

**Comments on the draft Legal Profession National Law:  
Business management and control – the compliance audit power**

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**THE PROPOSED REGULATORY FRAMEWORK**

1. Sections 3.2.2 (1) and (2) of the draft Law provide that legal practitioners and law practices respectively ‘must comply with this Law, the National Rules and [his or her or its] professional obligations regardless of the business structure in which or in connection with which [her or she or it] provides legal services.’
2. Section 3.2.3(1) provides that ‘each principal of a law practice is responsible for ensuring that all reasonable action is taken to ensure that all legal practitioner associates of the law practice comply with their obligations under this Law and the National Rules and their professional obligations, and [that] the legal services provided by the practice are provided in accordance with this law, the national Rules and the applicable professional obligations.’
3. Section 3.2.3(2) provides that ‘a failure to uphold that responsibility is capable of constituting unsatisfactory professional conduct or professional misconduct.’
4. Section 3.2.4(1) provides that ‘if a law practice contravenes any provision of this Law or the National Rules imposing an obligation on the law practice, each principal of the law practice is taken to have contravened the same provision, unless the principal establishes that:
  - a) the law practice contravened the provision without the actual, imputed or constructive knowledge of the principal; or
  - b) the principal was not in a position to influence the conduct of the law practice in relation to its contravention... and it was reasonable for the principal not to be in that position; or

- c) the principal, if in the position referred to in paragraph b), used all due diligence to prevent the contravention by the law practice.’
5. Section 3.2.4(2) provides that ‘a contravention of a requirement imposed on a law practice by this Law or the National Rules is capable of constituting unsatisfactory professional conduct by each principal of the law practice’.
6. Section 4.6.1 provides that ‘if the Ombudsman considers it necessary to do so, the Ombudsman may conduct an audit of the compliance of a law practice with this Law, the National Rules, and the applicable professional obligations , including the management of the provision of legal services by the law practice.’ It authorises the Ombudsman to conduct a compliance audit ‘whether or not a complaint has been made with respect to the provision of legal services by the law practice or an associate of the law practice’ and, under Chapter 7 of the Law, gives him / her significant powers of investigation.
7. Section 4.6.2 provides that ‘if the Ombudsman considers it necessary to do so, the Ombudsman may give a... management system direction to a law practice or a class of law practices to ensure that appropriate management systems are implemented and maintained to enable the provision of legal services by the law practice, or a law practice of that class, in accordance with this Law, the National Rules, and the applicable professional obligations...’, and that ‘a law practice must comply...’.

#### **PRELIMINARY COMMENTS**

8. These are significant and welcome reforms and to my mind (while I will argue they require fine tuning) the single most effective reform we could make to better protect consumers of legal services and to better promote, monitor and enforce high standards of conduct in the delivery of legal services.<sup>1</sup>

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<sup>1</sup> I argued the case in a paper I gave with my colleague Scott McLean at the Third International Legal Ethics Conference (ILEC3) in July 2008 and subsequently in papers delivered at the QLS Symposium in March 2009, at the Australian Legal Practice Management Association Annual Conference in August 2009, and most recently at the QLS Symposium in March 2010, all of which are published on the Commission’s website ([www.lsc.qld.gov.au](http://www.lsc.qld.gov.au)). The ILEC3 paper was later published in the journal *Legal Ethics*, Volume 11, part 2, Winter 2008. I have also argued the case in previous submissions to the National Legal Profession Reform Project Taskforce.

9. Our current system for dealing with complaints about the conduct of individual lawyers is a fundamentally important regulatory tool which provides aggrieved consumers a means of redress (and better and more timely redress under the changes proposed in the draft Law) but nonetheless an ineffective and inefficient means of achieving the broader regulatory purposes of promoting, monitoring and enforcing appropriate standards of conduct in the delivery of legal services and protecting consumers more generally.
10. The system for dealing with complaints:
- a) is almost entirely reactive rather than proactive and preventative in character. It addresses past and not future behaviour and does no more to encourage high standards of conduct than threaten disciplinary consequences for conduct that falls short of the mark;
  - b) is directed to the merest of minimum standards – the standards below which complainants can justifiably claim redress and / or practitioners can justifiably be held to account before the disciplinary bodies;
  - c) is highly selective in its application, and singles out sole practitioners and small law practices and lawyers who practice in only certain areas of law, to the extent that the conduct of lawyers who work in medium sized and larger law practices and other areas of law is only nominally subject to regulatory scrutiny;<sup>2</sup> and
  - d) gives regulators little if any ‘regulatory grip’ on the underlying causes of complaints, by ignoring the reality that the vast majority of complaints can be put down not to incompetence or knowing dishonesty on the part of individual

