

INSIDE RUNNING: INTERNAL COMPLAINTS MANAGEMENT PRACTICE AND REGULATION IN THE LEGAL PROFESSION

Christine Parker* & Linda Haller**

18 October 2010

[Forthcoming in *Monash University Law Review*]

ABSTRACT

This paper examines what makes for good complaints management in legal practice, how law firms are faring at complaints management, and the role of a regulator in encouraging implementation of effective complaints management. The first part of the paper argues that it can be important from the point of view of clients, legal practices and regulators for legal practices to implement internal complaints management practices. The second part of the paper considers the potential possibilities and problems when regulators attempt to mandate internal complaints management by legal practices. We examine a recent initiative by the Queensland regulator to ask lawyers to complete a survey on complaints management systems. We argue that this approach - of promoting awareness of, discussion about, and commitment to good complaints management inside legal practices, but without mandating any particular system - is a promising model that other jurisdictions should consider closely. The third part of the paper examines what good complaints management involves in

* Associate Professor and Reader, Melbourne Law School, University of Melbourne.

** Senior Lecturer, Melbourne Law School, University of Melbourne.

The authors are grateful to John Briton and Scott McLean at the Queensland Legal Services Commission for making data available for us to analyse in this paper and for many discussions. We are also grateful to Mevelyn Ong for research assistance in finalising the paper.

principle, and the perceptions, attitudes and practices of legal and non-legal staff in relation to complaints management in fact using the results from the Queensland survey.

INSIDE RUNNING: INTERNAL COMPLAINTS MANAGEMENT PRACTICE AND REGULATION IN THE LEGAL PROFESSION

INTRODUCTION

Many jurisdictions throughout the world continue to struggle with how best to deal with complaints about lawyers. Legal profession legislation in a number of states in Australia provides for external and independent Legal Services Commissioners to handle, or at least oversee, complaints made about Australian lawyers.¹ That legislation also generally requires clients to be told in writing about the client's right to lodge a formal complaint against the firm to external statutory regulators.² Much less is said in legislation regarding the obligations, if any, of firms to take primary responsibility for responding to client complaints. In Australia both state legislation and the 2004 Legal Profession Model Laws only require that clients be told the name of a person within the firm with whom they can 'discuss' legal costs, not complaints more generally.³ Internal complaints management systems within legal practices are not generally required.

Nevertheless, anecdotal evidence suggests many legal practices do voluntarily choose to implement an internal complaints management system. There is, however, very

¹ For instance, *Legal Profession Act 2007* (Qld) ['LPA'], Chapter 4 - Complaints and Discipline. Similar provisions exist in most other states of Australia, including New South Wales and Victoria, the two most populous states. Since this paper uses survey data about Queensland's legal practices, we cite the relevant provisions of the LPA throughout the paper.

² For instance, *Legal Profession Act 2007* (Qld) s 331, requires lawyers to tell clients of alternative external forums in which a client can dispute the costs charged. See also, *Draft National Legal Profession Law 2009*, s 4.3.7 (3)(b)(iv).

³ LPA s 308(1)(h); Standing Committee of Attorneys-General, *Legal Profession — Model Laws Project: Model Provisions 2004* ['Model Laws'] s 3.4.10(h).

little research in Australia or elsewhere uncovering what kinds of internal complaints management systems are in place and how well they work. It is increasingly the case that legal practices are being mandated to implement internal complaints management systems. The provisions governing incorporated legal practices (ILPs)⁴ in New South Wales, Queensland and Victoria now make the implementation of a complaints management system *de facto* mandatory for those firms, as we show below.⁵ The 2010 draft National Legal Profession Law applies the same requirements, including the *de facto* requirement to implement internal complaints management systems, to all legal practices.⁶

In this paper we report on a recent initiative by the Queensland Legal Services Commission (LSC) that provides a first, important glimpse of complaints management systems within legal practices. The process itself, and the results of the survey, contain useful lessons for any jurisdiction considering how to better respond to complaints about lawyers. The Queensland LSC's initiative was to implement a series of "ethics check" surveys for legal and non-legal staff of legal practices in order to promote reflection, discussion, and, where appropriate, organisational change in relation to how lawyers handle a number of ethical, professional conduct and

⁴ That is those firms that have chosen to incorporate under the general Corporations Law.

⁵ See below, n 52 to 58 and accompanying text.

⁶ This is done in two ways: (a) "[p]rincipals" of legal practices have an obligation to ensure that "all reasonable action is taken" to ensure legal services are provided in accordance with the relevant obligations. This is likely to, in fact, require them to put in place appropriate management systems including complaints management systems, at least in larger practices: *Draft National Legal Profession Law 2010*, ss 3.2.3 and 3.2.4; and (b) the Ombudsman can give a 'management system direction' that appropriate management systems be implemented and maintained: *Draft National Legal Profession Law 2010*, s 4.6.2 (2)(a).

consumer issues in their practices.⁷ In 2009 and 2010 the LSC asked all ILPs in Queensland to have their staff fill out the “Complaints Management System Check” online survey.⁸ This paper uses the questions asked and responses gathered in this complaints management system check as a basis for examining what makes for good complaints management in legal practice and the role of a regulator in encouraging implementation of effective complaints management.

The paper begins by showing why it can be important from the point of view of clients, legal practices and regulators for legal practices to implement internal complaints management practices. It might not, however, be easy for regulators and other external observers to specify in advance exactly how legal practices of varying size, client profile and practice area should manage complaints. The second part of the paper considers the potential possibilities and problems when regulators attempt to mandate internal complaints management by legal practices. We argue that the Queensland LSC’s approach to promoting awareness of, discussion about, and commitment to good complaints management inside incorporated legal practices through the “Complaints Management System Check” survey is a promising model that other jurisdictions should consider. The third part of the paper begins to fill the current gap in our empirical understanding of how staff within law firms perceive complaints management. It describes the issues covered by the Queensland survey in order to examine what good complaints management involves in principle, and the

⁷ Queensland Legal Services Commission, ‘Ethics Checks for Law Firms’ (2010) <<http://www.lsc.qld.gov.au/539.htm>>. See further, below at n 57 to 59 and accompanying text.

⁸ This was required as part of the LSC’s ongoing self-assessment and audit program for ILPs: *LPA s 30*. The survey questions are available at, Queensland Legal Services Commission, *Complaint Management Survey* (2010) <http://www.lsc.qld.gov.au/projects/Complaints_management_systems_160409.pdf>.

perceptions, attitudes and practices of legal and non-legal staff in relation to complaints management in fact.

1. THE IMPORTANCE OF COMPLAINTS MANAGEMENT BY LAW FIRMS

Regulation of the legal profession in the most populous Australian states has focused much attention in recent years on ensuring there are effective, independent systems for handling complaints against legal professionals by statutory regulators.⁹ Why should lawyers, regulators and external observers worry about whether clients can complain directly to their own lawyer or legal practice as well?

The primary reason to encourage the implementation of good internal complaints management by legal practices is that it is in the interests of clients: clients will be better off if any dissatisfactions they have are appropriately addressed by the firm itself at the earliest possible moment. It is even better if the firm not only responds to each current client's complaint the first time it occurs, but also reviews its systems and behaviours, learns and makes changes to ensure that similar problems do not arise again for future clients.

An effective internal complaint handling system can also benefit lawyers and legal practices. First, and most obviously, keeping clients happy is good business and helps maintain income flow. Second, an internal complaints management system can assist the practice in managing its responsibilities to external regulators; and, third, it can

⁹ See eg, New South Wales Law Reform Commission, *Complaints Against Lawyers: An Interim Report: Report 99* (2001) <<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/r99toc>>; Patrick Shanahan *Independent Review of the Queensland Law Society's Complaints Process* (2002) <<http://www.qls.com.au/content/lwp/wcm/resources/file/eb97d74584c1002/shanahan-QLS-complaints-process.pdf>>.

also help prevent or minimise civil liability. Finally, systems that deal effectively with client complaints might also build and maintain the workplace satisfaction of lawyers and other staff. Below we briefly explain each of these reasons for legal practices to voluntarily implement client complaint systems, before turning to the reasons why regulators would encourage firms to implement internal complaint management systems.

Complaints can be Good for Business

Ideally, legal practices would welcome the voicing of dissatisfaction from clients as a way to avoid loss of their business to another practice. Some practices appoint ‘client relationship partners’ to nurture the relationship with ongoing clients from the beginning of the retainer. This allows the practice to become aware of, and respond to, even minor levels of dissatisfaction or misunderstandings at a very early stage, and well before these could be considered ‘complaints’.

For some clients, the way that the legal practice responds to their complaint will affect whether the client continues to provide work to the practice, or takes it elsewhere. For others, the presence or absence of some form of complaints management system within a practice might influence their decision to give work to the practice in the first place. Yet others might insist as a term of the retainer that the practice comply with a particular complaints management regime proposed by the client,¹⁰ which may or may not be in harmony with a system the law firm has already designed for other purposes.

