

## NATIONAL LEGAL PROFESSION REFORM AND THE REGULATION OF THE FUTURE

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I have two speaking roles today – one as a member of the panel discussion about national legal profession reform in the opening plenary session and one as a co-presenter in a later session in the ethics stream under the heading *The Regulation of the Future: Principles, Prevention and Proportionality*. I have prepared just the one set of notes and will cut and paste my comments to suit.

It will be useful to know by way of background that the Council of Australian Governments (COAG) decided in February last year that there should be 'substantive and enduring uniformity' in the regulation of the legal profession across Australia. The Hon Robert McClelland, the Attorney-General, established a Taskforce accordingly and charged it to report to the COAG meeting in April this year with draft nationally uniform legislation and recommendations as to the regulatory structures that will be required to implement that legislation. The Taskforce released a series of papers late last year which are all publicly available on a dedicated website - [www.ag.gov.au/legalprofession](http://www.ag.gov.au/legalprofession) - which includes relevant background (including historical) information.

The Attorney also established a Consultative Group chaired by Professor the Hon Michael Lavarch to assist and advise the Taskforce. I am one of two other people appointed to that group from Queensland, along with Noela L'Estrange, the Chief Executive Officer of the Queensland Law Society (the QLS).

We expected until recently that the Taskforce would release a first draft of a proposed Bill well before this Symposium and accordingly that we would be able to comment about not only the bigger picture issues as we see them but specifics. We're told now that a

consultation draft will become available only after the April COAG meeting<sup>1</sup> and accordingly my comments will be directed to the proposals as outlined in the discussion papers. There is a lot one might say and so I will confine myself to a 'Cook's Tour' of some of the issues relating to the bigger picture questions and the areas of regulation most directly relevant to my work – promoting, monitoring and enforcing appropriate standards of conduct. I will talk to the following headings:

- Broad regulatory purposes p.2
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### **Broad regulatory purposes**

The Taskforce has had responses from members of the Consultative Group and others to the various discussion papers it published late last year, some of which have been aired in the media, but strangely neither the discussion papers produced by the Taskforce nor the bulk of the responses to those papers make any significant reference to the fundamental purposes the regulatory regime is or should be intended to achieve.

I say 'strangely' because it seems obvious to me that we can gauge the appropriateness of the proposed regulatory regime and its likely effectiveness and efficiency only by reference to such purposes.

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<sup>1</sup> No one is complaining about this so far as I'm aware. It will allow the Taskforce more time to prepare a more considered Bill and allow the Consultative Group and others more time to comment on the Bill than was previously expected.

Presumably they include creating and supporting a truly national legal profession. That is after all the whole purpose of proposing nationally uniform law. Presumably they include various purposes that will have more relevance to some aspects of the proposed regulatory regime than others, most relevantly given my role in the scheme of things purposes such as promoting, monitoring and enforcing high standards of conduct in the delivery of legal services and promoting and protecting the interests of users of legal services including by providing an effective means of redress for complaints.

Presumably and most fundamentally of all they include promoting and protecting public confidence in the legal system, the administration of justice and the rule of law. That seems to me to be the yardstick by which the proposed regime as a whole and each of its constituent parts should be measured, including and not least the parts dealing with the make up and manner of appointment of members of the proposed National Legal Services Board and role of the professional bodies in monitoring and enforcing standards of conduct. I'll return to those matters shortly.

It seems to me that the Bill should also include a clear statement or statements of principle guiding the exercise of all and any of the statutory functions and powers under the Bill - principles such as the Five Principles of Effective Regulation that have been adopted in the UK which require the exercise of regulatory powers and functions to be accountable, consistent, transparent, proportionate and targeted to risk.<sup>2</sup>

Giving statutory effect to principles of that sort should go at least some way to addressing the oft-stated concerns about over-regulation and would send a good message to lawyers and law firms – that their regulators are bound by and can be held to account against regulatory principles in just the same ways as them.

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<sup>2</sup> Lord Hunt discusses these principles in detail in the report of his recent and comprehensive review of the regulation of the legal profession in England and Wales headed *The Hunt Review of the Regulation of Legal Services*, October 2009 (the Hunt Report). The Australian Administrative Review Council enunciated a similar set of best practice principles in its recent report under the title *Government Agency Coercive Information Gathering Powers*. I note by the way that I will refer to the Hunt Report more than a few times in these notes. It is a significant document.

## The regulatory architecture

The Taskforce proposes creating two new regulatory bodies at a national level:<sup>3</sup>

- a National Legal Services Board (the Board) which will determine national standards for the regulation of the delivery of legal services and either ‘bear responsibility for, or have oversight of’ the related regulatory functions which it ‘may delegate to local bodies’; and
- a National Legal Services Ombudsman (the Ombudsman) who will ‘administer and oversee a national complaints-handling scheme’ but have powers to delegate complaint-handling functions to local bodies and to ‘monitor their work to ensure that they are exercising their powers appropriately’.

No one to my knowledge opposes the creation of a national Board but there are however significant differences of opinion (which have been aired in the media) about its make-up and manner of appointment. I will return to that matter shortly. There is opposition to the proposal to create an Ombudsman. The subset of members of the Consultative Group comprising affiliates of the professional bodies (let’s call them ‘the spokespeople for the professional bodies’) see no need for such a body. Nor is there is consensus in either case about the powers the proposed national bodies should have, if any, over their local ‘delegates’.

The contested issues in relation to powers are of course fundamental. I don’t propose to wade into that debate other than to say that it strikes me as fanciful to imagine that we will achieve ‘substantive and enduring uniformity’ in the regulation of the legal profession across Australia simply by having uniform laws and uniform national standards. That might not require a national body to have ‘line management’ powers over local ‘delegates’ traditionally conceived but it will require a national body to have a specific responsibility to nurture, monitor and sustain a consistency of implementation across jurisdictions, and sufficient power at the very least to bring people together to that end and to influence the outcome.

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<sup>3</sup> See the discussion paper *The Regulatory Framework: A National Legal Profession*, 16 September 2009. This and the Taskforce’s other discussion papers, and the various submissions made in response to those papers by members of the Consultative Group and others, are all available on the national legal profession reform website, at < [www.ag.gov.au/legalprofession](http://www.ag.gov.au/legalprofession) > .

Those matters aside:

- the Attorney-General, the Hon Robert McClelland said in a recent speech that, while the Taskforce is still considering the issue, it 'has developed a proposal that **the Board** will constitute up to seven members appointed by the Standing Committee of Attorneys-General (SCAG) with the Law Council of Australia and the Council of Chief Justices each having a nominee appointed. There would also be Board members with consumer protection and regulatory experience.'<sup>4</sup>

Some commentators argue that this proposal is unacceptable because it compromises the independence of the profession. I am not so sure exactly what they mean by the independence of the profession in this context or why it is so fundamental.