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<sup>2</sup> The complaints data tells us year after year that lawyers who do family law, residential conveyances, personal injuries and deceased estates work are many times more likely to find themselves subject to complaint than lawyers who do commercial litigation or banking or building and construction law. Similarly lawyers who work as sole practitioners or in small law practices are many times more likely to find themselves subject to complaint than lawyers who work in medium sized and larger law practices. Yet there is no reason to believe that lawyers who do commercial litigation and the like or who work for medium-sized and larger law practices are more ethical or have higher standards of conduct than lawyers who do family law or work in sole practice or small law practices. Nor do we have any reason to believe that consumers identify and bring to attention more than a fraction of the conduct that might justify a complaint thereby enabling appropriate action to be taken. How then can we look the public in the eye and justify dedicating the totality of the resources at our disposal for monitoring and enforcing appropriate standards of conduct to dealing with complaints? We can't.

lawyers but to sloppy business practices and inadequate governance arrangements on the part of their law practices.

11. The system for dealing with complaints should be supplemented accordingly with regulatory tools that are genuinely preventative in character; that are directed to ethical capacity-building more so than potential disciplinary consequences; that engage all lawyers and law practices rather than a mere sub-set of lawyers and law practices; and that put the focus not only on lawyers but also on law practices and their management systems and supervisory arrangements - on their 'ethical infrastructure'.
12. I am not alone in urging reforms to this effect. My counterpart in New South Wales has similarly argued the case and so, too, the Chief Justice of Western Australia, Hon Wayne Martin, in a paper he gave at the 2009 Conference of Regulatory Officers<sup>3</sup> and Lord Hunt following his recent and comprehensive review of the regulation of legal services in England and Wales.<sup>4</sup> There is also a substantial academic literature on the subject.<sup>5</sup>

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<sup>3</sup> The Chief Justice's speech, *The Future of Regulating the Legal Profession: Is the Profession Over-Regulated*, is published on the website of Western Australia's Supreme Court. He argued that the current regulatory framework puts 'too much emphasis upon a policing / punitive model and insufficient emphasis upon other methods of encouraging appropriate standards of professional behaviour.' He said 'in my experience on the body which regulates the legal profession in this state' - and all of us who deal with complaints and discipline have had this experience - 'there were many occasions upon which we were effectively forced to watch from a distance the tragic trajectory of a legal practitioner whose conduct could be confidently predicted to deteriorate to the point where he or she would ultimately be struck off. Often it was like watching a train wreck in slow motion, powerless to do anything to stop it.... In my opinion, the complaints and disciplinary function should not be the central focus of that part of the regulatory framework aimed at the encouragement and maintenance of proper standards of behaviour. I agree with those like NSW Legal Services Commissioner Mark who have suggested that greater emphasis be placed upon the creation of what has been described as an ethical infrastructure... What is needed is a focus on encouraging ethical behaviour and the provision of quality services rather than upon punishing non-compliant behaviour'.

<sup>4</sup> The *Hunt Review of the Regulation of Legal Services in England and Wales* October 2009 (the Hunt Report). Lord Hunt notes that the 'principal theme' of his report is that 'effective regulation of legal services must in future concentrate far more upon promoting good governance arrangements in firms' (p.47). He says, contrasting the current arrangements for the regulation of individual lawyers with proposed reforms which allow increasingly for the regulation of law practices, that 'it is no longer a question of which is better. It is question of how best the two types of regulation can complement each other, whilst remaining proportionate and avoiding double regulation'(p.59).

