AT WHAT COST, COSTS?

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Legal Services Commissioner

We have two fundamental and overlapping purposes at the Legal Services Commission. One is to provide users of legal services an effective, fair and reasonable means of redress for complaints. The second is to promote, monitor and enforce high standards of conduct in the provision of legal services, including by initiating disciplinary action as appropriate. Those purposes serve an even more fundamental purpose: to help protect and promote public confidence in the legal system, the administration of justice and the rule of law.

We don't shy away from initiating disciplinary action but we believe we best achieve our purposes by taking an educative and 'consciousness-raising' preventative approach wherever possible and appropriate in preference to a policing and punitive or 'gotcha' approach. We undertake our regulatory responsibilities accordingly. That is not always recognised by lawyers but is readily apparent in the way we go about our work.

It is evident for example in the way we deal with complaints.[1] More importantly in this context, however, it is evident in our commitments:

- to develop and publish regulatory guides to help lawyers better understand and comply with their professional obligations, including *Guidelines for Charging Outlays and*

[1] We don't initiate disciplinary proceedings for any but serious disciplinary offences without first inviting the practitioners concerned to acknowledge their mistake and persuade us they've done all they reasonably can to put things right with the complainants and prevent any similar mistakes in future - and hence satisfy us that no public interest would be served by holding them publicly to account. Notably we finalised 24% of the complaints we assessed in 2009-10 to involve an issue of unsatisfactory professional conduct or professional misconduct on the basis that no public interest would be served by initiating disciplinary proceedings and only 4% by initiating disciplinary proceedings. This data is readily accessible on the Commission's website at www.lsc.qld.gov.au

Disbursements, Guidelines for Charging Fees in Speculative Personal Injury Matters and various *Guidelines to Advertising Personal Injury Services*; [2] and

- to engage with law firms and their leaders to encourage and help them to strengthen their 'ethical infrastructure' including by developing and offering them a range of innovative on-line tools to assist.

This paper describes what we've done at the Commission to date and some of the things we are planning to do to further these objectives, with particular reference to the ways lawyers cost and bill for their services.

REGULATORY GUIDES

We've made a start, but we will give greater emphasis in the future than we have in the past to developing and publishing regulatory guides to help lawyers better understand and comply with their professional obligations. This is the way of the future.

Queensland's *Legal Profession Act 2007* and its counterpart legislation in the other states and territories extend to 600 pages give or take a few but will be superseded in 2012 or soon thereafter by the *Legal Profession National Law* (the National Law).[3] The National Law will take up less than 200 pages. It will focus 'on the outcomes to be achieved rather than prescribing the means by which they should be achieved' and will 'move away from reliance on detailed prescriptive rules and rely more on high level, broadly stated principles.'

Principles or performance-based regulation has a compelling logic to it, viz. that lawyers and law firms are better placed than legislators and regulators to decide how their business will best achieve a given regulatory objective - hence legislators and regulators should define the outcomes they require but give lawyers and law firms the flexibility to decide how best to achieve those outcomes in the circumstances of their particular practice.

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[2] These are all accessible on the Policies and Guidelines page on the Commission's website.

[3] The references that follow refer to the COAG draft of the proposed *National Legal Profession Law*, dated 14 December 2010, that can be found on the website of the Commonwealth Attorney-General's department at www.ag.gov.au/legalprofession

So far so good, but principles-based regulation will confront us with significant challenges. Many lawyers and law firms will be uncertain what the principles require of them in practice - including for example the principle that 'law firms must charge no more than fair and reasonable fees' – and uncertain in particular whether we as regulators will interpret and apply them in the same way they do.

That is why we should make it a priority going forward to develop and publish constantly evolving and non-binding regulatory guides, all the while taking care not to reintroduce prescriptive detail by the back door. Our counterpart regulators in other industry sectors have been doing it for years. The Australian Securities and Investment Commission, the Financial Ombudsman Service and the Telecommunications Industry Ombudsman, for example, all publish guidance in the form of Regulatory Guides (ASIC), Practice Notes or Guidelines (FOS) or Position Statements (TIO). [4] We should do the same, and we will.

We will adopt a principles-based methodology. We will not prescribe how exactly we plan to go about developing regulatory guides but rather commit to the fundamental and broadly stated principles that will govern our approach wherever possible and appropriate, having regard to the resources we have available to us from time to time:

- we will identify problem areas and develop regulatory guides collaboratively and in partnership with the QLS and/or the BAQ as appropriate, recognising their on-going responsibility for monitoring and articulating professional standards. We will respect the co-regulatory character of our regulatory arrangements.