¹⁰ An example can be seen in a Legal Aid Queensland Invitation to Tender that requires tendering legal practices to agree to participate in an internal dispute resolution process before resorting to external dispute resolution mechanisms; see eg, Legal Aid Queensland, ‘Invitation to Tender: Duty Lawyer Services,’ (15 January 2009)

It is well known that in relation to goods and services generally, not all aggrieved customers complain: many simply take their business elsewhere.¹¹ In one sense, then, the *lack* of complaint is a problem: had the service provider been aware of dissatisfaction, it would have been in a position to try to respond to it.¹² It is in the interests of service providers, including legal practices, to encourage dissatisfied clients to complain, and to proactively market the existence of their internal complaints systems.

Interface with Statutory Regulators

Receipt and internal reporting of a complaint may be one way in which a practice becomes aware of circumstances that must be reported to an external body. Examples include trust account breaches,¹³ cash transactions over \$10,000,¹⁴ and criminal conduct.¹⁵ Managers must become aware of problems within their practice or may find themselves liable for a failure to supervise under traditional professional conduct

<<https://elo.legalaid.qld.gov.au/elodgement/whatsnew/pdf/dutylawyer/invitationtotender.pdf> >
(accessed 23 July 2010) 3

<https://elo.legalaid.qld.gov.au/elodgement/whatsnew/pdf/dutylawyer/invitationtotender.pdf> (accessed 23 July 2010).

¹¹ Claes Fornell and Birger Wernerfelt, 'Defensive Marketing Strategy by Customer Complaint Management: A Theoretical Analysis' (1987) 24 *Journal of Marketing Research* 337, 339 (showing that only one-in-fifty dissatisfied consumers of packaged goods will voice their dissatisfaction).

¹² *Ibid.*

¹³ *LPA* s 260.

¹⁴ *Financial Transactions Reports Act 1988* (Cth) s 15A.

¹⁵ *Crimes Act 1900* (NSW) s 316(1).

rules,¹⁶ or for failure to have appropriate management systems in place under the provisions governing incorporated legal practices.¹⁷

Internal complaints management can also be relevant to external complaints. If and when a complaint is received by an external regulator, such as a state Legal Services Commissioner, a timely response is required. Failure to respond in a timely manner can amount to professional misconduct.¹⁸ Centralised, comprehensive recording of the prior receipt and handling of the complaint within the practice - before it is taken by the complainant to the Legal Services Commissioner - facilitates a timely and accurate response to the Commissioner.

Even if the Commissioner decides that the complainant had some cause for complaint, the existence of a complaint management system within the practice is still relevant to what the Commissioner decides to do next. Legislation in most Australian States gives the regulators a fair degree of discretion as to how to dispose of complaints, even those that are substantiated. The complaints management system might provide evidence that a legal practice director has taken ‘appropriate remedial action’, for example, and thereby satisfy the Commissioner that the complaint should be dismissed.¹⁹ In Queensland, the regulator is also entitled to dismiss even a substantiated complaint if it is in the public interest to do so.²⁰ The Queensland Legal Services Commissioner has indicated that the factors he will consider when considering the public interest include:

¹⁶ *Legal Services Commissioner v Devenish and Ors* [2006] LPT 008 (Queensland).

¹⁷ See above n 6 and below nn 52 to 56 and accompanying text.

¹⁸ *LPA* s 443.

¹⁹ *LPA* s 117(4)(b).

²⁰ *LPA* s 448(1)(b).

... whether the conduct was a genuine mistake or misunderstanding and is unlikely to be repeated; and whether the respondent acknowledges his or her error, or has shown remorse or apologized or made good any loss or harm his or her conduct has caused to others; ...whether the respondent co-operated fully and frankly during the investigation into his or her conduct; ... the likely disciplinary outcome if an application proceeds, and whether the respondent agrees to initiate the same or similar outcome him or herself - for example, by undertaking to complete a stated course of further legal education or to be subject to periodic inspection ...or to take advice from a stated person in relation to the management of his or her practice.²¹

The Commissioner's stated position suggests that the prior existence of a complaints management system within the practice would be highly relevant to the Commissioner's decision whether to prosecute or not. While the bringing of the complaint to the Commissioner indicates the system was not enough to resolve this particular complaint within the firm, it may suggest to the Commissioner that the conduct that led to the complaint was an isolated aberration. The legal practice might also be able to provide evidence to the Commissioner as to how the complaints management system has been strengthened as the result of this particular experience. This would demonstrate the insight and responsiveness that is critical to the regulator's decision whether to prosecute.

The Commissioner can also facilitate mediation to resolve a complaint.²² However, mediation requires an open-minded, cooperative approach by both parties. The

²¹ Queensland Legal Services Commissioner, *Prosecution Guidelines: Unsatisfactory Professional Conduct and Professional Misconduct* (2007)
<<http://www.lsc.qld.gov.au/policiesandguidelines/prosecution-guidelines-2007.pdf>>.

²² *LPA* s 441(2).

absence of any complaints management system at all might signal a firm with a blind spot in relation to complaint resolution, and therefore a less suitable candidate for mediation than a practice with a complaints management system in place.

The existence of a complaint management system continues to be relevant even in relation to those complaints that the Commissioner decides to bring to the attention of a disciplinary body. When deciding what orders to make, the disciplinary tribunal will be very interested in genuine attempts by the lawyer to respond to a complaint when it was first raised with the lawyer, because of the evidence it provides of remorse, insight, learning and attempted reparation.²³

Preventing and Managing Civil Liability

Complaint management systems also help legal practices in relation to their civil liability. Professional indemnity insurers require potential claims to be reported within a certain period of time. A complaints management system ensures that potential claims manifesting as complaints can be quickly and accurately brought to the insurer's attention. Insurers are interested in responding quickly to potential claims before they escalate into a large civil claim against the legal practice. Therefore they will often offer practices incentives such as reduced premiums in return for evidence of 'best practice' and ISO performance management standards²⁴. Systematic handling of complaints also helps forewarn legal practices of a client's intention to take civil

²³ *Re Roche* [2002] ACTSC 104 (21 October 2002); the court described the practitioners' offer of a \$150,000.00 compensation fund as a 'significant mitigatory factor:' at [88].

²⁴ LawCover, 'LawCover Insurance: What Does it Mean for You?' *StopLoss*, September 2004, <http://www.lawcover.com.au/filelibrary/files/Publications/Stoploss/Stoploss_September04.pdf> 4,. See also *The Legal Profession – Guide to ISO 9001: 2000*.

action and gives the practice an opportunity to respond to the complaint at an earlier, less expensive and less public stage before proceedings are issued.

For those civil claims that cannot be settled by the legal practice or insurer, evidence that the practice sought to respond to the complaint at an early stage may reduce the quantum of the claim by showing an attempt to mitigate the plaintiff's loss, contributory negligence, or a break in the chain of causation. Complaints management schemes within legal practices are also an important means by which professional bodies demonstrate risk management strategies that justify the limiting of liability within their profession under professional standards legislation.²⁵

Wellbeing of Staff

Complaints management systems within legal practices are also important for the well-being of staff, as they provide organisational support, protection and certainty. Staff may receive complaints and comments about their own work or the work of colleagues within the practice. A policy within the practice as to what constitutes a complaint and how complaints are to be dealt with gives staff confidence as to the appropriate way forward, and a sense that all complaints will be dealt with fairly. This is particularly the case if there is not only widespread knowledge of, but also a sense of commitment to, the complaints management policy within the practice. The in-

²⁵ *Professional Standards Act 2003* (Vic), s 30 (limitation of occupational liability by schemes) and Part 4 - Risk Management (ss 38-40). See also, Bernie Marden, 'High Aims for Professional Standards Legislation,' (2003) 77(11) *Law Institute Journal* 28; Mark Richardson, 'Towards a National Standards Regime' (2003) 41(8) *Law Society Journal* 64, cf Kirsty Magee, 'Kill Bill? Assessing the Merits of a National Professional Standards Scheme,' (2004) 65 *Precedent* 20, 23.

house or unwritten articulation of the policy²⁶ might even help explain to staff why in some cases, due to reputational or other pragmatic concerns,²⁷ the practice may need to capitulate to the demands of a client even though on a more objective assessment there is little fault found in a staff member's conduct. This training and candid discussion within the practice about the handling of complaints is beneficial if it establishes a culture that values receiving and responding to client feedback early and appropriately.

From the Regulators' Point of View

Regulators should see it as important for legal practices to have effective internal complaints management because of the value this provides to both clients and to the legal practices themselves.

In relation to future and current clients, the purpose of regulation ought to be to promote good service delivery and to prevent problems before they arise. Regulators have a mandate to handle consumer complaints and protect consumers rather than to collect disciplinary "scalps". Therefore, if legal practices can address client dissatisfaction internally, then regulators are achieving their purpose. The Queensland Legal Services Commissioner, for example, appears quite conscious of this, and has commented that 'how a firm deals with complaints from any source (not just clients) impacts directly on the reputation of the profession and therefore the public's

²⁶ Some practices may have a policy designed for release to clients and a more detailed version of the policy for internal use.

²⁷ Some have noted the difference between pragmatic and judicial handling of complaints within legal practices: Christa Christensen, Suzanne Day and Jane Worthington, 'Learned Profession? – The "Stuff of Sherry Talk:" the Response to Practice Rule 15' (1999) 6(1) *International Journal of the Legal Profession* 27, 43.

confidence in the profession and in the administration of justice.’²⁸ A regulator will have proactively protected clients if it has encouraged firms to use complaints monitoring and feedback to identify and rectify problems before more clients become more dissatisfied, and the lawyer becomes a ‘frequent flyer’²⁹ in the external statutory complaints handling system.