Obviously the independence of the judiciary is an absolutely fundamental principle of our system of government but I can't see how the make-up and manner of appointment of the proposed Board offends that particular principle. No one has proposed for example any changes much less diminution of the roles of the state and territory Supreme Courts in the admissions process or as the ultimate arbiters in matters of professional discipline.

The independence of the profession is a wider notion and seems to refer to the self-regulation of the profession. Certainly the proposal offends that principle but so does the current regulatory architecture. Most of the states and territories including Queensland already have co-regulatory regimes where the courts and the professional bodies share regulatory responsibilities with a variety of statutory regulators appointed by the executive branch of government.

And to my mind that is how it should be, as a matter of principle. I mentioned earlier my belief that the fundamental purposes of the regulatory regime should include promoting and protecting public confidence in the legal system, the administration of justice and the rule of law. That principle requires to my mind a strong and confident legal

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<sup>4</sup> The Hon Robert McClelland, address to the Law Society of Western Australia Summer School, 26 February 2010.

profession that is deeply engaged in the regulation of its affairs and most crucially in setting its own professional standards. It follows that the profession and its representative bodies should be significantly represented on the Board.

Equally however the principle rules out to my mind any suggestion that the Board should be comprised solely of lawyers or solely of people appointed or nominated by their professional bodies. It requires that the Board includes at least a significant minority of non-lawyers who between them have experience in consumer protection and in corporate and/or professional regulation more broadly and who can legitimately claim to represent both the interests of the users of legal services and the public interest.

I absolutely agree with the Attorney when he says that ‘such representation will enrich deliberation and show that the national leadership of the profession is genuinely mindful and respectful of the interests of those whom the legal profession serves.’<sup>5</sup>

It’s as well to remember in this context, as Lord Hunt points out in his recent and comprehensive review of arrangements for the regulation of the legal profession in England and Wales (the Hunt Report), that ‘the law - however defined, as the rule of law, the independence of the sector, the provision of services, or the integrity of the appointments process - does not belong to legal practitioners alone, nor even to those of us who avail themselves of legal services. The law belongs to all of us and also to none of us.’<sup>6</sup>

- the proposed **Ombudsman** should in my view be re-badged as the National Legal Services Commissioner and have a significantly broader role. Its role already exceeds the role traditionally associated with Ombudsmen and to my mind should become even more un-Ombudsman like: it should be responsible not only for dealing with complaints but also for trust account investigations and compliance audits. My argument is this:
  - the regulation of the future is going to put a much greater emphasis on prevention than simply dealing with complaints ‘after the fact’. The Taskforce has adopted a

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<sup>5</sup> ibid

<sup>6</sup> The Hunt Report, at p.26.

principles-based approach to regulation and that approach takes us inevitably and inexorably in that direction;<sup>7</sup>

- furthermore the Taskforce appears to have some sympathy for the view that we should supplement our systems for dealing with complaints with regulatory tools that are explicitly preventative, by putting the focus on law firms as much as individual lawyers and by requiring them to keep and implement appropriate management systems and supervisory arrangements;<sup>8</sup>
- the more we focus on prevention, the more we need the skills and the ways and means to identify the lawyers and law firms most at risk of non-compliance, to enable us to target our interventions accordingly;
- hence we should consolidate responsibility for receiving and dealing with complaints, for conducting compliance audits and for conducting trust account investigations in the one regulatory body. The three functions are complementary - they are all investigative and information gathering functions and are all directed to the same ultimate purpose of promoting, monitoring and enforcing appropriate standards of conduct. The information and perspective gained in the exercise of any one of them should be readily available to inform the exercise of any of the others, and in particular to help us to identify the law firms most likely to put consumers and the public at risk and to direct our regulatory resources there.<sup>9</sup>

It will be imperative whatever the Ombudsman's / Commissioner's role that the Board consults with and has regard for his or her views. The information and perspective the Ombudsman / Commissioner will be uniquely well placed to bring to the table will be an essential ingredient in the Board's standards-setting mix.

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<sup>7</sup> See the discussion under the next sub-heading, *Principles-based regulation*.

<sup>8</sup> See the discussion under the later sub-heading *Business structures and law firm regulation*.

<sup>9</sup> Lord Hunt notes at p.113 of his report that one common, practical challenge faced by regulators is that of 'using intelligence well, to improve risk assessment and the allocation of regulatory effort.' He is right, and we are unlikely to use intelligence well while we retain a multiplicity of regulatory bodies each of us dealing with discrete parts of the picture and each of us gathering information to ourselves that has a wider utility.

## Principles-based regulation

Lawyers and law firms often complain of being over-regulated. The spokespeople for the professional bodies claim repeatedly for example in their responses to the discussion papers produced by the Taskforce that ‘the legal profession is already the most heavily regulated profession if not industry in Australia’. They vehemently oppose reforms they believe will impose an additional regulatory burden and urge that the existing burden be lessened.

I am not so sure that lawyers are as over-regulated as many of them claim to be<sup>10</sup> but this much at least is true: the laws that regulate the legal profession should not only be made nationally uniform but simplified. Happily that is one key element of the reform agenda. The Attorney-General hit the nail on the head when he noted that there are 4,700 pages of legislation, regulations and rules across the country. Our local *Legal Profession Act* alone extends to 580 pages and the *Legal Profession Regulation* another 60. He said ‘this complexity... creates prescriptive and onerous over-regulation... Although it is still being refined, it is anticipated that the National Legal Profession Bill will be less than 200 pages. Underpinning this efficiency is a focus on outcomes based legislation – that is, focussing on the outcomes to be achieved rather than prescribing the means by which they should be achieved’.<sup>11</sup>

The focus on outcomes is achieved by setting standards for how lawyers and law firms must conduct themselves by ‘shifting the emphasis away from... processes towards the outcomes we seek to achieve’ and by ‘moving away from reliance on detailed, prescriptive rules and relying more on high-level, broadly stated rules or principles.’<sup>12</sup>

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<sup>10</sup> No one is saying for example that there shouldn’t be an admissions process or a practising certificate regime or compulsory professional development or mandatory professional indemnity insurance and the like. Nor is anyone arguing that lawyers should have any lesser an ethical ‘burden’ – and it would be wrong to conceive a lawyer’s ethical obligations as a regulatory burden in any event. The regulatory burden comes not with lawyers having to comply with their ethical obligations - that’s just doing what they should be doing - but demonstrating their compliance. And, as I’ll argue later, our current regulatory arrangements for monitoring and enforcing standards of conduct hardly over-regulate but leave whole classes of lawyers and law firms only nominally subject to regulatory scrutiny.

