal services to avoid delay
- acceptable processes for liens and file transfers
- shared understandings and appropriate documentation covering cost disclosure, billing practices and termination of retainer
- timely identification and resolution of conflicts of interests
- appropriate records management
- authorising and monitoring compliance with undertakings
- effective supervision of the practice and its staff, and
- compliance with trust account regulations and accounting procedures.

We expect legal practitioner directors to return the completed self-assessment form to us within a designated period; we evaluate the information and engage in a conversation with them about what further steps they might take, if any, to fix any perceived weaknesses; and we ask them to conduct periodic ‘maintenance audits’ to bring us up to date with any changes.

Self-assessment audits, in other words, are ‘gap analyses’ or ‘risk assessments’ or ‘management reviews’ that are designed to be a baseline for future improvements to the practice’s management systems and supervisory arrangements and reports on future improvements, and the subsequent ‘maintenance’ audits become those progress reports.

The exercise has had dramatic results. Law firms in New South Wales have been allowed to practise as incorporated legal practices since 2001 and my counterpart Commissioner there has been asking them to conduct self-assessment audits since 2004. His office engaged Dr Christine Parker of the Melbourne University Law School in 2008 to test the hypothesis that requiring incorporated legal practices to keep and implement appropriate management systems and to conduct self assessment audits results in improved standards of conduct. She reviewed the evidence in relation to all 631

incorporated legal practices that had completed a self- assessment audit at the time and found ‘compelling evidence’ that it did just that.⁵

Dr Parker found that the complaint rate per practitioner per year for incorporated legal practices after self-assessment is one third the complaint rate before self-assessment - *one-third* - and that this huge drop is ‘statistically significant at the highest level’. She also found that the complaint rate per practitioner per year for incorporated legal practices is one third - *one third* - the complaint rate for traditionally structured firms. That is evidence of extraordinary cultural change⁶ and, while it is too early to replicate that research in Queensland, the initial signs are consistent with those findings and all positive.

Why is that so? That’s a nice question. Let me digress for a moment to read to you from an article that was first published in the Harvard Business Review last year and reprinted in the Financial Review’s Boss magazine (the August 2009 edition, at pp.56-58) and that perhaps hints at an answer.

The author, a professor of behavioural economics at Duke University in North Carolina, reports having conducted research a few years ago that found that ‘most individuals, operating on their own and given the opportunity, will cheat – but just a little bit, all the while indulging in rationalisation that allows them to live with themselves.’ He conducted three experiments in which he gave participants twenty maths problems to solve in five minutes and paid them 50 cents for each correct answer. He says:

- ‘in our first treatment (the control condition), individual participants were asked to write the number of problems they answered correctly on collection slips and give them to an experimenter, who checked the totals against the problem sheets;

⁵ Dr Parker’s research paper is published on the websites of both the New South Wales and Queensland Legal Services Commissions - www.lawlink.nsw.gov.au/olsc and www.lsc.qld.gov.au.

⁶ These are Lord Hunt’s words in the report of his recent and comprehensive review of the regulation of the legal profession in England and Wales headed *The Hunt Review of the Regulation of Legal Services*, October 2009, at p.75.

- in a second treatment, participants shredded their answer sheets without verification and simply submitted their collection slips to the experimenter. Perhaps not surprisingly, we found these participants lied, saying that they'd correctly answered two more questions, on average, than those in the control treatment;
- in the third treatment, participants worked in pairs and shared the spoils. The results showed that when a person realises that fudging would benefit other team members by increasing the payout, dishonesty further increased by 25 per cent [and], more disturbingly, as the members of our experimental group became better acquainted, the tendency to cheat for the sake of the team increased even more.'

Crucially however, and on a brighter note, he reports that 'the simple act of asking people to think of their ethical foundations before they had the opportunity to cheat eliminated the dishonesty.'

I'm not qualified to comment on the merits of the research but I must say I'm attracted to the idea that the simple act of asking people to think of their ethical foundations - of simply nudging them to bring their ethical frame of reference to bear on the choices they're making - causes them to behave more ethically.