<sup>5</sup> The literature is canvassed in detail in C. Parker, A. Evans, L. Haller and R. Mortensen, *The Ethical Infrastructure of Legal Practice in Larger Law practices: Values, Policy and Behaviour*, University of New South Wales Law Journal, 31(1), 2008, 158.

13. The reforms outlined in the draft Law equip regulators potentially with an explicitly preventative regulatory tool that will enable and require them to engage co-operatively with lawyers and law practices and, as Lord Hunt urges us, to 'move from a reactive approach - moving in after problems have occurred - to an active mindset, where the roots of potential problems are identified so far as possible in advance and failures often averted.'<sup>6</sup>
14. The draft Law should be 'tweaked' however to ensure that the reforms achieve that preventative purpose, and achieve it more efficiently. I will highlight some proposed amendments in **bold type** over the pages that follow.
15. The Taskforce has received submissions from spokespeople for the professional bodies and the Large Law Firm Group which oppose these reforms. They argue that the reforms (which were foreshadowed in the Business Structures Discussion Paper dated 25 November 2009) are unwarranted; that they will impose additional and unnecessary compliance costs, especially on small law practices; and that they will permit unjustified intrusions into the ways law practices manage their affairs, by enabling regulators 'to require particular systems to be implemented' when firms should be free to decide the systems that work best for them. Their submissions are ill-conceived and ill-informed and should be rejected. I will return to these matters shortly.

#### **LINKING THE OBLIGATIONS OF PRINCIPALS WITH COMPLIANCE AUDITS**

16. Section 3.2.3(1) requires a principal of a law practice to ensure that he/she takes 'all reasonable action' to ensure that the practice and its legal practitioner associates comply with the Law, the Rules and the applicable obligations. Section 4.6.1 authorises the Ombudsman to conduct an audit of the compliance of a law practice with this Law and the applicable professional obligations 'including the management of the provision of legal services by the law practice.'
17. **It would be helpful if 3.2.3(1) made it plain that a principal's obligation to 'take all reasonable action' to ensure that the practice and its legal practitioner associates**

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<sup>6</sup> The Hunt Report, at pp.77-78.

**comply with the Law, the Rules and the applicable obligations includes an obligation to ensure that the practice keeps and implements management systems appropriate to enable the provision of legal services by the practice consistent with the Law, the Rules and the applicable professional obligations.** <sup>7</sup>

#### **LIMITING THE LIABILITY OF PRINCIPALS**

18. Section 3.2.3 makes each principal of a multi-principal law practice equally responsible for taking all reasonable action to ensure that practitioners employed by the practice comply with their professional obligations and that the legal services provided by the practice are provided in accordance with appropriate professional standards. Section 3.2.4 makes each principal equally liable for any contraventions of those responsibilities unless the principal establishes one of the defences set out in 3.2.4(1)(a)-(c).
19. It is hard to object to sections 3.2.3 and 3.2.4 as they apply to small law firms - that is to say, partnerships consisting of a small number of legal practitioners only. <sup>8</sup> Equally it is hard to object to the sections as they apply to incorporated legal practices however large the practice. That is because the principals of an incorporated legal practice are limited by definition to their 'supervising legal practitioner(s)' – that is to say, the one or more legal practitioners who hold a practising certificate authorising them to engage in legal practice as a principal of a law practice and who is or are (a) validly appointed director(s) of the company.<sup>9</sup> They will be relatively few in number and will all have significant management responsibilities by reason of their directorships.
20. Sections 3.2.3 and 3.2.4 impose an unreasonable burden however on the principals of all but small law firms that operate as partnerships, and an increasingly unreasonable burden the larger the number of partners. The reality in all but small law firms is that the partners have varied and different management responsibilities, and some of them little

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<sup>7</sup> This wording reflects section 117(3) of the Queensland *Legal Profession Act 2007* which in turn reflects section 2.7.9(3) of the 2006 National Model Laws.

<sup>8</sup> See the definition of the term 'law firm' at section 1.2.1.

<sup>9</sup> See the definition of the term 'principal' at section 1.2.1 which refers in turn to section 3.7.4 which defines the term 'supervising legal practitioner'.

if any operational management responsibility at all. The Law should recognise this reality and enable law firms to limit their partners' liabilities for these regulatory purposes.