- we will consult directly with the lawyers whose conduct we seek to influence. We will use the process of developing regulatory guides as a consciousness-raising opportunity – an opportunity to alert them to the issues, to engage with them in identifying problems and finding solutions, and to learn from what they tell us before we settle our position.

- we will consult with and give a voice to the users of legal services, especially those users who are least able to give voice to their interests – the typically one-off users of legal services who seek legal assistance with residential conveyances and family law, estate

[4] The documents are all readily accessible on their websites - www.asic.gov.au, www.fos.org.au and www.tio.com.au.

and personal injury matters at often critical moments in their lives. We will learn from what they tell us also, and develop an informed capacity to analyse issues from their point of view.[5]

- we will use traditional consultation techniques including by seeking responses to consultation documents and the like but we will use survey techniques also to help us identify the issues and test out possible guidance. We will use both quantitative and qualitative methods including both on-line surveys [6] and facilitated focus groups.[7]

- we will be methodologically sound. We will engage experts as appropriate and required to help us design our survey methods and interpret and analyse the results.

We've made a start. We are currently writing a consultation draft of a paper which will begin the process of developing a regulatory guide, or more likely a series of regulatory guides that will set out our attitude to a range of billing practices we see at the Commission and that cause us concern. It deals with how lawyers actually charge and bill for their services rather than issues related to costs disclosure. We will get to those issues down the track, separately.

The paper attempts firstly to describe some key principles that govern how lawyers can properly charge for their services. We want to describe those principles in plain English and as succinctly as possible and to point to the relevant legislation, case law and learned texts only in the footnotes. The paper attempts secondly to ask how those principles apply to the billing practices that are causing us concern. We will simply pose questions in the first instance as possible precursors of the questions we might ask in a survey of lawyers and users of legal services in relation to these issues and not attempt or imply any analysis. The

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[5] It will not be easy to consult with users of legal services given that there are no counterparts in the legal services sector of the consumer advocacy organisations such as Consumer Credit Legal Services or the Australian Communications Consumer Action Network which exist in other industry sectors. There are precedents, however – see note 7, below.

[6] We have used on-line surveys to good effect previously in our Ethics Checks which we discuss in some detail later in the paper.

[7] The Legal Services Consumer Panel in the UK has commissioned research including facilitated focus groups of legal consumers. The groups comprised people who had personal experience of using legal services within the previous two years or who were likely to use them in the next twelve months. The groups were mixed gender and included participants from both urban and rural areas, from black and minority ethnic groups, and from a range of age and socio-economic groups. For further information, click on the Publications page of the Panel's website at www.legalservicesconsumerpanel.org.uk

survey results will in turn inform the content of the regulatory guide(s) that are our ultimate objective.

I will illustrate what we are hoping to achieve by reference to two key principles. Consider firstly the principle that as noted earlier will be established by the National Law - the principle that '**a lawyer must charge costs that are no more than fair and reasonable in all the circumstances and that in particular are proportionately and reasonably incurred and proportionate and reasonable in amount.**' [8]

Consider secondly the principle that was recently and clearly enunciated by the New South Wales Court of Appeal - the principle (let's call it the 'once-only' principle) that '**a lawyer must not charge one unit of time more than once'.** [9]

Now consider some practices we are seeing at the Commission which cause us concern. Some of them are clearly unacceptable in our view and others are questionable. Consider:

- a lawyer who travelled to a court to attend to 3 separate matters. The travel took him 45 minutes. He had costs agreements with all three clients which authorised him to bill travel time. He charged all 3 clients 45 minutes of travel time.

- a solicitor who had a standard costs agreement which authorised her to bill travel time. She flew interstate on behalf of a client. She charged the client for her travel time on the plane, but used the time on the plane to review documents for another client on an entirely separate matter. She charged the second client also for her time on the plane.

- a barrister who had a costs agreement with a client facing a trial which authorised the barrister to charge a daily rate for preparation and appearance in court and allowed him to charge a cancellation fee for 'time set aside'. The barrister estimated the matter

[8] See Section 4.3.4(1). Section 4.3.4(2) then lists the factors that must be taken into account in considering whether costs are fair and reasonable. They include the level of skill, experience, specialisation and seniority of the lawyers concerned; the level of complexity, novelty or difficulty of the issues involved, the extent to which the matter involved a matter of public interest; the labour and responsibility involved; the urgency of the matter; the time spent on the matter; the quality of the work done; and the retainer and the instructions (express or implied) given in the matter.