<sup>11</sup> The Hon Robert McClelland, *op cit* at p.10.

<sup>12</sup> My brief description of principles-based regulation draws heavily on 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. The passages quoted here appear at pp.191-193. Black et al cite numerous useful references. See also the Hunt Report especially at pp.36-39; the Financial Services

Principles (or outcomes or performance) based regulation is founded on principles that:

- are drafted at a high level of generality, with the intention that they should be overarching requirements that can be applied flexibly;
- contain terms that are qualitative, not quantitative, and usually evaluative terms (terms like 'fair', 'reasonable' and 'suitable' as opposed to 'within two business days');
- are purposive, by expressing the reason behind the principle;
- have a very broad application to a diverse range of circumstances; and
- specify the outcome required but leave it to the discretion of the regulated entities (in this case lawyers and law firms) to determine how the outcome should be achieved.

The Taskforce clearly intends that the uniform national laws will reflect this kind of principles-based regulation. Its various discussion papers include numerous examples of the kinds of principles it has in mind including, for example:

- 'legal practitioners and law practices may only charge fair and reasonable costs';<sup>13</sup>
- 'legal costs should be proportionate to the complexity or importance of the issues and amount in dispute';<sup>14</sup>
- 'legal practitioners and law practices must take reasonable endeavours to act promptly and to minimise delay in the legal process and must not otherwise work in a way that unnecessarily increases costs in a matter';<sup>15</sup> and

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Authority, *Principles-based regulation: Focussing on the outcomes that matter*, April 2007; the Solicitors Regulation Authority for England and Wales (the SRA), *Achieving the Right Outcomes*, January 2010; and a draft discussion paper headed *Principles-based Regulation* by my counterpart in New South Wales, Steve Mark.

<sup>13</sup> The Legal Costs paper, 4 November 2009, at p.3

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

- 'regardless of the type of business structure, each principal of a law practice is responsible for ensuring that all reasonable action is taken to ensure that:
  - all Australian legal practitioners within the law practice comply with their obligations under the National Law and National Rules and their professional obligations; and
  - the legal services provided by the law practice are provided in accordance with the National Law, the National Rules and the professional obligations of an Australian legal practitioner.'<sup>16</sup>

Principles-based regulation has a compelling logic to it. It 'is based on the idea that [law] firms and their managements are better placed than regulators to determine what processes and actions are required within their business to achieve a given regulatory objective. So regulators, instead of focussing on prescribing the processes or actions firms must take, should step back and define the outcomes they require firms to achieve. Firms and their managements will then be free to find the most efficient way of achieving the outcome required.'<sup>17</sup>

This approach has some potentially significant advantages:

- it will shorten and simplify the legislation and related regulations and rules and reduce its complexity, and should go a long way to ameliorate the profession's concerns about over-regulation;
- it will give lawyers and law firms flexibility to design and implement the processes and systems that will work best for them in the circumstances of their particular practice, and is hence more likely to produce behaviours that meet the regulatory objectives;<sup>18</sup>

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<sup>16</sup> The Business Structures paper, 25 November 2009 – at p.3 (principle 4).

<sup>17</sup> Black et al, p.192

<sup>18</sup> The SRA notes that 'it should be clear that [principles-based regulation] is not in any sense lowering the standards required of [lawyers and law firms], and therefore the level of consumer protection. On the contrary, by focusing on core principles and outcomes [it is] encouraging firms to consider how that standard can best be provided to their client base, given their business model. In particular, this

- it will promote substantive compliance with the underlying purposes of the regulatory principles by requiring lawyers and law firms to take responsibility for compliance and to think through how best to comply rather than to mechanically ‘tick the boxes’;
- it will limit the scope for lawyers and law firms to comply with the letter but not the spirit of the ‘rules’ or to find ways around them by means of ‘creative’ compliance with forms of words.<sup>19</sup>

I strongly support this approach and so, too, my counterpart statutory regulators interstate, but none of us – not lawyers, not law firms, not regulators - should underestimate just how fundamentally it will change the regulatory culture. It is a radically different approach to regulation that will give us great opportunities but equally will confront us with significant challenges. I will mention just a few of them (and they are interrelated):

- principles-based regulation will generate new and different expectations about how lawyers engage with regulatory issues. It will give them much greater flexibility, but only by devolving significant responsibility to their law firms for interpreting and applying the regulatory ‘rules’.

It will require law firm principals to get involved and to accept responsibility for creating a ‘culture of compliance’ within their firms. It will require them to ensure that they have appropriate governance and supervisory systems and processes in place to interpret and apply the rules to their particular circumstances and to do so consistently across the practice and over time – or to coin a phrase, ‘to keep and implement appropriate management systems to enable the provision of legal services by the practice under the professional obligations of Australian legal practitioners.’

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allows firms to tailor their approach according to their clients’ needs. It should make regulation more effective.’ *Achieving the Right Outcomes*, *ibid.* at p.6.

<sup>19</sup> I am reminded of Sir Gerard Brennan’s remark, quoted in Stephen Parker and Charles Sampford, *Legal Ethics and Legal Practice*, Oxford, 1995, at p.176, that ‘if ethics were reduced to rules, a spiritless compliance would soon be replaced by skilful evasion.’ Similarly Lord Hunt quotes a legal academic telling him that ‘lawyers, being lawyers, can interpret rules and side step with skill those regulations they find to be difficult – that is what they are paid to do. Compliance in the legal profession offers unique challenges because lawyers are trained to find the holes in a system’ – the Hunt Report at pp.36-37.

- principles-based regulation is likely to cause many lawyers and law firms to feel a lack of certainty, and to feel that they don't know where they stand because they can't be sufficiently certain what the broadly stated principles actually require of them in practice and, crucially, whether the regulator will interpret them in the same way they do.

Of course the principles set out in legislation will be supported by guidance in the form of rules and no doubt over time further and less formally stated guidelines, but that will become problematic in itself and stands to defeat the whole purpose if:

- lawyers and law firms treat 'guidance' as binding as many of them undoubtedly will, as if it were a reformulation of the current prescriptive detail; and / or
- the guidance simply reintroduces prescriptive detail by the back door – and worse still if it does so in a way that avoids the checks and balances that typically apply to the promulgation of formal rules.