In any event, we also conduct two other kinds of compliance audit, both of them external audits we conduct ourselves.

b) on-site reviews

On-site reviews comprise tailor-made combinations of some or all the following kinds of activities:

- traditional desk-top policy and procedure reviews;
- detailed analyses of the firms' complaints history, including detailed analyses of the investigation files held by the Commission;
- interviews with legal practitioner directors, supervisors and managers;
- interviews with and / or focus groups of individual employees 'down the line';
- interviews with and / or focus groups of clients, including but not only clients who have lodged complaints with the Commission;

- interviews with third parties including, for example, practitioners from other law firms that have regular dealings with the law firm subject to audit;
- reviews of selected or randomly selected client files and bills, in-house complaints registers and the like;
- client satisfaction surveys; and
- mystery or 'shadow' shopping - having real or pretend consumers deal with the firm and behave exactly as a genuine client might behave and asking them to report their experience - and similarly mystery complaints.

On site reviews by their very nature are a resource intensive exercise both from our point of view and point of view of the law firms subject to audit, and it follows that we conduct audits of this kind only on an 'as needs' basis - on the basis of a risk assessment that tells us that a firm is or is highly likely to be non-compliant.

We should always be using our best efforts as regulators to target the firms most at risk of non-compliance with their professional and service obligations. We should not impose any needless 'regulatory burden' on low risk law firms but direct our regulatory resource to where it is most needed and can have the most beneficial impact in the public interest. We should carefully target the law firms most at risk of non-compliance, the risks having been assessed against clearly stated and consistently applied criteria, and audit them in ways that are proportionate to the identified risks and accountable.

c) web-based surveys, or ethics checks for law firms

We envisage developing a varied and ever-expanding suite of short, sharp web-based surveys which test discrete aspects of a law firm's ethical infrastructure.

We envisage requiring all firms potentially subject to audit to complete web-based ethics checks for law firms at regular intervals, not just the firms we assess to be most 'at risk'. We envisage them having the following characteristics:

- they will be designed specifically to maximize the value of the information they elicit at the same time as minimizing the compliance costs. We will design them so they take no more than and preferably less than 30 minutes to complete.

- they will be directed not just to a firm's managers but to all its employees, or in large firms at least significant samples of the different levels and classifications of their employees – directors, senior lawyers, junior lawyers, paralegals and other non-legal staff. We want the employees to give us, and the firm, a window on how the firm's policies and procedures and systems are perceived and understood and implemented 'down the line' by the different levels and classifications of their people.
- they will be directed not to reviewing policy and procedure manuals and the like but to collecting evidence about their impacts and outcomes and what's actually happening in practice.
- they will encourage individual respondents to be frank, by guaranteeing their anonymity. They preserve the anonymity of the law firms also, by enabling firms to identify themselves even to us only by a self-selected and secret code. We will only know a firm's identity if we have exercised our compliance audit powers – and of course we are rightly prohibited from disclosing that information to any third parties.
- they will have an educational value, if we get the questions right, by prompting each individual respondent to reflect on the significance of the questions and the implications of their answers both for them as individuals and their firm.
- they will add value from the firm's point of view also, by 'taking its ethical pulse'. The respondents' answers and in particular the patterns of answers across the different levels and classifications of the firm's employees will be a handy indicator of which of its management systems if any might need improvement. So too, when a firm has more than one office, will the patterns of answers across the different offices. That will be a handy indicator of the consistency of the firm's ethical culture across its various locations.
- they will add value from our point of view, too, as a risk indicator. The answers and the patterns of answers across the different levels and classifications of a firm's

employees might be positively encouraging or they might be anomalous, by suggesting that the firm's systems are not always reflected in what actually happens 'down the line' and stand to be improved by clarification or further training and the like. Equally they might hint at deep-seated problems that warrant a closer look by means of a comprehensive on-site review.

Certainly the information we obtain in this way will add powerfully to the risk information we will already have at our disposal, including the firm's complaints history and its legal practitioner director's self-assessment of the appropriateness of its systems and supervisory arrangements.