[9] *Bechara v Legal Services Commissioner* [2010] NSWCA 369, per Young JA at paragraphs 4 and 5 approving McClellan CJ at CL at paragraphs 138 and 139.

would take 3 days of preparation time and 3 days in court. The matter resolved in the court early on the third day and the barrister used the remainder of the day to complete several other briefs which he undertook of a fixed fee basis. He charged the client he represented in the court matter for 6 days work at his daily rate and the other clients the agreed fixed fees.

Are these billing practices fair, reasonable and proportionate? Have one or more of these lawyers breached the 'once-only' principle?

Or consider these quite different practices:

- a solicitor conducted a family law property matter for a client. Her professional fees come to $33,000 at the agreed hourly rate. The client noticed an additional charge in the bill of $825 described as a 'professional indemnity levy'. On consulting the costs agreement, the client noticed a clause which says 'we are required to take out professional indemnity insurance to protect you. Since this is for your benefit, you must pay for it. We charge you by adding a 2.5% levy to the other professional fees charged.'

- a law firm's standard time-costed costs agreement set out the different hourly charge-out rates charged as professional fees by the various solicitors who might work on a matter and, in a separate clause, provided that the firm does not charge separately for 'postage, phone calls, fax charges, internet access and sundries' but rather charges a flat rate 'administration fee' calculated of 15% of the professional fees that are billed in a matter.

Is it fair and reasonable when solicitors are obliged by law to hold professional indemnity insurance for a solicitor to charge a client a levy by way of a contribution to the premium? If so, is it fair, reasonable and proportionate that the levy is calculated as a fixed percentage of the solicitor's professional fees? Is it fair, reasonable, and proportionate to charge a flat rate 'administration fee' calculated as a fixed percentage of the firms professional costs irrespective of the 'administrative' or 'office' expenses the firm actually incurs in a matter, or the amount the firm might reasonably be estimated to have incurred in all the circumstances of any particular matter?

Or consider this quite different practice again:

- a lawyer sends a client a lump sum bill totalling $5,000. The client is unhappy with the bill and exercises his entitlement (under section 332 of *the Legal Profession Act 2007*) to request an itemised bill. The lawyer sends the client an itemised bill which totals $6,000. The letter accompanying the itemised bill includes the following paragraph: 'we have gone to a lot of time and trouble to provide you with our itemised bill and we now demand payment in the amount of $6,000. We will commence court action to recover our fees if you do not pay this amount within 7 days.'

  Question: is it fair and reasonable for a lawyer to increase the bill he or she sends a client as a lump sum bill if the client then exercises his or her entitlement to request an itemised bill? Shouldn't the client's request for an itemised bill be characterised as a request to itemise the original lump sum bill, not as a request for a new bill?

These are good questions, and questions we as regulators need to answer, and to answer in the form of regulatory guides which inform and educate lawyers and law firms and help them comply with their professional obligations. But there are many other practices that warrant similar scrutiny and should be addressed by way of regulatory guides also. Brian Bartley wrote critically in Proctor just last September for example about a practice which sees law firms billing clients for work performed by non-legally qualified 'paralegals' at charge out rates not much less than the rates they charge for the services of their lawyers. He asks 'where else in the community is it considered acceptable for employees to earn their weekly wage by morning tea time on Monday' and notes that 'secretaries should be a practice overhead, not a profit centre.' [10]

And then there is the rapidly growing practice of law firms, mainly large law firms, out-sourcing much of their routine 'commoditised' work including document review, legal research and drafting to off-shore 'legal process outsourcing' companies (LPOs) based in India and elsewhere that can do the work at a fraction of the cost they can do it themselves.[11]

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[10] See *Proctor*, Vol. 30 No. 8, September 2010, at p.12.

[11] This rapidly growing and already multi-billion dollar industry is getting increasing attention, not least for example on the front page of the Australian Financial Review of Friday 11 March 2011.

This is a practice that raises all sorts of interesting ethical and regulatory issues, not least how law firms that outsource the work can satisfy themselves, and how regulators can be satisfied, that the firms are properly supervising that work and identifying and dealing with any conflicts of interest.