21. Section 3.2.4 does just this but inefficiently and arguably harshly, by deeming all the partners to be equally liable but enabling those partners who have only limited management responsibilities to establish a defence. There are more efficient and better ways to achieve the same purpose.

**22. One way to limit the liability of principals for these regulatory purposes and at the same time to ensure appropriate accountability for these matters within law practices would be to:**

- a) enable and indeed require law firms like all other law practices to nominate one or more of their partners to be the firm's supervising legal practitioner(s);<sup>10</sup> and**
- b) delete the word 'principal' in sections 3.2.3 and 3.2.4 and replace it with the words 'supervising legal practitioner', and hence remove responsibility under section 3.2.3 and liability under section 3.2.4 from partners other than the partners the firm nominates to be its supervising legal practitioner(s).**

23. That solution would serve other useful purposes also. Part 5.2 of the draft Law allows complaints to be made about the conduct of either a lawyer or a law practice, for example, and Part 5.4 allows both lawyers and law practices to be subject to findings of

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<sup>10</sup> Section 3.7.4 of Part 3, Division 1 of the draft Law requires incorporated legal practices and unincorporated legal practices (which are defined to exclude law firms) to have at least one supervising legal practitioner and to notify the Board of the names and other particulars of each person who is or ceases to be a supervising legal practitioner of the law practice. It provides that a supervising legal practitioner is a legal practitioner who holds a practising certificate authorising him or her to engage in legal practice as a principal and in the case of a company is a validly appointed director of the company and in the case of a partnership is a partner in the partnership. There is no reason I can think of why section 3.7.4 and indeed all Part 3, Division 1 should not apply to all law practices.

Notably, while section 3.7.4 requires a supervising legal practitioner of a law practice to be a principal of the law practice, the reverse is not the case – it does not require all a law practice's principals to be supervising legal practitioners, just one of them at least and maybe more. If as I am suggesting that schema were to apply to all law practices it would allow law firms to nominate just their managing partner to be their supervising legal practitioner if that is their wish, or their managing partner and branch office managers and/ or practice group leaders if that is their wish or some other arrangement – it would be up to them to decide the arrangement that best suit the circumstances of their particular practice.

unsatisfactory professional conduct or professional misconduct. Yet section 5.2.6 which defines disciplinary matters and section 5.3.5 which deals with the determination of consumer matters by the Ombudsman, section 5.4.5 which deals with the determination of unsatisfactory professional conduct by the Ombudsman and section 5.4.9 which deals with the determination by disciplinary tribunals of professional misconduct refer only to the conduct of lawyers. There is no clear mechanism in those provisions for dealing with complaints about law practices or holding law practices to account for misconduct. The amendments I am suggesting would create a framework for resolving those difficulties by assigning accountability to, and limiting the liability of a law practice's principals to the principals the law practice nominates to be its supervising legal practitioners.

24. Alternatively but less satisfactorily in my view, sections 3.2.3 and 3.2.4 could be amended to enable law practices to limit their principals' liability in relation to their management and supervisory responsibilities in much the same way that section 4.3.18 allows them to limit their principals' liability in relation to costs. That section requires a law practice to nominate a 'responsible principal' for a bill of costs and deems each principal of the law practice to be a responsible principal for the bill only if the practice fails to nominate a responsible principal for a bill.

#### **MANAGEMENT SYSTEM DIRECTIONS**

25. Section 4.6.2 does not as the opponents of these reforms suggest authorise the Ombudsman (or his or her local delegates) to require a law practice to implement any particular management system, only to require a law practice 'to ensure that appropriate management systems are implemented and maintained to enable the provision of legal services... in accordance with the Law, the national Rules and the applicable professional obligations.'
26. The Ombudsman's power to give a management system direction under section 4.6.2 is fully consistent with the fundamental premise underlying principles or outcomes-based regulation, viz., that 'firms and their managements are better placed than regulators to determine what processes and actions are required within their business to achieve a given regulatory objective. So regulators, instead of focussing on prescribing the processes or actions firms must take, should step back and define the outcomes they



require firms to achieve. Firms and their managements will then be free to find the most efficient way of achieving the outcome required.’<sup>11</sup>