In relation to lawyers and legal practices, regulators prefer to deal with lawyers who are well-prepared to meet any complaint that does become an external complaint, and who can interface smoothly with the regulatory system. They should also be concerned that legal practices provide a safe and non-abusive place of work for staff. This could include systems to ensure client complaints are dealt with appropriately.

In the next section we briefly consider some of the advantages and disadvantages of regulation requiring implementation of internal complaints handling by legal practices, as opposed to relying on firms to do so voluntarily and in a way that suits their own size, structure and practice context.

2. REGULATING INTERNAL COMPLAINTS MANAGEMENT IN LEGAL PRACTICES

The analysis in the previous section suggests that most legal practices should recognise that it is important to have some sort of internal complaints management system in place. Is there a role for regulation to mandate and check that they do so, or should it be left to firms to voluntarily implement systems appropriate to their size

²⁸ John Briton, ‘Incorporated Legal Practice - Legal Profession Act 2007– Audit – Web Based Survey (Complaint Management)’ (Form Letter Sent to Queensland ILPs, 24 June 2009), (copy on file with authors, footnote omitted).

²⁹ Steve Mark, ‘Disciplining “Frequent Fliers,” ’ (2007) *Without Prejudice*, Issue 36, <http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/vwPrint1/OLSC_wp36>.

and practice context? In this section we suggest that, although many legal practices can be expected to voluntarily implement complaints management systems, regulation can have a role in prompting, guiding, and sometimes enforcing implementation of systems that legitimately and effectively meet the needs of clients and interface with the regulatory system, as well as meet the needs of lawyers and law firms. We go on to introduce the Queensland Legal Services Commissioner's approach to educating, requiring and enforcing implementation of complaints handling systems among ILPs, explain how it addresses some of the potential pitfalls of regulation in this area and suggest it provides useful lessons for other jurisdictions to consider.

Why Regulate Internal Complaints Management?

Firstly, while it will be in the “enlightened self-interest” of many firms to implement an internal complaints management system, since this is a new and developing area, they may need to be prompted to think about it in the first place. Or, having thought about it, they might need to be prompted to fully understand what best practice and standards ought to apply. Some empirical studies of law firm practice have suggested that, apart from statutory obligations, it remains unusual for law firms to solicit and then use client feedback.³⁰ Anecdotal evidence suggests that law firms lag well behind some other industries in the way in which they seek client feedback and handle external complaints. A regulatory mandate may be useful to focus firms' attention on

³⁰ Christensen et al, 'Learned Profession?', above n 27; Christa Christensen, Suzanne Day and Jane Worthington 'Complaint Handling by Solicitors: Practice Rule 15 - Waving or Drowning?' in Michael Harris and Martin Partington (eds) *Administrative Justice in the 21st Century* (Hart, 1999) 166-210; National Consumer Council, 'Solicitors and Client Care: An Aspect of Professional Competence' (February 1994) 6. See also the studies cited in, Christensen *et al*, 'Learned Profession?' above n 27, 28-9.

this important but new area among all the other demands on their time. A regulator with a mandate in this area can also guide firms by coordinating, developing, consolidating and disseminating knowledge of best practice, rather than leaving each firm to reinvent the wheel.

Secondly, firms may well be motivated to do something about internal complaints management even without a regulatory mandate. But it is important that there be an element of accountability and interface between what they do internally, and what the statutory regulatory system and the public interest requires. To the extent that law firms are encouraged to handle complaints internally, rather than complaints being handled by the independent, statutory complaints handling system, it is important to ensure that law firms do so in a way that is worthy of public trust.³¹ Thus regulation may be necessary to maintain minimum standards to ensure that internal complaints systems not only meet law firm's private interest in attracting and keeping the type of clients that are likely to make them money, but also the public interest in ensuring that all dissatisfied clients receive fair and efficient redress. There is a wide range of perceptions among service providers as to the value of client feedback and complaints. If the client is a valuable one from whom the practice hopes to receive future business, the value of the feedback is obvious, and the practice may even decide that the critical thing is to satisfy the client regardless of whether the complaint is justified. On the other hand, a legal practice might perceive the intrinsic value of the voice (complaint) of "one-shot" or intermittent clients to be very low, and therefore be less motivated to respond. For example, in their empirical study of complaint handling by solicitors in England, Christensen *et al* found that,

³¹ Shaubin Talesh, 'The Privatization of Public Legal Rights: How Manufacturers Construct the Meaning of Consumer Law,' (2009) 43 *Law and Society Review* 527, 530.

where the complaint handler identified a positive benefit to the firm in retaining the client [usually “commercial” clients], a pragmatic style of complaint handling was usually adopted to ensure the client achieved satisfaction. Conversely where no such benefit was perceived [usually with “private” individual clients], an adjudicative or judicial style was adopted which employed a variety of tactics to dispense with the complaint quickly without having to spend a great deal of time analysing and exploring it and determining whether or not it was valid.³²

Some level of transparency and accountability might be necessary to ensure short-term silencing and satisfaction of certain complainants does not substitute for appropriate attention to problems identified and fair consumer redress.³³

Finally, there is some empirical evidence in Queensland itself that a mandated requirement to introduce internal complaints handling can make a difference to client satisfaction levels. A Client Care Rule was introduced by the Queensland Law Society in 1993 and required that a firm inform a client at the beginning of the retainer that complaints could be referred to a nominated Client Care Officer within the firm or to the Law Society's Client Relations Centre.³⁴ There was a dramatic drop in the number of written complaints lodged against Queensland lawyers the year after

³² Christensen et al, ‘Complaint Handling by Solicitors’, above n 30, 183.

³³ Shauhin Talesh, above n 31, 542. See also, Lauren Edelman, Howard Erlanger and John Lande, ‘Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace’ (1993) 27 *Law and Society Review* 497, 525-527.

³⁴ The Client Care Rule was rescinded by the Law Society five years later in 1998, because it was felt that the Rule had been made redundant by the *Civil Justice Reform Act 1998* (Qld), see Queensland Law Society, *Solicitors Handbook* (2000) 4-6. However, that Act only required something much more modest, being disclosure to clients of the names of all individuals who would be working on the file and the client’s right to complain *externally*.

the client care rule was introduced.³⁵ This suggests that many complaints were dealt with satisfactorily by the firms themselves and did not need to proceed to the statutory regulator, although no systematic assessment has been conducted of the degree to which firms were complying with the rule. Similarly, in New South Wales when the regulator required all ILPs to implement appropriate management systems, which included timely client communication and complaints handling, the level of complaints to the external regulator about those ILPs dropped to one third of the rate that they were before.³⁶ This suggests that internal management systems prevented and resolved many problems before they needed to become a complaint to an external regulator.

These Australian findings are suggestive, but further research into compliance with these rules, and the mechanisms at work, would be needed to be sure of the causal connection between rules requiring complaints management systems and timely and appropriate internal complaints resolution. A need for caution is also suggested by overseas experience. In 1991 the Law Society of England and Wales introduced Practice Rule 15, which required all firms to have internal complaint procedures and all client complaints to first be handled internally within firms before being referred to the Office for the Supervision of Solicitors (OSS).³⁷ However, many English solicitors remained resistant, and did not see any benefit to the firm in implementing

³⁵ Linda Haller, 'Solicitors' Disciplinary Hearings in Queensland 1930-2000: A Statistical Analysis' (2001) 13(1) *Bond Law Review* 1, 13-14 (Table 3).

³⁶ Christine Parker, Tahlia Gordon and Steve 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.

³⁷ Mary Seneviratne, 'Consumer Complaints and the Legal Profession: Making Self-Regulation Work' (2000) 7 *International Journal of the Legal Profession* 39, 43.

complaints handling procedures.³⁸ Empirical research soon after these provisions were first introduced suggested that they had not been successful in changing lawyer behaviour. Indeed they were actively rejected and resisted by many lawyers who did not see a consumer focus as important and were cynical of the reasons for the rule's introduction.³⁹ For example, some law firms introduced formal "paper" complaints handling procedures to comply with the rules because they felt they had to, but did not actually comply substantively with those procedures in practice.⁴⁰ A regulator introducing this sort of requirement would need to be very careful to build up commitment to the value of implementing these systems among law firms, rather than suddenly mandating it in a legalistic way.

Difficulties and Dangers with External Regulation of Internal Complaints Management

There are indeed a number of reasons to be cautious about attempting to regulate the internal management of complaints handling.

First, while it might be considered important for regulators to coordinate, guide, and in some cases enforce, appropriate standards of justice and fairness in internal

³⁸ Mary Seneviratne, *The Legal Profession: Regulation and the Consumer* (Sweet & Maxwell, 1999) 161; Christensen et al, 'Learned Profession?' above n 27; Christensen et al 'Complaint Handling,' see n 30. A similar rule exists in relation to costs: *Solicitors' Costs Information and Client Care Code 1999* (UK), Rule 7 (last amended 8 June 2006).

³⁹ They thought that this was largely a device by the OSS to stem the tide of complaints then overwhelming the OSS: see Christensen et al, 'Complaint Handling,' above n 30.