So: watch this space. Accept that 'there is a role for regulators of leadership and guidance and not just policing and punishing', and join us - partner with us - in 'moving from a reactive approach, moving in after problems have occurred, to an active mindset, where the roots of potential problems are identified as far as possible in advance and failures often averted.'[12] This is the way of the future.

SUPPORTING LAW FIRMS TO DEVELOP ETHICAL INFRASTRUCTURES

Currently our strategies for promoting standards of conduct in the delivery of legal services focus squarely on individual lawyers and on 'front end' controls – controlling who can be admitted to the profession and then to practice; articulating detailed, prescriptive rules which seek to govern their conduct; and, more recently, mandating compulsory continuing professional development. We have just one strategy for monitoring and enforcing standards of conduct – enabling 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.

Yet our system for dealing with complaints about lawyers, while a fundamentally important regulatory tool which provides aggrieved consumers a means of redress, is an ineffective and inefficient means of achieving the broader regulatory purposes of monitoring and enforcing appropriate standards of conduct in the delivery of legal services and protecting consumers more generally. Notably it:

- is almost entirely reactive rather than proactive and preventative in character;
- is directed to the merest of minimum standards, the standard below which complainants can justifiably claim redress and/or practitioners can justifiably be held to account before the disciplinary bodies;

[12] These are Lord Hunt's words – see his recent and comprehensive review of the regulation of the legal services in England and Wales, *The Hunt Review of the Regulation of Legal Services* (the Hunt Report), October 2009 at pp.77-78.

- directs regulatory attention disproportionately to 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. The differential treatment simply can't be justified; [13] and
- gives regulators little if any 'regulatory grip' on the underlying causes of complaints, by ignoring two simple but fundamental realities:
    - the vast majority of complaints can be put down not to incompetence or knowing dishonesty on the part of individual lawyers but to sloppy business practices, poor supervision and inadequate quality assurance on the part of their law firms; and
    - just like everyone else who works within organisations, the conduct of individual lawyers is a function of the workplace cultures of the law firms which employ them, for better or worse. This obvious fact of human behaviour has consequences, not least for lawyer's billing practices, for the obvious reason that law firms like other commercial enterprises exist to make a profit and their workplace cultures invariably reflect their commercial (among other) motivations. We need think only of the potential impacts on individual lawyers within law firms of unreasonable pressure to meet unrealistic billing targets or other risk factors including performance against billing targets being, or even just being perceived to be the 'all important' performance measure for promotion and remuneration purposes.[14]

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[13] 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.

[14] There is a significant organisational studies literature that examines how people's behaviour is influenced by their organisational environments and an empirical legal ethics literature also. See for example Christine Parker, Adrian Evans, Linda Haller, Suzanne le Mire and Reid Mortensen, *The Ethical Infrastructure of Legal Practice In Larger Law Firms: Values, Policy, and Behaviour*, University of New South Wales Law Journal, 31(1);158-188 especially at pp.161-166; Christine Parker, *Peering Over the Ethical Precipice: Incorporation, Listing and the Ethical Responsibilities of Law Firms*, Melbourne University Law School Legal Studies Research paper No 339, subsequently published under the title *An Opportunity for the Ethical Maturation of the Law Firm: The Ethical Implications of Incorporated Listed Law Firms* in K. Tranter, F. Bartlett, L Corbin, R Mortensen and M. Robertson (ed), *Reaffirming Legal Ethics: Taking Stock and New Ideas*, 2010 96-128; Christine Parker and Adrian Evans*, Inside Lawyer's Ethics*, Cambridge University Press, Melbourne, 2007, Chapter 8; Susan Saab Fortney, *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture and the Effects of Billable Hours Requirements*, UMKC Law Review, Vol 68, 2000-2001; Lisa Lerman, *Blue-Chip Billing:*

> These are two simple but instructive facts. They tell us that we should be directing our regulatory energies not only to identifying and dealing with the 'bad eggs' in the profession but also and in particular to identifying and dealing with the 'bad nests' (or to use a more contemporary image, the 'bad incubators').

Our 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 firms rather than a mere sub-set of lawyers and law firms; and that put the focus not only on individual lawyers but also on law firms and their management systems and supervisory arrangements - on their 'ethical infrastructure'.