The fact is that principles-based regulation will work only if lawyers and law firms are confident that regulators will allow them the flexibility and 'space' to innovate and will respect good faith efforts on their part to interpret and apply the principles to their particular circumstances and to conduct themselves accordingly. Hence 'both regulators and regulated firms... need to exercise restraint; on the firms' part in asking for ever greater predictability, and on the regulators' part for trying to provide it.'<sup>20</sup>

- principles-based regulation is at a 'significant risk' of failing 'due to an inappropriate set of skills in both the [regulators] and the regulated firms and a relationship that is characterised by mistrust on both sides. A more principles-based regime will require a revolution in the relationship.'<sup>21</sup>

Lord Hunt cautions that 'reliance on principles implies the exercise of considerable judgement by both the regulator and the regulated community, and a broad acceptance of those judgements... This is difficult enough in spheres of activity that do not rely on the interpretation of words. It would be difficult - not to say impossible – for [regulators]

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<sup>20</sup> Black et al at p 202.

<sup>21</sup> Black et al at p.200.

to operate in the realm of judgement in the face of a continuous stream of challenges, judicial or otherwise.<sup>22</sup>

Principles-based regulation requires that regulators, lawyers and law firms have an open, on-going and constructive dialogue and develop mutual trust and shared understandings of the conduct the principles require. It requires agreed 'rules of engagement' in which:

- regulators, lawyers and law firms all 'move from a reactive approach - moving in after problems have occurred - to an active mindset, where the roots of potential problems are identified so far as possible in advance, and failures often averted';<sup>23</sup>
- lawyers and law firms adopt a policy of 'openness and engagement', and acknowledge and accept that 'there is a role for the regulator of leadership and guidance, and not just policing and punishing';<sup>24</sup> and
- regulators adopt 'a cooperative and educative approach' to monitoring and enforcing standards of conduct, 'particularly with firms that are well intentioned but either ill-informed or simply confused as to what the principles require'.<sup>25</sup>

I think the Commission can look Queensland lawyers and law firms in the eye and say that we've been at pains to model that kind of proactive and 'cooperative and educative approach' to regulation. I won't argue the case here but will refer to one key example only - our development and trialling of a series of innovative on-line surveys under the banner Ethics Checks for Law Firms. The Ethics Checks enable law firms to 'hold a mirror' to themselves and to reflect on the policies, procedures, values, attitudes, practices and behaviours explicitly stated or otherwise that help or hinder their people to deliver legal services to high ethical standards. We are encouraged by the positive feedback those

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<sup>22</sup> The Hunt Report, at p.38

<sup>23</sup> The Hunt report, at pp.77-78

<sup>24</sup> Black et al at pp.201-204 and the Hunt report at p77-78.

<sup>25</sup> Black et al, at p.195

surveys have attracted from the law firms which have trialled them, including but not only the first person feedback that is attached to these notes as Appendix 1.<sup>26</sup>

### **The role of professional bodies in compliance**

I mentioned earlier that the Taskforce is committed to a co-regulatory model of regulation and my own view that the profession should be deeply engaged in the regulation of its affairs and most crucially in setting its own professional standards. That does not mean however that the professional bodies should be involved in every aspect of the regulation of its affairs or have a controlling involvement. The question arises most sharply in relation to monitoring and enforcing standards of conduct.

Most of you in this room will recall that the legislative arrangements that applied in Queensland until 1 July 2004 required people who had complaints about solicitors to take their complaints to the Law Society. You will recall that public confidence in those arrangements was shattered in 2002-03 by adverse media publicity surrounding the Society's handling of complaints about the alleged conduct of Michael Baker of Baker Johnson Lawyers. The problem was that the process was seen to be insufficiently independent of the profession to give the public confidence that complaints would be dealt with thoroughly and impartially. It was characterised as 'Caesar judging Caesar'.

Not surprisingly in those circumstances the government seized the opportunity the promulgation of national model laws gave it to enact a *Legal Profession Act*<sup>27</sup> which among other things established a new system for dealing with complaints, and in particular an independent Legal Services Commission to bring a greater transparency and accountability to the process. The Act gives the Commissioner sole power to receive complaints and power either to deal with them itself or to refer them to the professional bodies for investigation but, crucially, it confines the role of the professional bodies in these circumstances to recommending to the Commissioner what further action should be taken, if any.

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<sup>26</sup> We've developed three Ethics Checks to date – a workplace culture check, a complaints management systems check, and a billing practices check for medium to large law firms. We have described them in detail on the Commission's website < [www.lsc.qld.gov.au](http://www.lsc.qld.gov.au) > together with feedback from the participating lawyers and law firms and the (de-identified) results.

<sup>27</sup> In fact there have been three separate Acts, in 2003, 2004 and 2007, each of which repealed the former, as the model laws moved towards finalisation.

The Act reserves for the Commissioner the power to make the ultimate decision and to initiate and prosecute disciplinary proceedings as appropriate. Thus the Act solves the Caesar judging Caesar problem but preserves a role for the professional bodies nonetheless.

The Taskforce proposes that this model be replicated nationally.<sup>28</sup> The spokespeople for the professional bodies oppose this limitation on the role of the professional bodies in dealing with complaints and urge that the model that applies in New South Wales be adopted instead. That is a model in which, as in Queensland, an independent Commissioner receives complaints and can refer them to the professional bodies for investigation but in which, unlike Queensland, the professional bodies then have powers to decide how the complaint should be dealt with and to initiate and prosecute disciplinary proceedings as appropriate.

Queensland has got this right and there should be no going back. The conflict of interest inherent in representative bodies determining complaints against their members is obvious and the public is rightly sceptical of their independence and impartiality.<sup>29</sup> It knows in its bones, as Paul Keating once reminded us, that a betting man always puts his money on self interest in a race with the public interest because, while it won't always win, self interest will never give up and will always be in there trying.<sup>30</sup>

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<sup>28</sup> The National Legal Services Ombudsman paper, 30 October 2009, at p.4

<sup>29</sup> Lord Hunt reflects on this issue at length. He notes that governments have created independent 'oversight' regulators 'expressly to address concerns... that self-regulatory bodies have been more responsive to practitioners' concerns than those of the general public... Thus professional autonomy has given way to accountability... An integral part of modern professionalism is the acceptance that we should be subject to public scrutiny... Lawyers can no longer rely on the public universally and unquestioningly endorsing a perception of them as a peculiarly selfless breed... motivated solely by a strong ethos of service, deserving of automatic respect and capable of being left to regulate their own affairs.... The era of unquestioning acceptance is over.' He recommends that the Law Society clearly separate its representative from its regulatory functions and restructures itself to create entirely separate and distinct 'brands' and governance arrangements – effectively two organisations – to exercise the two functions. See the Hunt Report at pp.26-32 and pp.47-52.

<sup>30</sup> I note by way of a recent illustration that the President of the Law Society said in last month's *Proctor* that 'we [that is to say, the Society and its leaders] have to continually challenge what we do and make sure that whatever we do satisfies the question 'is it in the member's interests?' If that test is applied, then we will always be successful' - *Proctor*, February 2010, at p 17. That is an entirely laudable objective for a representative body but problematic for a regulatory body that must be guided not by its member's or the profession's interests but the public interest. Representative bodies will of course claim with the best of good faith to swap hats when they're performing regulatory and not representative functions. Claims to this effect are inevitably met with scepticism at best and more often than not with downright disbelief.