⁴⁰ Christensen et al, 'Learned Profession?' above n 27. See also, Neville Harris, 'Do Solicitors Care for Their Clients?' (1994) 13 *Civil Justice Quarterly* 359, 359-373; John Jenkins, 'Practice Management: What Do We Know About How Solicitors Manage Their Practices?' (1994) 1 *International Journal of the Legal Profession* 223.

complaints handling, regulators also need to be careful to ensure that they do not take this too far and promote an onerous “one size fits all” approach to complaints management inside law firms. For example, the requirements for fair and efficient handling of complaints may be dependent on the size of the law firm involved, the practice area and the profile of clients.⁴¹ In a small firm, for example, it is more difficult for the complaint to be handled by someone apart from the person complained about, reducing the likelihood of resolution.⁴²

Second, it is important to remember that complaints systems that meet regulators’ concerns and those that meet law firms’ concerns may be incommensurate in some ways. Regulators see a different profile of complaints about legal practices than legal practices see themselves. For example, regulators do not see the success stories. A client who complains to a practice and is satisfied with the practice’s response to their complaint has no need to take it further. Nor do regulators see the complaints that clients choose to deal with outside the statutory complaints system such as complaints that lead the client to lodge a civil claim against the legal practice, withdraw future work, disparage the practice to other potential clients, or to do nothing at all.⁴³

Conversely, regulators may see complaints that have not been seen or dealt with by the legal practice concerned. Unlike some other jurisdictions, there is no obligation in any Australian jurisdiction for a client to take their complaint to the legal practice first

⁴¹ American Express – SOCAP, ‘Study of Complaint Handling in Australia Report 2: A Profile of Enquiry and Complaint Handling by Australian Business’ (1995). In this Report, only ‘medium and large’ businesses were surveyed.

⁴² National Consumer Council, ‘Solicitors and Client Care: an Aspect of Professional Competence’ (1994).

⁴³ Harris, above n 40, 367; Sarah O’Neil, ‘Complaints about Solicitors’ (1999) 259 *Scottish Legal Action Group Journal* 48.

before they pursue it with a regulator.⁴⁴ Many complaints received by external regulators about lawyers allege poor communication during the retainer itself and these clients are more likely to take their complaint straight to an external regulator, rather than to the firm.⁴⁵ Complaints that have worried a legal practice may not worry the regulator. The regulator might summarily dismiss the complaint as outside the regulator's jurisdiction. Regulators may also see complaints from a broader range of sources than the legal practice complained about. For instance, a judge may write to a regulator to complain about a lawyer who appeared before him or her but see no need to also write a letter of complaint to the lawyer concerned.⁴⁶

The different complaint profiles that concern regulators and firms might mean that if regulators attempt to mandate certain complaint procedures, these procedures may not reflect the complaints experience and concerns of the legal practice itself. The regulator's idea of what complaints procedures should look like might therefore have little normative traction with legal practices, and may even be perceived as overly prescriptive and reflecting an unfairly jaundiced view of lawyers' relations with clients on the part of the regulator.

Finally, it is also important to consider whether a reduction in the number of complaints to an external regulator - and a concomitant increase in complaints handled internally by legal practices - is a good thing. There is a danger that internal

⁴⁴ Cf the United Kingdom, where Practice Rule 15 required all client complaints to be handled by law firms first before being referred to the Office for the Supervision of Solicitors: Seneviratne (2000), above n 37, 43.

⁴⁵ Law Society of England and Wales, 'Complaints Management Practice Note 4' (2010).

⁴⁶ This may be because the judge already indicated his displeasure to the lawyer in court. It also may be because, unlike a client, the judge is not seeking redress or might believe the legal practice is unable to redress the conduct that has occurred.

complaints systems actively discourage clients from taking their complaint to an external, statutory regulator by exhausting complainants, or by encouraging them to accept a substantively inadequate resolution proffered by the practice.⁴⁷ Thus encouraging internal complaints management by firms might hide the true level of discontent among clients and the true number of recidivist firms and lawyers.

Desiderata for Regulation of Internal Complaints Management by Legal Practices

On the basis of the analysis above, it is important that any regulation in this area should meet the following two criteria:

It should be *flexible and principles-based*: it should not take a one size fits all approach, but ensure that firms have the flexibility to meet the basic goals and minimum standards of internal complaints management in ways that suit their size, structure and context.⁴⁸

It should be aimed primarily at *capacity-building and learning and only use enforcement of the requirement to implement a complaints procedure as a last resort*: the objective should be to foster and guide firms to take responsibility for their own complaints handling in a way that meets public standards. Coercion should be aimed at getting them to think it through for themselves rather than punishment. Any punitive consequences should be reserved for situations where there has been a clear harm above and beyond failing to implement an appropriate system – for example a situation where there have been many justified complaints that have not been resolved

⁴⁷ Sharon Gilad, 'Accountability or Expectations Management? The Role of the Ombudsman in Financial Regulation' (2008) 30(2) *Law & Policy* 227-253; Laura Nader, *No Access to Law: Alternatives to the American Judicial System* (Academic Press, 1980).

⁴⁸ Parker, Gordon and Mark, above n 36.

effectively, the firm has been required to put in place a system and has still failed to do so.⁴⁹

On the other hand, external regulators should never use the fact that they are encouraging legal practices to take responsibility for internal handling of complaints as an excuse for cutting back their own involvement in, and commitment to, independent, external complaints handling.⁵⁰ The more that law firms are encouraged to implement internal complaints handling procedures, the more important it is that clients still feel that they have the option of going to an external, independent complaints handler if they are not satisfied with how the law firm has handled their complaint. This is an important consumer protection for the client and a check on the justice and fairness of law firms' internal procedures. External regulators should also monitor the way in which law firms implement internal complaints handling systems as both a check on their justice and fairness in practice,⁵¹ but also so that the regulator itself is continuously learning from lawyers about what type of procedures can be practically and efficiently implemented.

⁴⁹ This is consistent with regulatory enforcement strategies that are widely considered to be effective and fair among business regulation practitioners and scholars such as 'responsive regulation,' management-based regulation and meta-regulation. See eg, Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, (Oxford University Press, 1992); Sharon Gilad, 'It Runs in the Family: Meta-regulation and its Siblings,' *Regulation & Governance* (forthcoming); Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, 2002) 245-291.

⁵⁰ Christensen et al, 'Learned Profession?' above n 27; Christensen et al, 'Complaint Handling,' above n 30. This is also consistent with scholarship and evaluation of business regulation more generally, see above n 49.

⁵¹ Christensen et al, 'Complaint Handling,' above n 30.

This is the approach that the Queensland Legal Services Commissioner has taken to encouraging the implementation of appropriate internal complaints management systems by ILPs, as we show in the next section.

The Regulatory Approach to Encouraging Implementation of Appropriate Internal Complaints Management Systems in ILPs in Queensland

In those Australian states that allow incorporation of legal practices, the law requires that all ILPs must have ‘appropriate management systems’ in place to ensure that the firm, its directors and employees comply with all their legal and professional ethical obligations.⁵² The Legal Services Commissioners in each state exercise powers to audit the compliance with regulatory obligations of ILPs, their officers and employees, as well as their management of the provision of legal services (including the way they supervise officers and employees).⁵³ The New South Wales, Victorian

⁵² For instance, *LPA*, s 117(3). All ILPs must have at least one director who is a legal practitioner (a ‘legal practitioner director’): s 117. The legal practitioner director is responsible for the management of the legal services provided by the ILP, preventing or remedying any professional misconduct or unsatisfactory professional conduct of a legal practitioner employed by the practice, and for the implementation and maintenance of ‘appropriate management systems’: ss 117(3), (4). The legal practitioner director can be held personally responsible in professional disciplinary action for failures in relation to any of these responsibilities, including failure to implement and maintain appropriate management systems: s 118. For further details of this regime throughout the Australian states that allow ILPs, see Christine Parker, ‘Law Firms Incorporated: How Incorporation Could and Should Make Firms More Ethically Responsible’ (2004) 23(2) *The University of Queensland Law Journal* 347, 372; Christine Parker, ‘An Opportunity for the Ethical Maturation of the Law Firm: the Ethical Implications of Incorporated and Listed Law Firms’ in Kieran Tranter et al (eds) *Re-Affirming Legal Ethics* (Routledge, 2010) 96-108.

⁵³ These audits may be conducted whether or not a complaint has been made about the ILP’s provision of legal services. The results of the audit may be taken into account in disciplinary proceedings against a legal practitioner director or other persons, and in decisions about the grant, renewal, amendment, cancellation or suspension of a practising certificate. See eg, *LPA* s130; *Model Laws* s 2.7.22.

and Queensland Legal Services Commissioners have adopted a list of ten objectives to be addressed by ‘appropriate management systems’.⁵⁴ These Commissioners are requiring incorporated firms to assess themselves as to how well they have achieved each of these ten objectives – and report the results back.⁵⁵ One of these ten principles for appropriate management systems is that ILPs are able to show that they have systems in place to ensure “effective, timely and courteous communication”. This principle is defined to include a basic internal complaints management scheme. ILPs should be able to show that “All comments and complaints by clients are dealt with promptly and, where possible, by someone else in the practice other than the person complained about.”⁵⁶

More can be done by regulators, as shown by the Queensland Legal Services Commissioner’s development of programs for further monitoring, assessment and external auditing of these appropriate management systems.⁵⁷ A suite of “ethics

⁵⁴ See, New South Wales Legal Services Commissioner, *Ten Areas to be Addressed to Demonstrate Compliance with Appropriate Management Systems*, (5 February 2007) <http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/OLSC_tenobjectives>; Queensland Legal Services Commission, *Incorporate Legal Practices and Multi-Disciplinary Partnerships*, (2010) <<http://www.lsc.qld.gov.au/24.htm>>; and the Legal Services Board of Victoria, *Incorporated Legal Practices: Self-Assessment Audit*, (2004) <http://www.lsb.vic.gov.au/documents/LSB_ILPSelfAssessmentAudit.pdf>. For further detail and evaluation of this process, see Parker, Gordon and Mark, above n 36, ; Steve Mark and Tahlia Gordon, ‘Innovations in Regulation – Responding to a Changing Legal Services Market’ (2009) 22 *Georgetown Journal of Legal Ethics* 501.