We have the regulatory tools available to us already, at least in relation to incorporated legal practices – the requirement that they have 'appropriate management systems' which ensure that their provision of legal services meets the legislative and other relevant professional standards and our power as regulators to audit their management systems and supervisory arrangements to ensure their compliance.

I and others have argued long and hard over recent years including in submissions to the National Legal Profession Reform Taskforce that the same regulatory arrangements should apply to all law firms, incorporated or otherwise.[15] The National Law takes a significant step in this direction but, sadly, ultimately stops short. It requires all law firms in effect to have appropriate management systems[16] and even gives us a new power as regulators to give law firms 'management system directions' as appropriate.[17] Unlike our current legislation, however, which says simply that the Commissioner 'may conduct an audit of an

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Regulation of Billing and Expense Fraud by Lawyers, (1999) 12 Georgetown Journal of Legal Ethics 205 and *A Double Standard for Lawyer Dishonesty: Billing Fraud Versus Misappropriation*, 34 Hofstra Law Review, 847, 2005-2006; and William G Ross, *Kicking the Unethical Billing Habit*, (1998), 50 Rutgers Law Review, 2199. See also Patrick J Schiltz, *On Being a Happy, Healthy and Ethical Member of an Unhappy, Unhealthy and Unethical Profession*, 52, Vanderbilt Law Review 871, 1999.

[15] See, for example, the paper I presented at this same conference last year under the title *National Legal Profession Reform and the Regulation of the Future*. See also the paper I co-authored with the Commission's Scott McLean and presented at the Fourth International Legal Ethics Conference (ILEC4) at Stanford University in July 1010 under the heading *Lawyer Regulation, Consciousness-Raising and Social Science.* Both papers are published on the Commission's website, at www.lsc.qld.gov.au.

[16] This is the effect of section 3.2.4, Responsibilities of principals.

[17] See section 4.6.2.

incorporated legal practice about the compliance of the practice…',[18] the National Law says 'the Commissioner… may conduct an audit… of a law practice… if the Commissioner considers there are reasonable grounds to do so based on the conduct of the law practice or one or more of its associates or a complaint against the law practice or one or more of its associates.'[19] Those words could be applied in a number of different ways and, to the extent that they are applied narrowly to preclude the Commissioner from conducting a compliance audit of a law firm in the absence of some positive evidence of possible misconduct, will restrict us yet again to 'a reactive approach, moving in after problems have occurred' and limit our ability to adopt 'an active mindset, where the roots of potential problems are identified as far as possible in advance and failures often averted.'

This is regrettable because our compliance audit power as currently expressed has achieved 'extraordinary cultural change'.[20] Professor 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 conduct 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. [21]

The figures are striking. The complaint rate per practitioner per year for incorporated legal practices after self-assessment was one third the complaint rate before self-assessment, a reduction that is 'statistically significant at the highest level'. Similarly the complaint rate per

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[18] See the *Legal Profession Act 2007*, section 130.

[19] See section 4.6.1. The Law Council and the Large Law Firm Group argued vigorously during the national reform process that the compliance audit power as it applies currently to incorporated legal practices authorises regulators to conduct compliance audits without 'just cause' and in a manner which is unduly intrusive and imposes unnecessary compliance costs. This is not the place to rehearse the arguments but to my mind the Law Council's and the Large Law Firm Group's position on this issue amounts to little more than ill-informed scare mongering. I address their arguments in detail in the paper *National Legal Profession Reform and the Regulation of the Future*, (see note 15, above).

[20] These are Lord Hunt's words – see the Hunt Report (above) at p.75. I have argued this case at length in the papers mentioned in the previous footnote and I won't repeat those arguments here.

[21] 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 and www.lsc.qld.gov.au respectively – and has been published under the title *Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal profession in New South Wales*, (2010) 37 Journal of Law and Society, 466-500.

practitioner per year for incorporated legal practices after self-assessment was one third the complaint rate for traditionally structured firms.

That is a great result for consumers, obviously, but also for the law firms 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've completed their firm's self-assessment and 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 the firms and their clients.

The message we hear as regulators is that the simple act of requiring a law firm's principals to take time out to stock-take just how well their management systems and supervisory arrangements support the firm and its people to deliver competent and ethical legal services – the simple act of prompting them to reflect on the adequacy of their ethical infrastructure - dramatically improves standards of conduct within their firm.