The same argument applies equally in my view to all the regulatory functions that go to monitoring and enforcing standards of conduct in the delivery of legal services - not only the system for dealing with complaints but the systems for conducting trust account inspections and compliance audits of incorporated legal practices (and other law firms that might become subject to a compliance auditing regime).

The same conflicts and perceived conflicts of interest apply and, if the purposes of the regulatory regime include promoting and protecting public confidence in the legal system, the administration of justice and the rule of law, then these functions should all be performed independently of the representative bodies, or at least be subject to the kind of independent oversight that the Commission has in relation to complaints.

### **The system for dealing with complaints**

I have been arguing for years now that the *Legal Profession Act* gives us inadequate powers to deal with consumer disputes and minor disciplinary matters and to provide consumers with fair and timely redress when their lawyers have treated them poorly.

We have a complaints and disciplinary regime that has been focussed historically on dealing with unethical conduct of kinds that might warrant a significant disciplinary response. The reality however is that only relatively few complaints describe misconduct of those kinds. The bulk of complaints describe everyday mistakes, errors of judgement, stuff ups and poor standards of service rather than misconduct as that term is ordinarily understood, and very often conduct of kinds that in the context of an employment relationship would be seen in a performance management rather than a disciplinary context.

Most complaints in other words are complaints of kinds which, if they're well founded, are likely to be best dealt with not by disciplinary action but by persuading and if needs be requiring the lawyer to put things right – to apologise to the complainant, to re-do the work or otherwise to remedy their mistake, to waive some or all their fees, to compensate the complainant for any costs they have incurred consequent upon the lawyer's conduct or to take such other action as may be fair and reasonable in all the circumstances of the complaint. Such action might include making improvements to the firm's office systems and supervisory arrangements or undertaking some relevant further training and the like.

The problem is that the Act makes all but voluntary redress entirely contingent on a finding of unsatisfactory professional conduct – and, given that the purposes of the Act include providing consumers a means of redress for complaints, that makes the concept of unsatisfactory professional concept a very broad concept indeed. It turns everyday mistakes and poor standards of service into disciplinary matters, potentially, or requires us alternatively, if a complainant is owed redress and we can't persuade the lawyer to put things right, simply to look the other way.<sup>31</sup>

It is often the case that neither option is acceptable. This an unduly threatening and punitive regime from a lawyer's point of view and an unduly limited and ineffective means of redress from a complainant's.

The Taskforce has proposed reforms which resolve this problem. It proposes that 'complaints-handlers should have a broad array of powers and a wide discretion to deal with complaints as they see fit' including powers:

- in relation to complaints of a consumer nature, to make 'binding determinations when reasonably satisfied that the conduct the subject of the complaint was not fair and reasonable in all the circumstances', including by issuing a caution; requiring an apology; requiring the practitioner or law practice to re-do the work the subject of the complaint at no cost or to waive or reduce its fees; requiring the practitioner to undertake training or counselling or to be supervised and making a compensation order (up to an as yet unspecified cap); and
- in relation to complaints of a minor disciplinary nature, 'to make a determination that a practitioner has engaged in unsatisfactory professional conduct' and, in addition to making any of the orders the Ombudsman is empowered to make in relation to

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<sup>31</sup> I hasten to add that we've refused to look the other way in these circumstances. Rather, we ask lawyers subject to complaint to demonstrate that no public interest would be served by commencing disciplinary proceedings because they've done all they reasonably can to put things right. I have described the strategy in various papers on the Commission's website including a paper delivered at the BAQ 2006 Annual Conference and a paper under the title *Unsatisfactory Professional Conduct*. I think it is fair to say the strategy has worked to deliver fair outcomes for consumers and lawyers alike but it remains less than ideal.

complaints of a consumer nature, to reprimand the practitioner, impose a condition on his or her practising certificate or issue a fine.<sup>32</sup>

I am pleased to say that these proposals appear to have received broad in principle support. No one to my knowledge has opposed them.

There is an issue however in relation to the right of review. The Taskforce proposes that binding determinations made by the Ombudsman's / Commissioner's delegates in the states and territories in relation to complaints of a consumer nature be subject to review by the Ombudsman, and that their binding determinations of complaints of a minor disciplinary nature be subject to review by their local disciplinary body.<sup>33</sup>

The latter is clearly appropriate but the former is problematic and risks the Ombudsman / Commissioner becoming swamped by an unduly large review workload. It would be preferable for the Ombudsman / Commissioner to 'devolve' rather than delegate his or her powers to local complaints-handlers and to build-in appropriate rights of 'internal' review from there, including by clearly delineating exactly which of their decisions are potentially subject to review.

There is one further issue I want to raise before moving on from the system for dealing with complaints - the importance of reforming the system to give complaints-handlers a capacity to respond appropriately to complaints about practitioners who they have reason to believe may be psychologically unwell or just not coping.

Complaints-handlers have a responsibility to look after consumers whose interests may be compromised in these circumstances but a responsibility equally not to unnecessarily exacerbate the practitioners' difficulties. The power to impose conditions on practising certificates will be helpful in this regard but will be of only limited use in the absence of a 'last resort' power to require practitioners to undergo a health assessment.

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<sup>32</sup> The National Legal Services Ombudsman paper, 30 October 2009 at pp.6-9

<sup>33</sup> *ibid.* at p.11

### Business structures and law firm (as opposed to lawyer) regulation

I have argued for some time now that 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 would be to make all law firms subject to the same or similar regulatory oversight that now applies only to incorporated legal practices.<sup>34</sup>

That would require two key reforms:

- firstly, it would require putting not only legal practitioner directors of incorporated legal practices but the principals of all law firms under specific obligations over and above their professional obligations as Australian legal practitioners to keep and implement *appropriate management systems* - that is to say, management systems that are appropriate 'to enable the provision of legal services by the practice under the professional obligations of Australian legal practitioners.'<sup>35</sup>
- secondly, it would require regulators to be authorised to conduct *compliance audits* not only of incorporated legal practices but of all law firms, and to conduct a compliance audit 'whether or not a complaint has been made', about 'the compliance of the practice and of its officers and employees with the requirements of [the Act] or a regulation and the legal profession rules' and 'the management of the provision of legal services by the

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<sup>34</sup> I have argued the case in papers I gave at the Third International Legal Ethics Conference (ILEC3) in July 2008, at the QLS Symposium in March 2009 and at the Australian Legal Practice Management Association Annual Conference in August 2009, all of which are published on the Commission's website ([www.lsc.qld.gov.au](http://www.lsc.qld.gov.au)). An edited version of the paper my colleague, Scott McLean and I gave at ILEC3 was later published in the journal *Legal Ethics*, Vol. 11, Part 2, Winter 2008. I have also argued the case in several submissions to the National Legal Profession Reform Project Taskforce.