⁵⁵ Ibid.

⁵⁶ New South Wales Legal Services Commissioner, above n 54.

⁵⁷ See John Briton, ‘Rethinking the Regulation of Lawyer Conduct: The Centrality of Law Firm Management and Ethical Infrastructures’ (Paper Presented at the Australian Legal Practice Management Association National Conference, August 2009); John Briton and Scott McLean, ‘Incorporated Legal Practices: Dragging the Regulation of the Legal Profession into the Modern Era’, (2008) 11 *Legal Ethics* 241; Christine Parker and Lyn Aitken, ‘The Queensland “Workplace Culture

check” surveys, including the Complaints Management System Check, is part of this program. Law firms (whether incorporated or not) can participate in ethics checks surveys voluntarily, or their participation can be required as part of the self-assessment and audit of ILPs. In 2009 and 2010 the Legal Services Commission asked all 65 (at the relevant time) of the ILPs in Queensland to have their staff fill out the complaints management system check survey as part of their self-assessment of whether they had appropriate management systems in place, as required by the law.

Legal practitioner directors of ILPs are expected to fill out a general self-assessment audit on behalf of the whole firm. But the ethics check surveys, including the “Complaints Management System Check”, are to be filled out by all staff in the firm. The primary aim was therefore to raise awareness among all staff of the need for appropriately designed and implemented complaints management systems. The Complaints Management System Check was also intended to promote discussion within practices about these issues and, as a result, to prompt change in individual attitudes and practices as appropriate. It was not intended as a one-way conversation. That is, it was not designed to be a rigidly prescriptive checklist for good complaints management. It was hoped that lawyers and law firms could profitably use the survey questions as a check of what they were doing. The focus, however, was primarily on uncovering the knowledge and attitudes of various members of the practice in relation to the complaints management policies and procedures operating within their practice in order to open up genuine conversations within firms about appropriate complaints management.⁵⁸ The survey methodology was also designed to allow the regulator to

Check:” Learning from Reflection on Ethics Inside Law Firms,’ *Georgetown Journal of Legal Ethics*, (forthcoming).

⁵⁸ Parker and Aitken, above n 57.

listen to and find out something about how law firms themselves organise their complaints management.

3. THE COMPLAINTS MANAGEMENT ETHICS CHECK SURVEY

The primary value of the Queensland Complaints Management Ethics Check survey is in the fact that it sets forth a number of issues and challenges that legal practices must consider if they are to engage in effective and just complaints management. Therefore in the following subsections we briefly explain the questions asked in the survey and why they are important for legal practices to address, wherever they might be located. We also briefly describe the responses to the survey.⁵⁹ There has been little previous investigation of the handling of complaints about lawyers, especially inside law firms. Neither lawyers, regulators, or observers have a good sense of the range of ways in which legal practices manage complaints, and how well they work. Although the conclusions about law firms' actual practice of complaints management that can be generated from this survey are preliminary and relate to only one jurisdiction, they open a window on how law firms operate internally - an issue on which there is a dearth of systematic information from any practice type or locations.⁶⁰

⁵⁹ Tables of statistics are given for key questions. Full statistics showing responses from the whole survey are available from the authors and also from the Queensland Legal Services Commission website, see Queensland Legal Services Commission, *The Complaints Management Systems Check – the Results to 31st May 2010* (2010) <<http://www.lsc.qld.gov.au/567.htm>>.

⁶⁰ For a detailed discussion of the strengths and limitations of using the Queensland Legal Services Commission's ethics checks surveys for this purpose, see Parker and Aitken, above n 57. For a summary of previous research and knowledge about the internal handling of various ethical and professional conduct issues by Australian law firms, see Christine Parker, Adrian Evans, Linda Haller,

The questions that make up the survey fall into five main categories:

- general information about the respondents to the survey;
- how lawyers and the firm understand what counts as a “complaint”;
- the policies and procedures for complaints handling;
- how firms respond to complaints that they find are justified; and
- individual lawyer’s personal attitudes to complaints.

In the subsections that follow we discuss each in turn.

The Respondents to the Complaints Management Ethics Check Survey

The Queensland LSC’s complaints management ethics check survey was conducted in two tranches: The first tranche was conducted in May 2009 and achieved responses from 283 lawyers and other staff in 35 ILPs. The second tranche undertook the survey in March 2010 and, by the time of writing, achieved responses from 331 lawyers and other staff in 30 ILPs. All 614 respondents in 65 ILPs are reported together in this paper.⁶¹ All ILPs that were required to participate in the survey did so. Total numbers of lawyers and staff in each ILP are not known and therefore a response rate for individual lawyers and staff cannot be calculated.

All respondents were from practices with less than fifty practicing certificate holders, and more than half were from practices with nine or less practising certificate holders.

Suzanne LeMire, and Reid Mortensen, ‘The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour’ (2008) 31(1) *University of New South Wales Law Journal* 158.

⁶¹ Some further respondents filled in the survey after the analysis reported here and therefore the data available on the LSC website reports a slightly higher number of respondents. The number 614 excluded those who did not fill out most of the survey.

The precise breakdown is shown in Table 1. About half were from firms located in the Brisbane CBD (or with the head office of the firm located in the CBD). Ten percent were located in Brisbane suburbs and forty percent in regional Queensland.

Of the 614 respondents, 197 were male and 417 female. Lawyers, and especially directors, were more likely to be men. Women respondents were likely to be non-legal staff or paralegals. (See Table 2.)

Table 1: Respondents by Size of Law Firm

Number of practising certificate holders in firm	Percentage (and number) of respondents
<5	32% (199)
5-9	25% (154)
10-19	26% (162)
20-49	16% (99)
>50	0
Total	100% (614)

Table 2: Respondents by Occupation within Firm and Gender

Occupation within law firm	Male (% of males)	Female (% of females)	Totals (% of total)
Paralegal	5%	18%	14% (86)
Graduate/Trainee lawyer	7%	4%	5% (31)
1 st to 3 rd year lawyer	15%	10%	12% (72)
4 th + year lawyer	8%	3%	5% (28)
Senior associate	9%	2%	4% (26)
Partner/Director	41%	4%	16% (96)
Consultant/In House Counsel/ Special Counsel	6%	1%	2% (15)
Non-Legal Staff (Administration/Secretarial/ Receptionist)	2%	48%	33% (203)
Non-Legal Staff (Management eg Practice Manager)	2%	3%	3% (17)
Non-Legal Staff (Other eg HR/ IT/ Accounts)	5%	7%	6% (39)
Totals (% of total)	32% (197)	68% (417)⁶²	100% (614)

Understanding of What Constitutes a Complaint

What counts as a complaint is the foundation of effective complaints management. If individuals in the firm do not even become aware that a client is making a complaint, then it will not necessarily be dealt with appropriately.

⁶² Note that numbers in column do not add to 417, because information about position was not available for one female respondent.

Best practice guidance on complaints handling in industry and government generally suggests that a complaint should be understood as ‘any expression of dissatisfaction with the delivery of a product or service’.⁶³ A client care guide published by the law society in the jurisdiction studied here has recognised that a complaint can be defined more or less narrowly from the broadest (‘any description of client dissatisfaction, however expressed’) through to only written, formalised complaints or even more narrowly, but suggests that ‘the most effective complaints handling procedures recognise and define ‘complaint’ broadly so that the firm has a chance to resolve the complaint early and thus eliminate the risk of either a more formal complaint or any other effect of client dissatisfaction.’⁶⁴ This suggests that law firms in this jurisdiction may have more expansive and sophisticated complaints management systems than law firms without similar guidance emanating from their professional body. The survey results reported below suggest a different story, as will be seen.

The survey asked respondents to tick which of a range of options their firm would actually treat as a complaint. The results are shown in Table 3. The vast majority see any sort of explicit expression of dissatisfaction as a complaint. (Although it is curious that a small minority of respondents did not count each of ‘a letter expressing dissatisfaction with the amount billed’ or a query from the LSC once a client had made external allegations as “complaints”.) Some of the items pushed respondents and their firms to think about, and ultimately define for themselves, when they might proactively identify something as a complaint, even if the client had not quite

⁶³ See, Queensland Ombudsman, ‘Guide to Developing Effective Complaints Management Policies and Procedures,’ (2006) 5 (sections 3, ‘Application/Scope of Policy’ and 4 ‘Complaints Management System’).