27. Notably those of us who’ve been responsible for administering the compliance auditing regime that applies currently only to incorporated legal practices (and that the draft Law extends to all law practices, incorporated or otherwise) have always seen it to be a form of principles-based regulation, and have always left incorporated legal practices free to decide the management systems that best fit the circumstances of their particular practice.
28. About 1300 New South Wales incorporated legal practices have completed compliance audits in the form of self-assessment audits since compliance audits were first conducted there in 2004, and another 200 plus in Queensland since the regime commenced here in 2007.<sup>12</sup> I have asked another 65 incorporated legal practices in Queensland to complete a short, sharp on-line ‘ethics check’ survey as a form of compliance audit (more of this later) and, additionally, my counterpart in New South Wales and I between us have initiated another dozen or so more comprehensive and necessarily more intrusive follow-up audits of law practices we have assessed to be at significant risk of non-compliance.
29. Not one of those 1600 or so firms will say we as regulators have imposed a particular management system upon them, or required a particular system to be implemented.

#### **FRAMING THE COMPLIANCE AUDIT POWER**

30. Current legislation provides that the relevant regulatory authority ‘may conduct an audit [a compliance audit] of an incorporated legal practice about...’.<sup>13</sup> Section 4.6.1 of the draft Law authorises the Ombudsman to conduct a compliance audit of any law practice, incorporated or otherwise, ‘if the Ombudsman considers it necessary to do so.’ Those additional words have been inserted presumably to limit the Ombudsman’s discretion to

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<sup>11</sup> Julia Black, Martin Hopper and Christa Band, *Making a Success of Principles-Based Regulation*, Law and Financial Markets Review, Volume 1, No. 3, May 2007, p.192.

<sup>12</sup> 213 to 31 May 2010, to be exact.

<sup>13</sup> e.g. the Queensland *Legal Profession Act 2007*, at section 130.

audit law practices ‘unnecessarily’ and in that way to impose an unjustifiable and needless regulatory burden on the practices subject to audit.

31. No law practice should be subject to any unjustifiable and needless regulatory burden, but authorising the Ombudsman to conduct a compliance audit only ‘if the Ombudsman considers it necessary to do so’ serves only to muddy the water.
32. The problem is that those words are capable of multiple meanings and insufficiently precise to convey the legislative intent. They might be interpreted liberally, to authorise the Ombudsman to conduct a compliance audit of a law practice or audits of each of a class of law practice or indeed of all law practices if the Ombudsman believes that to be required or appropriate for the effective discharge of his or her functions under the Law. Equally they might be interpreted more narrowly, to authorise the Ombudsman to conduct a compliance audit of a law practice only if he or she has reasonable grounds to believe that the law practice is non-compliant.<sup>14</sup>
33. The narrow interpretation would rob the compliance audit power of its potential to be genuinely and pro-actively preventative – for reasons I set out in some detail under the following sub-heading - and the draft Law should be amended in my view to rule that interpretation out.
34. It would be wrong in any event to allow so crucial a power to be the subject of unnecessary argument, and quite inconsistent with the philosophical underpinnings of principles-based regulation which include reducing the scope for sterile debate about forms of words and promoting instead meaningful debate about the fundamental purposes the regulatory framework is seeking to achieve. The Law should make its purposes plain.
- 35. The draft Law should clearly state the outcomes it is seeking to achieve, consistent with the thrust of principles-based regulation, and be amended to delete the words ‘if**

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<sup>14</sup> The Chairman of the Large Law Firm Group is quoted in the Financial Review of 4 June 2010, for example, as saying that ‘the Ombudsman should not be able to conduct compliance audits or give management directions without cause.’ I agree with him in relation to management directions but for the reasons I go on to describe not compliance audits.

the Ombudsman considers it necessary to do so' from section 4.6.1 and to constrain the exercise of the Ombudsman's discretion to conduct a compliance audit by:

- a) including a new section after section 4.6.1 to the effect that the Ombudsman must conduct an audit in such a way as to keep the compliance cost to a law practice subject to audit proportionate to the value of the information that is sought to be obtained<sup>15</sup>; and by
- b) amending section 1.1.3 which describes the objectives the Law seeks to achieve<sup>16</sup> by 'beefing up' the objective to 'assist and facilitate the legal profession to comply with regulatory responsibilities' and 'beefing up' the principles which appear to be intended to govern the exercise of any of the powers and discretions given to any of the regulatory bodies established under the Law<sup>17</sup> to require, for example, that they be exercised in ways that are accountable, consistent, transparent, proportionate and targeted to risk.<sup>18</sup>

35. Requiring the Ombudsman to comply with a statutory principle or principles to that effect would achieve the outcome sought to be achieved and at the same time send a useful message to lawyers and law practices - that the Ombudsman is bound by and can be held to account against regulatory principles just like them.

36. I note in this regard that section 8.3.6 of the draft Law gives the National Legal Services Board a specific function 'to monitor and review the exercise of the functions of the

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<sup>15</sup> This is one of the best practice principles enunciated by the Australian Administrative Review Council in its report entitled *Government Agency Coercive Information Gathering Powers*, 2008.

<sup>16</sup> Section 1.1.3 of the draft Law describes the Law's objectives to include 'enhancing the protection of clients of law practices and the protection of the public more generally' and 'promoting the efficient and effective regulation of the legal profession [in a way] which is targeted, proportionate and assists and facilitates the legal profession to comply with regulatory responsibilities'.

<sup>17</sup> The (UK) *Legal Services Act 2007*, for example, sets out at section 1 its 'regulatory objectives' including 'protecting and promoting the public interest,... protecting and promoting the interests of consumers... and promoting and maintaining adherence to the professional principles' - which are effectively a high level summary of what we would call conduct rules - and then provides at section 116 that the Office for Legal Complaints 'must, so far as is reasonably practicable, act in a way which is compatible with the regulatory objectives and which it considers most appropriate for the purpose of meeting those objectives.' Similarly (although less comprehensively), Queensland's *Legal Profession Act 2007* includes at section 19 a statement of the 'grounds that are reasonable in the circumstances.'

<sup>18</sup> These are the five principles of effective regulation that have been adopted in England and Wales. The Hunt Report canvasses these principles at p.21 and then in detail at pp.47-86.

Ombudsman'. We should expect the Board to hold the Ombudsman to account if he or she over-reaches.

### **PROTECTING THE BABY AGAINST BEING THROWN OUT WITH THE BATHWATER**

37. The narrow interpretation of the words 'if the Ombudsman considers it necessary to do so' in section 4.6.1 would rob the compliance audit power of its potential to be genuinely and pro-actively preventative. We will hardly as Lord Hunts puts it 'move from a reactive approach - moving in after problems have occurred - to an active mindset, where the roots of potential problems are identified so far as possible in advance and failures often averted' if the Ombudsman is authorised to conduct a compliance audit of a law practice only if he or she has reasonable grounds to believe that the law practice is non-compliant. That requires a problem or problems to have already occurred, or at least sufficient smoke to suspect a fire.

38. Furthermore the narrow interpretation would prevent the Ombudsman requiring law practices to conduct compliance audits of the kind that my counterpart in New South Wales and I have required of incorporated legal practices as of course over recent years on or soon after their commencement<sup>19</sup> and that have achieved what Lord Hunt describes as 'extraordinary cultural change'.<sup>20</sup>

39. Dr Christine Parker of Melbourne University Law School initiated and conducted research in 2008 with the cooperation of my counterpart Commissioner in New South Wales to test the hypothesis that requiring incorporated legal practices to keep and implement appropriate management systems and to undertake self-assessment audits results in improved standards of conduct in those firms. She reviewed the evidence in relation to all 631 incorporated legal practices that had completed a self-assessment audit at that time and found 'compelling evidence' that it did just that.<sup>21</sup> She found that

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<sup>19</sup> I have mentioned already that 1300 or so incorporated legal practices in New South Wales have completed self-assessment audits since the compliance auditing regime first commenced there in 2004 and more than 200 in Queensland since 2007 – see paragraph 23, above.