- they have potential to add further value again, if as we envisage we publish the aggregated and de-identified results. That will enable law firms to compare their performance with the performance of their law firm peers, and serve the public interest also by exposing aspects of law firm culture to public scrutiny.

We have developed three web-based surveys to date, and they are all readily accessible on the Commission's website together with the survey results to date. Simply go to the website, www.lsc.qld.gov.au, click on the Ethics Checks for Law Firms box on the home page and follow the prompts from there.

- a *workplace culture check* which has its origins in research findings to the effect that 'yes' answers to questions like the following correlate with good ethical performance and 'no' answers with poor ethical performance:⁷
 - is ethical discussion part of the norm within my workplace?
 - is my workplace 'values (as opposed to rules) driven'?

⁷ Linda Klebe Trevino, Gary R Weaver, David G Gibson and Barbara Ley Toffler, *Managing Ethics and Legal Compliance: What Works and What Hurts*, California Management Review, Volume 41, Issue 2, January 1999. See also Linda Klebe Trevino and Gary R Weaver, *Organisational Justice and Ethics Program Follow-Through: Influences on Employee's Harmful and Helpful behaviour*, Business Ethics Quarterly, Volume 11, Issue 4, and 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, Volume 31, Number 1, 2008.

- am I and my colleagues within my workplace willing to seek ethical advice from our peers and supervisors, or to query whether what I and others are doing or have been asked to do by a client or a supervisor is ethical?
- am I and my colleagues within my workplace willing to report 'bad news' to our supervisors, including suspicions that a colleague's or a supervisor's conduct might be unethical?
- am I confident that reporting bad news within my workplace will be rewarded and not punished?
- do my supervisors act consistently with their expectations of me and others they supervise? and
- am I and my colleagues treated fairly at work and with dignity and respect?

We invited 15 law firms to complete this survey in 2009 and 478 of their employees from 30 branch offices took part. The feedback was overwhelmingly positive - all but one of the firms' managing partners / legal practitioner directors reported that completing the survey was either helpful or very helpful to them in gauging their firm's ethical culture and the one dissenter said it was neither helpful nor unhelpful. Notably 8 of them said their firm had made changes to the way their firm goes about its business as a result of participating in the survey, and 6 of them agreed to give us some more qualitative feedback, entirely in their own words, and to go public. I will let them speak for themselves - see Appendix 1.

We are currently collaborating with several legal academics from both Griffith and Melbourne University law schools to subject the results to rigorous statistical analysis.⁸ The findings will be presented in conference papers in the near future, including at an International Legal Ethics Conference at Stanford University in July. The early results tend to suggest that law firm principals have a more optimistic view of their firm's ethical culture than their more junior employees.

⁸ I repeat that we guarantee the anonymity of both the individual lawyers who complete the surveys and their law firms. We only ever publish de-identified results even if we know who has taken part (and generally we don't).

- a *complaints management systems check* which tests the adequacy of a firm's system for dealing with complaints, whether by clients, other law firms, internal whistle blowers or anyone else, and is premised on our belief that the majority of the complaints that come to us as regulators could have been avoided if only the law firms subject to complaint had an effective system for dealing with complaints in-house.

We required 35 incorporated legal practices to complete the complaints management check as a form of compliance audit during May and June 2009, and asked another 35 incorporated legal practices to complete the survey in April just past. We posted the 2009 results on the Commission's website and will post the 2010 results later this month or in June.

- a *billing practices check for medium to large law firms* which poses a series of questions about billing practices within medium to large law firms having regard to the issues we encounter daily in our complaints driven work. We 'road-tested' an earlier version with one of the large national law firms and were greatly encouraged by the firm's response - the managing partner of its Brisbane office told us 'the survey was a useful reminder of the issues that arise in best billing practice. It has prompted us to review our own management systems to see how effectively they deliver best billing practice and given us some very good ideas as to how to improve our systems.'