⁶⁴ Queensland Law Society, ‘Practice Management: Client Care: Communication and Services’ (2008) 73-76 (section 16, ‘Handling Complaints’).

explicitly and formally expressed dissatisfaction. For example, if a client leaves several messages in a short space of time or “queries” items on a bill a firm might choose to treat them as “complaints” in order to head off more serious concerns.

Table 3: Responses to Question: Which of the Following Examples are Likely to be Treated as Complaints in the Firm?

	Proportion (and number) of respondents⁶⁵
A letter expressing dissatisfaction with your firm and its services generally	96% (558)
A letter expressing dissatisfaction with the amount billed	90% (523)
A client expressing dissatisfaction with their solicitor failing to return several phone calls after messages were left on a daily basis for one week	87% (506)
The Legal Services Commissioner requesting an explanation from the firm after a client makes allegations to the Commissioner	87% (504)
A client verbally abusing the firm’s receptionist regarding phone calls to their solicitor that were unreturned after 2 days	76% (441)
A client querying items on a bill that you knew had been agreed to in their client agreement.	40% (235)
Several of the same messages left with the receptionist in a short space of time, asking the client’s solicitor to return the call.	28% (163)
A client ringing on a weekly basis to ask about the progress of their matter.	10% (59)
Total number who answered question	(581)

⁶⁵ Respondents could tick more than one response. Therefore, responses add up to more than 100%. Not all respondents answered this question.

Policies, Procedures and Practices of Complaints Management

The bulk of the survey asked respondents about their firms' policies, procedures and practices for receiving, processing, resolving, recording and reviewing complaints. The various industry and government resources that seek to define what is best practice in complaint handling generally - and for the legal profession specifically - suggest that, at a minimum, even for a small firm, complaints management should include:⁶⁶

- a written complaints policy and procedure that is communicated to all staff;
- communication to clients that the firm is open to complaints and wants to know about dissatisfaction;
- a procedure for managing complaints that includes acknowledging receipt of a complaint as soon as possible, assessing the complaints for validity, resolving the complaint as soon as practically possible and communicating the resolution to the client;
- one person with final responsibility for handling complaints, regardless of firm size;
- central collection and recording of complaints;

⁶⁶ See further, Queensland Ombudsman, 'Guide to Developing Effective Complaints Management Policies and Procedures,' (2006) 5-7 (sections 4 'Complaints Management System,' section 5 'Visibility and Access', section 6 'Responsiveness', and section 7 'Assessment and Action'). For a discussion of different possibilities for defining complaint in the context of legal practice, see Queensland Law Society, 'Practice Management: Client Care: Communication and Services' (2008) 73-76 (section 16, 'Handling Complaints'), and 102-103 (Appendix 1: Dos and Don'ts of Client Care).

- review of complaints on an individual basis and at regular intervals to find out the root cause of complaints and any trends in order to change things or design new processes to put things right and prevent further complaints.

The survey did not ask for specific details about precisely what legal practices' complaints handling policies and procedures said about each of these issues. It did ask whether each legal practice had policies that addressed each of these issues one way or another.

The first step is actually having a *complaints policy in writing* that can be communicated to all staff. Three quarters (74%) of the respondents believed their firm had a complaints policy; but only just over half (56%) believed that it was in writing.⁶⁷ In open text comments in the survey a number of respondents commented that they were solo practitioners, or that they worked in a small practice, that dealt with complaints informally and therefore did not require a written complaints policy. However, once there are any staff at all, it is useful to have the policy and procedure formalised in writing.

The second aspect of complaints management is how the legal practice's openness to receiving complaints, and the procedure for doing so, is *communicated to clients*. This is especially important for less sophisticated, or less "valuable", clients who may not feel confident to complain, or even know how to do so, without some encouragement. A range of questions in the survey asked about various ways in which information about how to make complaints could be made available to clients. These questions were designed to prompt law firms to think about the range of possibilities. It is not necessary for each practice to use every possible method of communication of the

⁶⁷ 21% and 28% said 'I do not know' to those two questions respectively.

complaints policy to clients. The important thing is that clients are told one way or another from the very beginning who they can complain to, and that this is done in a way that suggests that the firm encourages them to complain as soon as they are dissatisfied with anything. The responses show that most respondents believe their firms make some effort to communicate how to complain to their clients, and that they do so in a range of different ways (see Table 4).⁶⁸ The most common method of informing clients about the practice's complaints policy is through the costs disclosure statement. This makes sense as it must be given at the beginning of the retainer and must include information about the possibility of complaining to the LSC.⁶⁹ However it raises the possibility that many practices might only be telling clients about their right to complain externally to the LSC rather than to someone in the firm, since the legislation only requires the former in the costs disclosure statement.

⁶⁸ However, there was some inconsistency in the responses to different part of the survey on this point: 76% responded to a specific question on the issue by saying that their engagement letter “always” includes information about how to complain. But only 41% chose the option of “standard letter sent out to new clients” for the more open ended question shown in Table 4.

⁶⁹ *LPA* ss 308, 310, 316(6), 316(7).

Table 4: Responses to Question: How does your Firm Provide Information to Clients about how to make a Complaint?

	Percentage (and number) of respondents ⁷⁰
Costs disclosure statement	69% (378)
Written client agreement	60% (331)
Standard letter sent to new clients	41% (226)
Standard statement sent with each account	31% (171)
Orally at first interview	11% (63)
Webpage	5% (27)
The firm's client service charter	4% (21)
There is no information provided as to how to make a complaint	5% (26)
Other (please specify)	(34)
Total number who answered question	(552)

The third, fourth and fifth steps concern the *procedures for how the complaint is actually handled, who has responsibility for handling it, and how information about complaints is collected and recorded*: A series of items asked about whether the firm had procedures about who was to actually assess and resolve complaints, how they were to do it, and the time frames for communicating with clients about the receipt, assessment and resolution of their complaints. The results are shown in Table 5. About three quarters of respondents felt that their practices gave them clear

⁷⁰ Respondents could tick more than one response. Therefore, responses add up to more than 100%. Not all respondents answered this question.

instructions about “what should be done when anyone in the practice receives a complaint” and “the role and responsibilities of staff in relation to handling complaints”. Yet as the questions become more specific about whether there are clear instructions on how the complaints should be processed and determined, how and when feedback should be provided to clients, and procedures for interfacing with the Legal Services Commission and indemnity insurer in relation to complaints, the positive responses drop away. This might suggest a lack of specificity in some practices’ complaints handling procedures. Being clear about these matters can be as important for the wellbeing of staff as for clients.⁷¹

⁷¹ See nn 26 to 27 and accompanying text.

Table 5: Complaints Management Policies and Procedures in Legal Practices

Does your firm have...	Yes	No	I don't know	Number of respondents answering each question
Clear instructions about what should be done when anyone in the practice receives a complaint?	73%	10%	17%	582
Clear instructions about the roles and responsibilities of staff in relation to handling complaints?	73%	11%	17%	580
Clear instructions about when a complaint is to be handled by the relevant partner or supervisor?	72%	11%	17%	582
Clear instructions on when to report a complaint to a supervisor?	72%	11%	17%	581
A clear policy statement of the firm's commitment to responding to complaints effectively and efficiently?	61%	12%	27%	583
Clear instructions about how complaints should be processed and determined?	59%	14%	26%	579
Clear instructions about providing feedback to clients after the outcome is determined?	59%	14%	27%	577
Clear instructions about how complaints should be recorded?	57%	17%	26%	580
Clear instructions about providing feedback to clients on complaints?	54%	17%	29%	576
Clear instructions on which complaints need to be reported to the professional indemnity	53%	15%	32%	579

insurer, and who will report them?				
Clear instructions about the time frame in which a complaint should be reviewed and determined?	46%	21%	34%	581
Clear instructions about the time frame in which the determination of a complaint should be provided to the complainant?	45%	20%	35%	579
A clear statement of the procedure to be followed in the event of a complaint to the Legal Services Commission?	44%	21%	35%	579
An agreed definition of what is a "complaint"?	39%	28%	34%	580

One key issue for law firms is identifying *a senior person 'with ultimate responsibility for handling complaints'* and ideally 'the authority to settle complaints'.⁷² A study of law firms in the north of England found that firms varied in the degree to which the complaint was managed centrally, for example by a client services manager, or a senior partner, or left in the hands of the particular fee-earner or work team.⁷³ The vast majority of respondents to this survey (88%) said that in their firm it was clear whose job it was to manage complaints.

The survey was particularly concerned with whether *firms trained lawyers and other staff in relation to these procedures for complaints handling*. Here there is quite a diversity with many respondents saying they had never received any training about complaints management in their firm: Around half (49%) say they did not receive

⁷² Queensland Law Society, 'Practice Management: Client Care: Communication and Services' (2008) 74.

⁷³ National Consumer Council, 'Solicitors and Client Care: an Aspect of Professional Competence' (1994) 10-11.

training in the practice's complaints management procedures at their induction into the practice; forty percent say they have not received training in the last twelve months. These questions did give a "not applicable" option for staff that felt such training would not be applicable to them, which many also ticked – although in small practices (as most of the practices surveyed were) it seems likely that most staff would have some client contact at least through answering the phone. All staff – professional and non-professional – who might have any client contact at all should understand the complaints handling procedure of the practice.