<sup>35</sup> The obligation to keep and implement appropriate management systems includes obligations to take 'all reasonable steps' to ensure that practitioners employed by the practice do not engage in unsatisfactory professional conduct or professional misconduct'; to take 'all reasonable action' to prevent unsatisfactory professional conduct or professional misconduct on the part of practitioners employed by the practice; and 'to deal with it' if it happens, including by taking 'appropriate remedial action'- *Legal Profession Act 2007*, ss.117-118. These sections replicate parts 2.7.9-2.7.10 of the National Model Law.

practice, including the supervision of the officers and employees providing the services'.<sup>36</sup>

The Taskforce has proposed reforms very much along these lines. It proposes 'a new system that applies consistent standards to law practices of all kinds', whatever their business structure, and proposes that the Bill includes the following (among other) principles (the first of which I mentioned earlier):

- 'regardless of the type of business structure, each principal of a law practice is responsible for ensuring that all reasonable action is taken to ensure that:
  - all Australian legal practitioners within the law practice comply with their obligations under the National Law and National Rules and their professional obligations; and
  - the legal services provided by the law practice are provided in accordance with the National Law, the National Rules and the professional obligations of an Australian legal practitioner;' and
- 'if the Board considers it necessary to do so, the Board may conduct an audit of the compliance of the law practice with the National Law or the National Rules, and the management of the provision of legal services by the practice'; and
- 'if the Board considers it necessary to do so, the Board may require a law practice to:
  - ensure that an appropriate management system is implemented and maintained to enable the provision of legal services by the law practice in accordance with the national law, the National Rules and the professional obligations of legal practitioners within the law practice; and
  - provide periodic reports on its compliance with the appropriate management system.'<sup>37</sup>

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<sup>36</sup> The compliance audit power in relation to incorporated legal practices is set out in the *Legal Profession Act* at s.130 and the National Model Law part 2.7.22. Notably the New South Wales *Legal Profession Act 2004* already allows limited compliance audits of all law firms. It says at s.670(1) that 'the Law Society Council or the Commissioner may cause an audit to be conducted of the compliance of a law practice (and of its officers and employees) with the requirements of this Act, the regulations or the legal profession rules.'

<sup>37</sup> The Business Structures paper, 25 November 2009 – these are principles 4, 7 and 8 in that paper.

Happily, the first of those principles appears to be uncontroversial. I say ‘happily’ because I find it hard to imagine anyone seriously trying to argue that law firm principals shouldn’t be subject to obligations of this kind. They merely replicate in the Australian context obligations set out in the conduct rules that apply in both the United States and in England and Wales.<sup>38</sup> They are as obvious an obligation of lawyers in their capacity as principals of law firm as their obligation in their capacity as lawyers per se to ‘practice under the professional obligations of an Australian legal practitioner’ or to ‘act honestly and fairly and with competence and diligence in the service of a client’. They simply reaffirm at the law firm level the purposes of the regulatory regime overall.

Unhappily, the same can’t be said for the second and third of the proposed principles. The spokespeople for the professional bodies vehemently opposed reforms to this effect in their submissions to the Taskforce, and so too the Large Law Firm Group albeit less vehemently.

Their counter arguments are at best misinformed. They describe four key objections:

- they claim firstly that the reforms are ‘clearly unwarranted’ and that there is simply ‘no justification’ for giving regulators a compliance audit power. Regrettably, they make the bald assertion without even attempting to rebut the arguments they’re opposing. It’s not as if there aren’t any:
  - I have argued the case at length in a number of speeches over recent years, including at this same symposium last year and so, too, Steve Mark, my counterpart in New South Wales;<sup>39</sup>

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<sup>38</sup> See the American Bar Association’s Model Rules of Professional Conduct, Rule 5.1: Responsibilities of Partners, Managers and Supervisory Lawyers; and the Solicitors Regulation Authority’s Rule 5: Business Management in England and Wales.

I note however that the draft national Australian Solicitors Conduct Rules that were approved by the Law Council on 7 December 2009 include no such rule. Draft Rule 37 (supervision of legal services) says only that ‘a solicitor with designated responsibility for a matter must exercise reasonable supervision over solicitors and all other employees engaged in the provision of legal services for that matter.’

<sup>39</sup> References to my papers are included under footnote 30, above. Steve Mark’s papers are published on the website of the (NSW) Legal Services Commissioner ([www.lawlink.nsw.gov.au/olsc](http://www.lawlink.nsw.gov.au/olsc)) and some of them in various legal journals also.

- there is also a substantial academic literature on the subject;<sup>40</sup>
- the Chief Justice of Western Australia, the Hon Wayne Martin, argued the case forcefully at the Conference of Regulatory Officers in Perth in September last year;<sup>41</sup> and
- perhaps most significantly, Lord Hunt argued the case in great detail in the report of his comprehensive review of the regulation of the legal profession in England and Wales that was published only in October last year – and it should be said a report that was commissioned by the Law Society of England and Wales.

Notably, Lord Hunt says 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’<sup>42</sup> and he elaborates in great detail exactly what he means and why. He says, contrasting the regulation of individuals and of firms, or entities, that ‘it is no longer a question of which is better. It is a question of how best the two types of regulation can complement each other, whilst remaining proportionate and avoiding ‘double regulation’.<sup>43</sup>

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<sup>40</sup> The papers referred to above include references to some, but not all that literature.

<sup>41</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 says at pp.13-18 that ‘It seems to me that there is a mounting body of evidence to suggest that those responsible for the regulation of the legal profession have failed to inculcate within the profession a prevailing culture of adherence to appropriate ethical and moral standards.... It seems to me that the regulation of the legal profession may have placed too much emphasis upon a policing / punitive model, and insufficient emphasis upon other methods of encouraging appropriate standards of professional behaviour... In my experience on the body which regulates the legal profession in this state, 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>42</sup> The Hunt Report, p.47. Lord Hunt adds at p.60 that ‘entity based regulation complements individual regulation rather than supplanting or superseding it. Individual regulation comes about by dint of the profession to which one is admitted and the services one seeks to provide, whereas entity regulation attaches to the type of organisation within which one works.’