<sup>20</sup> The Hunt Report, at p.75.

<sup>21</sup> See C. Parker, T. Gordon and S. Mark, *Research Report: Assessing the Impact of Management-Based Regulation on NSW Incorporated Legal Practices*. The report is accessible on the websites of both the New South Wales and Queensland Legal Services Commissions - [www.lawlink.nsw.gov.au/olsc](http://www.lawlink.nsw.gov.au/olsc) and

the complaint rate per practitioner per year for incorporated legal practices after self-assessment is one third the complaint rate before self-assessment - *one-third* - and that this huge drop is 'statistically significant at the highest level'. She also found that the complaint rate per practitioner per year for incorporated legal practices that had completed self-assessment audits is one third - *one third* - the complaint rate for traditionally structured firms.

40. That is a great result for consumers, obviously, but also for the law practices concerned and for the reputation of the legal profession more generally. It is too early to replicate the New South Wales research in Queensland but we routinely survey legal practitioner directors after they have completed their firm's self-assessment audit and we can say that two-thirds of them report that the process prompted them to make identifiable improvements to their management systems and supervisory arrangements. That is a great result also, both for those law practices and their clients.
41. Dr Parker's research tells us not only that self-assessment audits serve a significant preventative purpose but also that it is wrong to conceive of the compliance costs to law practices simply as additional costs that sit on top of a practice's pre-existing regulatory burden. There are trade-offs. We know the compliance costs inherent in responding to complaints, and indeed respondents remind us of them often. Dr Parker's research tells us and so does our own anecdotal evidence that the compliance costs of the auditing regime are typically off-set by reduced compliance costs in responding to complaints, and significantly so, to the point even of not only not adding to but reducing the regulatory burden overall.
42. The argument that a compliance auditing regime will impose additional and unnecessary compliance costs is something of a beat up in any event. Why is it, for example, if the regulatory regime that applies to incorporated legal practices imposes such an unreasonable regulatory burden, especially on small firms, that so many firms and most of them small firms are lining up to incorporate?

43. Law practices have been allowed to incorporate in Queensland only since 1 July 2007 and they are incorporating in steadily increasing numbers. There were 97 incorporated legal practices at 30 June 2008, or 7% of all Queensland law practices; there were 171 or 12% of all law practices at 30 June 2009; and there were 267 or 18% of all Queensland law practices at 31 May 2010. They're mostly small firms - about a third of them are sole practitioner firms and another third employ only two or three practitioners – and more than two thirds of them practise in suburban Brisbane or in regional and rural cities and towns. Much the same is true in New South Wales.
44. And why is it, if the regulatory regime that applies to incorporated legal practices imposes such an unreasonable regulatory burden, that incorporated legal practices aren't complaining? We have had only one complaint in Queensland so far, after more than 200 self-assessment audits, but a lot of positive feedback, most of it spontaneous and entirely unsolicited. Here is one recent example, notably from a sole practitioner in a rural town: 'I found the exercise, while time consuming, to be most useful, in particular with respect to identifying some areas of my practice that need improvement.' That is typical.
45. The narrow construction of the words 'if the Ombudsman considers it necessary to do so' would prevent the Ombudsman requiring law practices to conduct not only self-assessment audits but another innovative form of compliance audit that we have tried with considerable early success in Queensland.
46. We are developing what we hope will be a varied and ever expanding suite of short, sharp on-line surveys (or ethics checks for law practices) which allow law practices to audit their ethical infrastructures. Individual lawyers are most welcome to complete the surveys but they work best when everyone at a firm does them, or in larger firms at least a good sample of each of the different levels and classifications of their people. That allows firms to test how their policies and systems are perceived and implemented 'down the line' and the values and attitudes their employees bring to their work. We have developed three such surveys to date - a workplace culture check, a complaints

management systems check, and a billing practices check for medium to large law practices – and are preparing another, on supervision practices.<sup>22</sup>

47. We required 35 incorporated legal practices to complete the complaints management systems check as a form of compliance audit during May and June 2009, and another 30 in April 2010. Notably, we invited 15 law practices to complete the workplace culture check on a purely voluntary basis in February and March 2009 and all 15 firms accepted. A total of 502 people completed the survey.<sup>23</sup> Another 17 firms and 116 people have completed the survey since, entirely at their own initiative. Similarly we invited all 172 Queensland law practices that employ 7 or more practising certificate holders to complete the billing practices survey in April and May 2010, on a purely voluntary basis once again, and 40 of them and 517 people took part.<sup>24</sup> We have posted the de-identified results of all three surveys on the Commission's website and they make very interesting reading indeed.