The final issue of policies and procedures with which the survey was concerned was whether firms kept a *register of complaints* so that they can track complaints and ensure they are dealt with in a timely and appropriate way, and also so they can review complaints for systemic learning. Only thirty percent of respondents were confident that their firm did keep such a register. Many respondents commented in the open text boxes that their practices had never received a complaint, and that this question was therefore irrelevant. This response raises again the importance of respondents' understanding of what counts as a "complaint". If they have a narrow understanding of a complaint, or if their firm has no agreed definition of what counts as a complaint, then complaints procedures may never be activated at all, even where they might have been useful. It may be that many lawyers implicitly distinguished between "formal" and "informal" complaints in their own minds, and felt that only "formal" complaints would need to go through a "formal" complaints handling procedure and be recorded in a written register. Unsophisticated clients, however, will not necessarily realise that they need to make a formal, written complaint in order to be dealt with by the formal complaints handling system of the firm. Very sophisticated clients, on the other hand, may well be able to express their

dissatisfaction and be attended to without making a formal “complaint” as such. As one respondent said: “No complaints received but clients do audit our files from time to time and provide us with feedback.”

Indeed, a number of respondents commented in the open text boxes that their firm’s approach to complaints handling was largely informal, and that they felt this was effective:

Just because a firm does not have a formal written policy does not mean that staff do not know what to do. I have gained knowledge of how to deal with complaints through experience.

Amend your questions to allow for the informal training that occurs in small firms – I’d guarantee it’s more effective anyway!

Informal methods will sometimes be more effective than formal procedures in resolving an individual complaint. However, without central documentation and recording, they may be less able to warn management of more systemic failings within the firm. Moreover if there is no systematic way of handling all complaints, informal or not, then the firm has no way of ensuring that both sophisticated and unsophisticated clients receive equal justice in the way their complaints are resolved.

Some respondents commented that the survey had prompted them (as it was designed to do) to think that their firm’s ‘informal’ policies were perhaps a little too ‘ad hoc’ to be effective:

I’m new to this practice (and private practice generally) and this survey has made me think about being active in putting in place a complaints management system. As far as I am aware, we don’t appear to have one and complaints would appear to be handled on an “ad hoc” basis.

We will be discussing implementing a complaints register at our next office meeting!!! Good idea. We are only a very small firm of six but this is very important.

Responses to Complaints

Another question asked respondents how their firm responds when it finds that a complaint is justified. Respondents were asked to rate each option according to whether it was used 'never', 'sometimes', 'often' or 'always'. This was intended to provoke thought about the range of options available. The results are shown in Table 6.

Table 6: Responses to Question: How Does Your Firm Respond When it Finds that a Complaint is Justified?

	Always	Often	Sometimes	Never	I don't know	Total number of respondents answering each question
An apology	43%	10%	20%	1%	26%	543
Issue raised at staff member's performance review	20%	9%	28%	3%	40%	534
Internal seminar if issue is of wider relevance to the firm	19%	10%	28%	7%	36%	535
Internal discipline of staff member within firm	16%	7%	37%	5%	37%	537
Waiver or reduction of legal fees	8%	18%	49%	1%	25%	542
Repayment of legal fees	3%	3%	36%	9%	48%	531
Carry out legal work without fee or for a stated fee	3%	9%	43%	5%	40%	534
Other form of compensation	1%	2%	21%	18%	59%	526
No redress	1%	0.5%	10%	40%	48%	524
Other (please specify)						52
Total number who answered question						546

The most common response was an apology. Nevertheless only 48% of respondents said their firm 'always' offered an apology for a justified complaint. There seems little reason for a law firm not to always offer an apology once they have found that a complaint is justified, and for this to be well known to all staff. An apology may not

be forthcoming if the firm is concerned this might breach the terms of their professional indemnity insurance: One respondent commented that “Care would be taken in regard to the apology if there is an issue of professional negligence and care had to be taken not to admit negligence for fear of voiding our PI insurance.” The lack of apology might also reflect an attitude on the part of the legal practice of “pragmatically” resolving the complaint (for instance, by reducing fees) without making a judgment that the client was actually correct to complain.⁷⁴ Very few respondents stated that their practice ‘always’ or ‘often’ reduced, waived or repaid fees in response to justified complaints (8% for always and 18% for often). A large proportion of respondents (49%) did however say that their firm ‘sometimes’ reduced, waived or repaid fees.

The survey also asked whether firms ever charged their clients for dealing with a complaint. This was because the regulator had received complaints that this had sometimes occurred despite warnings from the professional body to its members of the negative attitude underlying this approach, well demonstrated by this quote from a complaints policy sent to clients by one less enlightened firm:

Please remember that our time costs money and the time taken to deal with your complaint will mean we are unable to deal with proper clients. However, we understand and take your complaints seriously and for this reason you will be charged a flat rate of \$250 in recognition of the time we have spent in evaluating your claim. This is regardless of how long we

⁷⁴ See Christensen et al, ‘Learned Profession?’ above n 27.

actually spend and is quite good value for money given that our cheapest fee earner charges \$250 per hour.⁷⁵

Only a few respondents said that their firm had ever charged a client for complaints (four said sometimes or always), although a large proportion (41%) said they did not know whether their firm ever did. In a firm with a positive and proactive approach to complaints, everyone should know that clients are never charged for making complaints.

Only part of the response to a justified complaint is the response to the client who actually complained. A proactive and preventive complaints management policy should also include internal firm responses to try to make sure that it does not happen again, and that the firm learns from the complaint. A substantial minority of respondents said that their firms always ran an internal seminar if the issue was of wider relevance to the firm and raised any issues in performance reviews of staff.

A separate series of questions (not shown in a table) also asked about whether firms responded to complaints by analysing complaint data to identify any systemic or recurrent issues, and by fixing a problem in policies or procedures as a result of a client complaint. The vast majority of respondents (61%) were not aware of whether systemic reviews of complaints data happened or not, but the next largest group said it happened 'from time to time' (20%). About half of respondents were not aware of whether any complaint had ever prompted change to a policy or procedure, but almost a third (28%) said this had occurred 'at least once', while 11% said it occurred 'regularly'. It is important to remember that many respondents believed their practice

⁷⁵ Queensland Law Society, 'Practice Management: Client Care: Communication and Services,' (2008) 75.

had never actually received a complaint. Clearly if one does not receive complaints, or does not believe one receives complaints, then one cannot learn from them.

Dividing the responses between practice leaders (directors of the ILPs) and other lawyers, about 70% of the employee lawyers, and only 14% of practice leaders, chose “I don’t know” in response to the question “How often does your firm analyse complaint data to identify any systemic or recurrent issues?” Forty percent of practice leaders chose the option of “from time to time”. Similarly, going back to the question asking about what responses were used by the firm to respond to justified complaints; junior lawyers are more likely to choose the “I don’t know” option in contrast with practice leaders, who are more likely to choose ‘sometimes’ or ‘often’.⁷⁶ This suggests that leaders might consider doing more to communicate to all members of the firm what the usual responses are to clients with justified complaints, and how the firm as a whole learns from complaints. Communicating to all members of the firm that the firm is committed to constructive responses to justified complaints, and that attending to complaints changes things for the better, can help create an overall positive attitude to client complaints and the firm’s complaint management processes.

Lawyer and Staff Attitudes to Complaints

It is very well to have nice procedures, but if the attitude of staff and of the firm as a whole is to discourage complaints or to react defensively, then a complaints management policy is unlikely to be of value either to the client (in terms of receiving a fair resolution) or the firm (in terms of receiving client feedback from which it can learn). Therefore the survey asked lawyers and staff to respond to a range of

⁷⁶ There is little other difference between men and women or senior and junior lawyers in their responses to this question.

challenging and probing statements about how they felt personally about complaints. These questions were intended primarily to prompt individuals to become aware of their own feelings, and any tendency to react defensively to complaints. It also included statements aimed more at gauging respondent's sense of confidence, knowledge of, and interest in complaints received by their practice. The results are shown in Table 7.

Table 7: Attitudes Towards Complaints

	Agree ⁷⁷	Neither agree nor disagree	Disagree ⁷⁸	Total respondents who answered each question
(a) I hope my colleagues would tell me if they received a complaint about my work	97%	3%	0.5%	565
(b) Complaints can't be ignored because of the damage they can do to your reputation	90%	6%	6%	566
(c) I feel confident that my firm will provide effective redress/ feedback to any client that complains	90%	10%	0.5%	566
(d) In my firm we encourage feedback from clients	77%	21%	2%	567
(e) I feel confident that I know how to deal with a client complaint	81%	14%	5.5%	567
(f) I know when to trigger the complaints process	77%	18%	6%	565
(g) I feel confident that my colleagues would understand why I need to pass on a complaint about their work	77%	19%	4%	565
(h) A firm needs to record and analyse even unsubstantiated complaints internally if it is to improve client relationships	76%	21%	3.5%	564
(i) We can learn a lot from analysing even frivolous complaints	67%	22%	12%	564

⁷⁷ Combines those who answered “strongly agree” and those who answered “agree.”

⁷⁸ Combined those who answered “strongly disagree” and those answered “disagree.”