<sup>43</sup> Ibid, at p.59

The pro-reform arguments – the arguments that the spokespeople for the professional bodies and the large law firm group make not even the slightest attempt to rebut – include as I see it at least the following:

- that the adoption of a principles-based approach to regulation necessarily implies that our regulatory systems for monitoring and enforcing standards of conduct will focus on law firm management systems and governance arrangements as much as individual lawyer behaviour, as an inevitable and logical consequence of the devolution to law firms of a significant responsibility for interpreting and applying broadly stated principles in ways that best suit the circumstances of their particular practice. I refer to the earlier discussion of principles-based regulation.
- that our systems for promoting appropriate standards of conduct in the profession have long put the spotlight on individual lawyers and on ‘front end’ controls – by seeking to control who can be admitted to the profession and then to practice and by articulating detailed, prescriptive rules of conduct and, more recently, by mandating compulsory continuing professional development – but paid only limited attention to law firms and to ‘back end’ outputs and outcomes. With the exception of the handling of trust monies, which has long been subject to audit, our systems for monitoring and enforcing standards of conduct have relied as good as exclusively on authorising regulators to receive and deal with complaints about the conduct of individual lawyers and to hold them to account when their conduct falls short of the mark.
- systems for dealing with complaints provide consumers a means of redress for complaints and are a fundamentally important regulatory tool but, that said, they are an inherently limited, inefficient and ineffective tool for achieving the broader regulatory purpose of monitoring and enforcing standards of conduct and protecting consumers more generally.
- systems for dealing with complaints are inherently reactive rather than proactive and preventative in character. They are all stick and no carrot. They do no more to encourage high standards of conduct than threaten disciplinary consequences for

conduct that falls short of the mark – and this despite the fact that many if not most complaints describe conduct that in the context of an employment relationship would be seen in a performance management rather than a disciplinary context.

- they are directed to the merest of minimum standards, the standards below which complainants can justifiably claim redress and / or practitioners can justifiably be held to account before the disciplinary bodies, rather than to best practice and continual improvement towards best practice.
  
- they are highly selective in their application. The complaints data tells us year after year that lawyers who do residential conveyances and family law or personal injuries or deceased estates work are many times more likely to find themselves subject to complaint than lawyers who do commercial litigation or banking or building and construction law. Similarly lawyers who work as sole practitioners or in small law firms are many times more likely to find themselves subject to complaint than lawyers who work in medium sized and larger law firms, to the extent that the conduct of lawyers who work for medium-sized and larger law firms is only nominally subject to regulatory scrutiny.

Yet there is no reason to believe that lawyers who do commercial litigation and the like or who work for medium-sized and larger law firms are more ethical or have higher standards of conduct than lawyers who do family law or work in sole practice or small law firms. Nor do we have any reason to believe that consumers identify and bring to attention more than a fraction of the conduct that might justify a complaint thereby enabling the appropriate action to be taken.

How then can we look the public in the eye and justify dedicating the totality of the resources at our disposal for monitoring and enforcing appropriate standards of conduct to dealing with complaints? We can't.

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

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

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

To my mind those are powerful policy and equity based arguments why not only incorporated legal practices but all law firms should be subject to a compliance auditing regime. But there is a powerful evidence-based argument as well:

- o law firms in New South Wales have been allowed to practise as incorporated legal practices since 2001 and my counterpart Commissioner there has been conducting compliance audits in the form of self-assessment audits since 2004. His office engaged Dr Christine Parker of the Melbourne University Law School in 2008 to test the hypothesis that requiring incorporated legal practices to keep and implement appropriate management systems and to undertake self assessment audits to review their compliance 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 and found 'compelling evidence' that it did just that.<sup>44</sup>

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

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<sup>44</sup> Dr Parker's research paper is published on the websites of both the New South Wales and Queensland Legal Services Commissions - [www.lawlink.nsw.gov.au/olsc](http://www.lawlink.nsw.gov.au/olsc) and [www.lsc.qld.gov.au](http://www.lsc.qld.gov.au).

- it's too early to replicate that research in Queensland where incorporated legal practices have been allowed only since 1 July 2007. What we can say however is that we have required every incorporated legal practice that practises in Queensland to undertake the same self-assessment audit process that is used in New South Wales and two-thirds of the 151 firms which had completed the audit by 30 June 2009 reported having improved their systems as a result. That is encouraging.

The spokespeople for the professional bodies dismiss Dr Parker's research in a single sentence.<sup>45</sup> They say simply that her findings are 'based on limited research in Australia that would not appear to support the proposed extension of substantially intrusive powers.' That is extraordinary, to say the least, because:

- the research could only have been done in Australia, and only in New South Wales. New South Wales is the only place in the world to have implemented this sort of entity-based regulation for long enough to collect a meaningful body of data.
- it was hardly limited research. It wasn't based on sampling techniques, for example, but whole populations – every single law firm that had completed a self-assessment audit over the six year period since the compliance auditing program began, all 631 of them, and every single law firm incorporated or otherwise that found itself subject to complaint over that same six year period.
- and it's hard to know, if this evidence doesn't, just what evidence it would take to persuade the spokespeople for the professional bodies that the proposed reforms have merit. It is compelling evidence of the effectiveness of this regulatory tool, just as Dr Parker says it is. The spokespeople for the professional bodies just don't get it, but Lord Hunt on the other hand sees it for what it is - evidence of 'extraordinary cultural change'.<sup>46</sup>

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<sup>45</sup> It should be noted that Dr Parker is no lightweight but a nationally and internationally respected researcher who has written several books and numerous articles about legal ethics, the regulation of the legal profession and corporate regulation more generally.

<sup>46</sup> The Hunt Report, at p.75.

- the spokespeople for the professional bodies and the Large Law Firm Group claim secondly that the proposed reforms would permit 'unjustified intrusions' into the ways law firms manage their affairs, by enabling regulators 'to require particular systems to be implemented' when 'no one size fits all' and firms should be free to decide the systems that work best for them.

This is an extraordinary claim also. Of course it's true that law firms should be free to decide the management systems that work best for them, given their particular circumstances, and that it would be unjustifiably intrusive and counterproductive in the extreme to require firms to implement any particular 'one size fits all' solution. But no one least of all the proponents of the proposed reforms has ever said it isn't.

On the contrary:

- it is inherent in a principles-based approach to regulation that law firms determine for themselves the management systems that best fit the circumstances of their particular practice. We have always seen the compliance auditing regime as a form of principles or outcomes-based regulation, regulation that emphasises the outcomes to be achieved over prescriptions about how they should be achieved.
- read the literature, read our papers, read our websites, listen to our spiel, read the pro forma self-assessment form itself - everything that those of us who have argued the importance of these reforms have said and done emphasises the fundamental importance of firms engaging with the issues and finding the solutions that work best for them. We expect firms to keep and implement management and supervisory systems that support and encourage and reward high standards of conduct and that deter, detect and deal with any misconduct that may occur, and we're happy to engage them in conversation about how best they might go about it, but we want them to work it out for themselves. That's how cultural change is achieved.
- don't just take our word for it. About 1300 incorporated legal practices have completed a self-assessment audit in New South Wales, 631 when Dr Parker did her research in 2008 and that same number again and more since, and exactly 200 to 28

February 2010 in Queensland. My counterpart in New South Wales and I have initiated another dozen or so more comprehensive follow up audits between us, and I have asked another 70 or so incorporated legal practices in Queensland to complete an on-line survey as a form of compliance audit.