We've set out to build on that foundation by developing what we hope will become a varied and growing suite of short, sharp on-line surveys or 'ethics checks' which serve an ethical capacity-building purpose by allowing law firms to audit or review the strength of their ethical infrastructure – not only their formal policies and procedures and management arrangements but also and in particular the unwritten rules and customs and behaviours that determine what actually happens in practice. We've designed them specifically:

- to give volunteer law firms the option to participate if they so wish but also as a form of compliance audit of incorporated legal practices;

- to keep 'compliance costs' to a minimum, and to take no more than and preferably less than 30 minutes to complete;

- to guarantee the anonymity of the individual respondents who take part, and to ensure the anonymity of their law firms also, by enabling firms to identify themselves only by a secret and self-selected code. We will know a firm's identity only if it volunteers to give us that information or is an incorporated legal practice we have asked to complete a survey as a form of compliance audit - and we are rightly prohibited in that circumstance from disclosing that information to any third parties;

- to elicit responses not about a firm's policies and procedures per se but how they are perceived and understood and their impacts and outcomes 'down the line' and what actually happens in practice;

- to work best when everyone at a law firm takes part, or in larger firms at least a good sample of each of the different levels and classifications of their people and people from its various branch offices, if it has them. That allows firms to check how their policies and systems are perceived and implemented by the different levels and classifications of their people, whether they're followed though in practice and the values and attitudes its people bring to their work. It allows the firm to 'hold an ethical mirror' to itself and to identify the strengths and weaknesses in 'the ways things are done around here' and make any improvements that may be required.

- to prompt the individual respondents to reflect upon, and to prompt both spontaneous and organised discussion within the firm about those issues; and

- by publishing the results on the Commission's website, to enable participating law firms to compare their results with the results of other comparable law firms and to serve a broader public interest also, by exposing key aspects of law firm culture to public scrutiny.

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 we are preparing a fourth, on supervision practices. [22]

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. 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 a total of 517 people took

[22] The surveys are readily accessible on the Commission's website (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.

part. Notably we have asked 65 incorporated legal practices to complete the complaints management systems check as a form of compliance audit.

We have posted the de-identified results of all three surveys on the Commission's website and they make very interesting reading indeed. I will return to the survey results shortly but make the point now that 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 that feedback on the website also, exactly as they gave it to us, entirely in their own words. They tell us, cutting a longer story short, that the surveys have served exactly the ethical capacity-building we hoped they might. They tell us that participating in the surveys prompted the individuals who took part to think about the ethical issues canvassed in the survey questions, generated both spontaneous and organised discussion within their firms and lead them to improve their systems accordingly.

THE BILLING PRACTICES CHECK: THE RAW RESULTS

We publish and continually update the results on the Commission's website. We publish the non-identifiable results for each of the participating law firms arranged by their size measured by the number of practising certificate holders the firms employ. That allows the firms not only to obtain their own results but to compare their results with the results of other like firms, the aggregated results for all firms within that size band and the aggregated results overall.

We also publish various 'cross-tabulation' reports which compare the aggregated results according to the respondent's gender, length of post-admission experience and employment status within their firms, and similarly the aggregated results for the participating firms according to their business structure. That is a rich source of information for those and other law firms and, importantly, serves the public interest by exposing aspects of legal and law firm culture to public scrutiny.

Annexure 1 sets out the aggregated results of some of the survey questions for all 517 people who participated in the billing practices check in April and May 2010.

THE BILLING PRACTICES CHECK: THE SLICED AND DICED RESULTS

We conduct the ethic check surveys primarily for our own regulatory purposes but we are keenly aware that the results are a rich source of data about lawyers' values, attitudes and behaviours and law firm cultures, data that lends itself to disinterested scholarly analysis. Our possession of that data gives us great scope for productive and mutually beneficial collaborations with legal academics, particularly those of them with an empirical bent, and the collaboration will serve us well. The better informed we are about the behaviour of law firms and the people who work for them the better we can craft regulatory strategies to achieve our purposes.[23]

We have developed a strong relationship with Professor Parker in particular. Professor Parker and the Commission's Dr Lyn Aitken have analysed the results of the Workplace Culture Check we conducted in 2009 and she and her colleague at Melbourne University Law School, Dr Linda Haller, have analysed the results of the Complaints Management Check we conducted in 2009 and 2010. Both analyses will shortly be published in significant legal journals.[24]

Professor Parker and her colleague, David Ruschena have similarly analysed the results of the 2010 Billing Practices Check and are writing up their findings for publication as we speak.[25] They have interrogated the data[26] to examine among other things the extent to

[23] The Commission's Scott McLean and I reflected on these issues in our paper *Lawyer Regulation, Consciousness-Raising and Social Science* – see note 15, above.