(j) I'd like to know more about the sort of complaints that my firm receives, and what eventually happens to them	57%	33%	9%	566
(k) Lawyers can expect more complaints than most other service providers – it's the nature of the beast	46%	38%	18%	566
(l) When it comes to handling complaints, protecting the practice's reputation is more important than the sensibilities of individual staff	42%	39%	19%	564
(m) I can usually pick which clients will complain when I first meet them	35%	45%	20%	565
(n) The practice must sometimes cave into unreasonable complaints about me to avoid losing the client or for the sake of the practice's reputation	22%	40%	38%	564
(o) When a large client complains, we have no choice but to accede to their demands, even if they're unreasonable	14%	34%	52%	546

It is quite natural for people to feel defensive 'when confronted with what is, or what is perceived as, criticism'.⁷⁹ It should not be up to staff individually to have to work out how to respond to complaints constructively – the firm should support them so that they can develop a positive attitude. This can be done by participation in awareness activities to help reveal and acknowledge possible prejudices regarding complainant profiles (for example that family law clients are more prone to complain) or motivations to complain (for example that receipt of the bill seems to prompt

⁷⁹ Queensland Law Society, 'Practice Management: Client Care: Communication and Services' (2008) 79.

spurious complaints),⁸⁰ and then providing training in how to overcome natural feelings of defensiveness. The firm needs to support the development of a constructive attitude towards complaints by providing a well known complaints system that includes support for those who handle complaints, and a commitment to making an appropriate response to complaints in terms of reparation and apology.⁸¹

Clearly, there was generally a more socially desirable way to answer many of these items – and the responses reflect that social desirability bias with most people choosing the more positive, less defensive options. Nevertheless, there are still substantial proportions of respondents who have chosen the uncertain middle option for many statements. There are also some interesting differences in the pattern of responses. Men feel more strongly confident than women in relation to items (e), (g), (f) and (l), and a little more positively than women in relation to items (a), (b), and (c). In relation to item (o), men are more strongly definite in disagreement. There are some similar differences between junior lawyers (ie 1st to 3rd year lawyers) and practice leaders. Practice leaders feel more strongly positive on items (e), (g), (f) and (l), like men. Practice leaders also disagree more strongly on items (n) and (o). This

⁸⁰ There is at least anecdotal evidence that a client's receipt of the bill from the lawyer is often closely followed by receipt of a complaint from the client. Within the legal profession, this is usually considered to be evidence of the bad faith of such complaints; they are simply a tactic to have the bill reduced. The level of suspicion is heightened if the complaint does not only allege poor service, but also claims the bill is too high: Christensen et al, 'Learned Profession?' above n 27, 49. However, qualitative research has provided a credible alternative explanation from the point of view of clients. Client interviewees reported that they were sometimes afraid to voice their dissatisfaction earlier for fear that this would compromise the successful completion of the legal work that they required: see Christensen et al, 'Learned Profession?' above n 27, 47.

⁸¹ Queensland Law Society, 'Practice Management: Client Care: Communication and Service,' (2008) 74-76, 88.

might suggest a natural tendency for more senior practitioners to feel more confident about their ability to handle, and learn from, complaints.

Right at the end of the survey there was a very general opportunity to comment on the whole survey. Some of the responses give additional insight into the attitudes respondents perceived in their own firms towards complaints management. They give a picture of a range of practices and attitudes – suggesting that some firms are doing very well and others perhaps not so well. The tone of the comments also illustrates what a difference this can make to staff well being. Some respondents had quite negative experiences within their practices:

Generally in all the legal firms I have worked in for the last five years, unethical behaviour is rampant. From what I hear within the industry (hearsay) the problem is widespread. Solicitors just scare the complainant into submission with the fear of knowledge and the cost involved in fighting them in court. The Legal Services Commission should advertise to the community that complaints will be investigated at no expense and they will be compensated in restitution on an indemnity basis for breach of professional ethical standards.

I do not feel that my firm has an appropriate complaints management system, and I do not feel that I could approach a partner of the firm regarding another partner's behaviour, ethics, or their treatment of a client.

Another respondent commented on how *ad hoc* and varied complaints management was even within the one practice:

It is difficult to provide a general opinion of the firm when there are some partners who are able to effectively deal with complaints from clients and

come to a mutually satisfactory resolution, and there are other partners within the firm who are unable to effectively deal with client complaints because they won't accept responsibility, avoid the client's calls and blame other staff members for their errors.

On the other hand, a number of respondents reported that their practices had very positive approaches to complaints management:

Although I have only been at this firm for a short period of time, I have found the staff here to be professional and ethical at all times. Therefore, even though I don't know all the complaint handling procedures they have in place, I am confident that the staff take all reasonable steps to address complaints and client concerns as and when they arise.

And some reported, as we have already seen, that the survey itself had prompted them to re-think their complaints management to take a more proactive approach:

The survey has been a very good exercise for all staff in that while we are very careful in managing clients, we have not had a reason to have a closely considered complaints policy. We do have policies and agreed approaches to most things and discuss client management with our staff regularly. While we have not had a complaint to date, it has been a good exercise for all staff to understand complaint handling as well as client management.

5. CONCLUSION

We have argued that internal law firm complaints management can be good for clients, legal practices and regulators alike. Yet, we still know very little about the extent to which legal practices have actually implemented internal complaints

management systems and how well they operate in practice. The data reported in this paper begin to give us some insight into how legal practices handle complaints and what regulators can and should do in order to encourage them to do so appropriately.

We have argued that regulators need to be very careful about any initiatives to mandate the implementation of internal complaints management by legal practices for the following reasons: external regulators see a very different profile of complaints than seen by legal practices themselves; legal practices are so diverse in size and practice area that one size cannot possibly fit all; and practice staff are less likely to make a normative commitment to a system imposed upon them. The regulator studied here has attempted to steer a middle path between mandating prescriptive standards for complaints management and simply leaving it to firms to decide for themselves how to handle complaints and whether to have an internal complaints management system. The “Complaints Management System Check” survey is a promising way to promote awareness of, discussion about, and commitment to the elements of good complaints management inside legal practices.

More research is needed to evaluate the impact of this survey on the attitudes and practices of law firms and their staff in dealing with client complaints. But even the responses to the survey itself indicate some of the ways in which the awareness promoted by the survey was useful and necessary. As we have seen, some respondents did comment that the survey had prompted them to change certain features of complaints management practice in their firms. The results also indicate that in many firms who participated in the survey, complaints management is quite informal and ad hoc. We see no reason why we would not find similar results in firms in other jurisdictions. This suggests the need for more empirical research, and also for

the immediate implementation of discussion within firms about complaints management issues.

Indeed some of the open text responses to various survey questions suggested that perfectly natural, but not necessarily helpful, defensive reactions to complaints among lawyers and law practices are still common in some parts of the profession. One respondent commented: “We don’t do formal ‘training’ but we talk about stuff ups and complaints in team meetings regularly, and decide which difficult clients we are going to manage out the door fast.” Another said, “I think what you are trying to do here is good. But I am aware that too many good people leave the practice of law in part because they find it hard to cope with unjustified complaints made often strategically by clients to not pay bills or get other outcomes.” This study adds to the limited empirical evidence already available from the United Kingdom suggesting that some lawyers are cynical about the reasons for, and value of, complaints management systems.⁸²

There is certainly still much research that could be done to understand the distinctive features of complaints from consumers of legal services. For example, it may be that providers of legal services assume that a higher proportion of their clients lodge frivolous or vexatious complaints than in other service industries. Customers of legal services often seek legal assistance because they are in ‘trouble’ and buying a solution to their problem.⁸³ It may well be that their levels of anxiety are heightened as compared with the general community of consumers of services, and that this heightened level of anxiety might lead to a greater desire on their part to allocate

⁸² Above nn 37 to 40.

⁸³ Queensland Law Society, ‘Practice Management: Client Care: Communication and Services’ (2008) 3.

blame. Nevertheless, any suggestion that there may be miscommunication between lawyers and clients, or a level of cynicism within the legal profession as to the value of complaints, underlines the importance of understanding not only what formal complaints management policies might be in place within legal practices, but also the culture within individual practices in relation to client complaints.

Research on consumer complaints management inside large organizations has suggested that internal and industry-based schemes can sometimes be used to ‘cool out’ or ‘exhaust’ complaining customers so that they are happy with a lesser resolution of their complaint than their full legal rights would entitle them to.⁸⁴

Independent legal profession regulators should therefore monitor the quality of internal complaints management if they are going to encourage legal practices to deal with complaints internally. It is important that clients who have their complaints handled by the firm itself do not receive second class justice as compared to those who complain externally. It is also important that clients whose complaints are handled internally still feel able to complain externally if they are not completely satisfied with their legal practice’s response.

The experience that clients, especially individual and unsophisticated clients, have of their lawyers contributes substantially to the quality of their experience of the legal system. This means that complaints management by lawyers and legal practices is not just an issue for law firms, but is an essential aspect of access to justice, and therefore a matter of legitimate concern to regulators and observers. The Queensland Complaints Management Systems Check survey begins to shed some light on this issue, but further research of complaints handling by legal practices in other parts of

⁸⁴ Edelman et al, above n 33; Talesh, above n 31; Gilad, see above n 47; Nader, above n 47.

the world as well as research into how clients themselves experience law firm management of complaints is needed.