I know that our colleagues in legal academia will want to take a close look at the results and of all the surveys of this survey in particular. This is where the rubber hits the road – where the ethical imperatives inherent in the business of law rub most closely against the commercial imperatives inherent in the business of law.

Of course I'm not an academic and my motivations in designing and running the surveys have a lot more to do with encouraging individual lawyers and law firms as a whole to reflect on and discuss the ethical issues the subject of the surveys and to tease out whether and how they might be able to strengthen their governance arrangements to better support them in delivering legal services to consistently high ethical standards.

The surveys are nonetheless a form of empirical research and a rich source of information about the attitudes, values and practices lawyers and law firms bring to their work. I am actively encouraging legal academics to take an interest, to lend us their skills in survey methodology and design and to slice and dice the results to see what lessons they too can extract from the data and to publish their findings for the benefit of the profession as a whole.

I note that I wrote on 16 April just past to the managing partners / legal practitioner directors of all 172 Queensland law firms which employ 7 or more solicitors to invite them to complete the survey by 30 April, completely voluntarily. I suggested a cut-off date of 30 April. The take up rate has been greater than I expected or even dared to hope. A total of 25 firms had entered results by 30 April but another 29 firms have contacted me to say that they want to take part but for various good reasons need more time, some of them to late May – and if they do as they say they will, 50 or more firms or just short of one-third of the firms I invited to take part will have done so. That is a hugely encouraging vote of confidence.

And in conclusion

So, in summary, there are powerful policy-based and increasingly evidence-based reasons why we should top up our system for dealing with complaints about the delivery of legal services with forms of regulation that are genuinely preventative in character and that focus on the future rather than the past; that are directed to ethical capacity building more so than threatening punishment; that engage all lawyers and law firms, not just a sub-set of lawyers and law firms; and that puts law firms and their ethical infrastructures at the very front and centre of the regulatory regime.

The regulatory regime that applies to incorporated legal practices ticks all the boxes and should be extended to all law firms in my view. I am confident that the empirical research that I know will be done will prove just as it has with the self-assessment surveys that the approach achieves measurable and significant cultural change for the better.

I am confident that this is the way of the future. I think it will increasingly become the way we go about our business of promoting, monitoring and enforcing standards of conduct in the delivery of legal services. I'm confident, too, while obviously it will have to be adapted to suit the circumstances, that it has a broader application to other industry sectors and to the business of ethics more generally.

Thank you once again for asking me to speak to you, and for listening. I hope you found it worthwhile.

APPENDIX 1

THE ON-LINE ETHICS CHECKS FOR LAW FIRMS: FIRST PERSON TESTIMONIALS BY PRINCIPALS OF FIRMS WHICH HAVE COMPLETED THE WORKPLACE CULTURE CHECK

The Legal Services Commission invited fifteen volunteer law firms to complete the first of its on-line Ethics Checks for Law Firms – the Workplace Culture Check – in February 2009. The survey was carefully designed to preserve the anonymity of both the firms and the individual people from those firms who took part. The Commission published the results on its website, again strictly anonymously, and also the results of an anonymous feedback survey of the firms' principals. The feedback was overwhelmingly positive. We asked six of the principals if they would be prepared to give us some more qualitative feedback, entirely in their own words, and to 'go public'. They all agreed. This is what they said:

Dr Peter Ellender, the Chief Executive Officer at Carter Newell, said:

Carter Newell willingly took the opportunity to participate in the ethics survey presented by the Legal Services Commissioner. Ready access to the survey via the on-line delivery ensured a sound take up by participants.

Carter Newell found the vignettes, covering practical and day-to-day ethical dilemmas experienced by legal practitioners, to be a very useful tool in raising awareness of such issues, prompting thought and discussion amongst the team about how best to handle similar 'real life' situations.

I can attest that the survey and the scenarios posed certainly created robust discussion around the Carter Newell partnership table and this was, of course, one of the key aims of the process instigated by the Legal Services Commissioner. Ethical issues are rarely black and white, and although seen this way and defended or portrayed as such by individuals with much vigour, the bottom line is that they are often subjective in nature and require debate and careful consideration.