Here's a challenge: find even one of those 1500 or so firms that will say we as regulators have imposed a system on them, or required a particular system to be implemented.

- the spokespeople for the professional bodies and the Large Law Firm Group claim thirdly that the proposed reforms will impose additional and unnecessary compliance costs on law firms, especially smaller law firms, to the extent even say the spokespeople for the professional bodies of risking 'significant access to justice issues' by causing 'small businesses in remote, rural and regional parts of Australia [to] close their doors.'

That is an extraordinary claim also. Of course there's a compliance cost but we should keep a sense of perspective.

- 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?

Law firms 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 7.3% of all Queensland law firms; there were 171 or 12.2% of all law firms at 30 June 2009; and there were 245 or 16.6% of all firms at 28 February 2010. They're mostly small firms - about a third of them are sole practitioner firms and another third employ only 2 or 3 practitioners – and more than two thirds of them practise in suburban Brisbane or in regional and rural cities and towns.

There are just short of 1000 incorporated legal practices in New South Wales, or about 20% of all New South Wales law firms, and they have much the same size and geographic profile as their Queensland counterparts.

- 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, 250 compliance audits down the track, and from a legal practitioner director whose sense of grievance appears to be over-determined. He complained to us not only that 'lawyers are already drowning in bureaucracy' and that we're 'just one in a long line of government departments adding to the regulatory burden' but also that a high profile former political staffer was recently given a well paid government job.

We much more commonly get positive feedback, most of it spontaneous and entirely unsolicited. Here is one recent example, and 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.'

Here are two more examples, from a suburban and a CBD firm respectively: 'the exercise was very worthwhile. I have put in place a new position called 'Compliance Manager' to make sure our protocols are properly implemented and to do spot checks... I hope other firms get similar benefit', and 'we found the self-assessment audit to be a positive process which resulted in our making a critical and candid review of our policies and procedures as the start of a process of continuous improvement.' This sort of feedback helps explain and sets Dr Parker's research findings in context.

- it is plainly just wrong to conceive of the compliance costs inherent in a compliance auditing regime simply as additional costs that will sit on top of a firm's existing regulatory burden. There will be 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 subtracting from the regulatory burden overall.

- it is also wrong to conceive of the compliance costs as impacting all law firms equally. We should always direct our regulatory resource to where it is most needed and most likely to have a beneficial impact in the public interest, and any properly implemented compliance auditing regime will carefully target the law firms most at risk of non-compliance. The spokespeople for the professional bodies and the Large Law Firm Group note, rightly, that most competent practitioners and law firms have risk-management strategies and systems in place already. Most firms have little to fear.
  
- I've argued already that the legislation should require that regulatory powers and discretions be exercised in a manner that is not only targeted to the firms most at risk of non-compliance but also proportionate, consistent, accountable and transparent.<sup>47</sup> No doubt the Board will promulgate and unpack these or like principles in the form of national standards, and so it should.

In any event, notwithstanding all the above, there's an argument that 'the implementation of appropriate management systems and the related self-assessment systems should not be seen as a compliance burden, but as an opportunity for your practice to better prepare itself for the challenges ahead, improving efficiency, profitability, client satisfaction and morale.' That is an extract from the promotional materials for a recent workshop on incorporated legal practices and appropriate management systems conducted by the Law Society.<sup>48</sup> It's hard to disagree.

- finally, the spokespeople for the professional bodies and the Large Law Firm Group argue that the professional bodies, professional indemnity insurers and regulators all have an important and useful role to play in supporting law firms improve the management of their practices, but 'by way of guidance rather than prescription' – by running continuing legal education courses and seminars and the like and by offering structured incentives for firms that implement best risk management practice including reduced professional indemnity insurance premiums.

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<sup>47</sup> I argued earlier in the paper that these Five Principles of Effective Regulation should have legislative expression here as they have in the UK.

<sup>48</sup> The workshop was held at Law Society House on 3 March.

It is always best to secure compliance voluntarily, obviously, but:

- most lawyers and law firms embrace guidance of these and like kinds, but some don't, and they're the very lawyers and law firms most at risk of non-compliance. Regulators require appropriate powers to compel a small minority of recalcitrant law firms to come to the party. Regulators shouldn't be reduced to preaching to the converted.
- those powers will be needed only rarely and should be exercised only as a last resort and I repeat: they should carefully target the law firms most at risk of non-compliance, the risks having been assessed against clearly stated and consistently applied criteria, and in ways that are proportionate to the identified risks and accountable.
- and that means in my view (as I argued earlier) that responsibility for receiving and dealing with complaints, for conducting trust account investigations and for conducting compliance audits should be consolidated in the one regulatory body. The three functions are complementary - they are all investigative and intelligence gathering functions and are all directed to the same ultimate purpose of promoting, monitoring and enforcing appropriate standards of conduct. The information gained in the exercise of any one of them should be readily available to inform the exercise of any of the others, and in particular to help us to identify the law firms most likely to put consumers and the public at risk and to direct our scarce regulatory resources there.

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

I must say I find it puzzling that the spokespeople for the professional bodies should so vehemently oppose this pro-actively preventative, 'cooperative and educative' approach to regulation in favour of maintaining a punitive, and indeed selectively punitive, complaints-based regime as our sole regulatory tool for monitoring and enforcing standards of conduct in the profession.

## **Conclusion**

The 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 but can and should be reformed to achieve that goal more effectively and efficiently. The Taskforce has pointed the way forward.

The system for dealing with complaints is at best however 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. It should be supplemented with regulatory tools that focus squarely on the conduct of law firms and their management systems and supervisory arrangements – their ethical infrastructures.

The focus on internal governance and compliance functions within law firms that is inherent in the principles-based approach to regulation and that has been put to the test so successfully with incorporated legal practices brings 'an invaluable and totally fresh approach to the analysis of best practice in legal regulation.'<sup>49</sup> The Taskforce has pointed the way forward on this score also. It has given us an historic opportunity to embrace this invaluable and totally fresh approach and an opportunity which is unlikely to be repeated any time soon. We should grasp it while we can.

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<sup>49</sup> The Hunt Report, at p.5.

## APPENDIX 1

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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