48. Those are extraordinary take-up rates for entirely voluntary surveys and invite the obvious question: why is it, if surveys and potentially compliance audits of these innovative kinds impose such an unreasonable regulatory burden, that so many firms and so many of their people are so keen to take part?

49. We routinely ask both the individual respondents and the principals of the participating law practices for their feedback after they've completed a survey and the response has been profoundly encouraging. We have published their feedback on the website also, exactly as they gave it to us, entirely in their own words.<sup>25</sup> They tell us, cutting a longer story short, that participating in the surveys prompted the individuals who took part to think about the ethical issues canvassed in the survey questions, generated both

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<sup>22</sup> The surveys are readily accessible on the Commission's website ([www.lsc.qld.gov.au](http://www.lsc.qld.gov.au)). Simply click on the Ethics Checks for Law Firms box on the home page and follow the prompts from there.

<sup>23</sup> 294 of those 502 people identified themselves as solicitors, a figure which represents just short of 4% of all Queensland solicitors.

<sup>24</sup> 371 of those 517 people identified themselves as solicitors, a figure which represents just short of 5% of all Queensland solicitors.

<sup>25</sup> Go to the Ethics Checks for Law Firms box on the Commission's home page and follow the prompts from there.

spontaneous and organised discussion within their practices and lead them to make some useful changes to ‘the ways we do things around here.’

50. Large law firms already conduct internal ‘workplace culture checks’ and engagement surveys and the like but authorising the Ombudsman to conduct compliance audits will enable smaller and less sophisticated firms to undertake and benefit from a similar ‘self-assessment’ process, and a process that has no commercial motivation but is directed solely to testing their ethical infrastructure.
51. Obviously it is preferable if law practices volunteer to review the effectiveness and efficiency of their management systems and supervisory arrangements in these and like ways or take equivalent steps of their own, but the Ombudsman should be authorised as a last resort to compel those law practices which don’t – the very law practices most likely to be non-compliant. It would make a nonsense of regulation to reduce regulators to preaching to the converted.
52. So, in summary, the words ‘if the Ombudsman considers it necessary to do so’ in section 4.6.1 serve no useful purpose. They appear to be intended to offer law practices some reassurance that the Ombudsman is precluded from conducting compliance audits needlessly and unjustifiably but they lend themselves to be interpreted in such a way as to preclude the Ombudsman from conducting compliance audits of kinds which are neither needless nor unjustifiable but have achieved ‘extraordinary cultural change’ to the benefit of consumers and law practices alike. They risk throwing out the baby with the bathwater.
53. I noted earlier (at paragraph 28) that my counterpart in New South Wales and I have conducted almost 1600 compliance audits between us since 2004 comprising 1500 self-assessment audits and another 68 on-line ‘ethics checks’ but only a dozen or so comprehensive and necessarily more intrusive follow-up audits of a more traditional kind. That is as it should be. We should always use our best efforts as regulators to target the law practices most at risk of non-compliance with their professional and service obligations, and we should never impose any needless regulatory burden on low risk practices but direct our regulatory resource to where it is most needed and can have the most beneficial impact in the public interest.



54. But the words ‘if the Ombudsman considers it necessary to do so’ do nothing to secure those purposes and worse still are self-defeating: self-assessment audits and on-line ethics checks are two of the key tools the Ombudsman will require to identify the law practices most at risk of non-compliance and to target his or her more intrusive interventions accordingly. They are handy risk indicators and risk indicators of a unique and particularly valuable kind – a kind that gives law practices a window on the adequacy of their management systems and supervisory arrangements at the same time as and even before the regulator, and an opportunity to pull the rug out from under any grounds the regulator might otherwise have to come knocking.