Carter Newell has, as a result of the surveys, strengthened the internal Professional Standards and Ethics committee and importantly, embedded consideration of ethical issues further in the behaviours of all team members with exposure to such issues during both induction and on-going training.

Tony Hogarth, a Partner at MacDonnell's Law, said:

When MacDonnell's Law was initially approached to participate in the voluntary Ethics Survey, the firm was willing to do so, with an interest about what we might learn. With three significant offices across Queensland, we considered it a useful tool to engage our lawyers to think about ethical practices and procedures by participating in the confidential survey.

We had good uptake by our lawyers and were encouraged by the results. The outcomes were useful and prompted discussion about internal policies and to be constantly mindful of legal ethics. This can only be beneficial for the firm and ultimately, the reputation of the profession generally. I have no hesitation in recommending participation to other firms who might be considering the surveys. You have nothing to lose and, potentially, much to gain.

Robert Hynes, the Managing Partner of Hynes lawyers, said:

Our firm recently participated in the anonymous online ethics survey conducted by the LSC. All staff participated in the survey and we found the feedback provided to us very useful. As a result of this feedback, we identified the need to document two of our 'informal' policies regarding conflicts to ensure consistency.

We also carried out compulsory training sessions for all staff to ensure these policies were properly understood and implemented. We have found that the use of these confidential surveys are quite beneficial and would certainly like to see these continued in the future to assist us further in developing and testing both the understanding and efficiency of our internal firm policies and procedures.

Paul Tully, the Principal of McInnes Wilson lawyers, said:

In 2009 McInnes Wilson participated in the Work Place Culture Survey conducted by the LSC. Although the questions covered numerous aspects of the workplace there was a particular slant towards matters relating to ethics.

As Chairman of the firm I found the responses most informative. Clearly we as a firm are not doing enough to address this issue. I have requested our HR department to provide an action plan to better inform our staff as the survey indicated a lack of contemporary training in the area. Fortunately the answers indicated no particular ethical matter, but rather the lack of updated information on the subject.

Simon Morrison, the Executive Director of Shine lawyers, said:

Shine Lawyers was very pleased to participate in the voluntary on-line Workplace Culture Surveys initiated by John Briton and the Queensland Legal Services Commission. We found the process to be one of great enlightenment and encouragement.

During the process, our lawyers got to express key views about aspects of the firm's operations and we learnt a considerable amount from the exercise. In particular we were able to discover key things the firm needed to focus on to keep improving.

I congratulate John Briton and the Commission on this great initiative. It is a great illustration of true engagement with the legal profession in an effort to improve the experiences for our clients and our people. I would encourage more firms to take up

the opportunity to participate. It has been a very rewarding experience for Shine Lawyers.

Michael Sparksman, the Managing Partner of ClarkeKann Lawyers, said:

Following an invitation of the Legal Services Commission, many of ClarkeKann's partners and staff agreed to participate in its Workplace Culture Check on a voluntary basis.

We recognised that the LSC was exploring regulatory issues quite differently from other regulators here or overseas. In particular, the aim of the survey was to generate data to support proactive improvement strategies instead of simply offering lag data on complaints and prosecutions. We also saw a genuine effort on the part of the Legal Services Commission to produce information with real business value – not just data for data's sake.

The survey was especially useful to our firm because we were in the process of trying to further define our intrinsic culture, and we recognised that our ethical infrastructure was a crucial part of how it appeared to our internal community as well as to clients. We were not surprised that approaching the survey with an open mind, and confidence in the integrity and resilience of our people, meant it had a positive impact internally.

The survey data was interesting in terms of confirming that we were doing some things pretty well, but that we were also misreading some signals and had made a few assumptions which weren't justified.

Too often the real costs of poor culture are not recognised until they hit the bottom line. With a bit of thought and intuition, survey results of this kind can be used to shape business strategies for law firms which are more likely to withstand the pressures of modern practice.