[24] Christine Parker and Lyn Aitken, *The Queensland Workplace Culture Check: Learning from Reflection on Ethics Inside Law Firms*, Georgetown Journal of Legal Ethics, (2011), forthcoming; and Christine Parker and Linda Haller, *Inside Running: Internal Complaints management and Regulation in the Legal Profession*, Monash University Law Review, also forthcoming. Notably the Briton and McLean paper (see notes 15 and 19, above) and the Parker and Aitken paper were identified in a review written by Professor Elizabeth Chambliss of New York Law School and published in the journal *Jotwell* on 25 January 2011 'as among the best works of recent scholarship in the legal profession'.

[25] Christine Parker and David Ruschena, *The Pressures of Billable Hours: Lessons From A Survey of Billing Practices Inside Law Firms*, forthcoming in the St Thomas Law Review.

[26] Note that Parker and Ruschena 'cleaned' the raw data we provided them by disregarding individual responses that could not be connected to a valid firm code, disregarding individual responses by people other than lawyers; disregarding firms which had fewer than five individual respondents participate in the survey and disregarding firms which had only a small proportion of their lawyers participate in the survey. The worked therefore with a sample of 324 individual respondents (who they note were broadly representative of the gender and seniority demographics of the profession as a whole) from 25 law firms (which they note is a good sample of the 172 law firms which were invited to participate in the survey).

which lawyers report that their firms use time-based billing; the extent to which lawyers perceive their firms use their billable hours to assess and motivate their performance; and the extent to which lawyers perceive their firm's billing practices to put them under ethical pressure. Here are some of their key findings:

- **Individual Lawyers' Daily Billable Hour Targets, by Gender**

	Male (n = 180)	**Female (n = 141)**	**Total (n = 323)**
No daily target	16%	11%	13%
Less than 6 hours per day	32%	21%	27%
6 hours per day	14%	14%	14%
More than 6 hours per day	39%	55%	46%

- **Individual Lawyers' Daily Billable Hour Targets, by Role**

	Partner (n = 80)	**Other lawyers (n = 243)**	**Total (n = 323)**
No daily target	18%	12%	13%
Less than 6 hours per day	39%	23%	27%
6 hours per day	15%	13%	14%
More than 6 hours per day	29%	53%	46%

- **Firms' Overall Daily Billable Hour Targets**

Firm's overall daily billable hour targets	**Percentage of firms**
No daily target	16%
Less than 6 hours per day	40%
6 hours per day	16%
More than 6 hours per day	28%

- ‘the proportion of partners who consider that a lawyer’s ethical reputation is always or mostly relevant to her remuneration is almost twice as high as the proportion of other lawyers holding the same view (60% of partners versus 33% of employed lawyers)… Employed lawyers are much more likely to believe that performance measurement and management is solely determined by the amount earned, while partners see performance assessment as based on a range of factors including the amount earned, competence, efficiency, and ethics.’

- ‘one respondent took the opportunity to add a free text comment as follows: ‘this firm is all about the money and while they say and like to pretend that other things matter, in reality they don’t. It’s all about how much money you make the partners’.’

- ‘in 11 of the 25 firms, more than half of the lawyer respondents reported that they had had concerns about the billing practices of others within the firm.’

- ‘in 11 of the 25 firms, more than 20% of the lawyers reported that they had actually observed instances of bill padding. This includes 5 firms where more than 40% of the lawyers said they had observed bill padding. However in no firm had more than half of the lawyers observed bill padding.’

- ‘even the majority of partners agreed with the statement that ‘it feels as if there is pressure to bill from the management of the practice’, but partners expressed less agreement than other lawyers. The difference in variation between the two groups is statistically significant.’

- ‘partners were less likely than employed lawyers to agree that time billing results in lawyers competing against each other; that time billing fails to discourage excessive duplication; that time billing adversely affects the quality of mentoring; and that time billing encourages cutting corners when there is pressure to meet a budget. The differences between partners’ and employed lawyers’ responses were statistically significant.’

- **Responses to Hypothetical Scenario involving billing clients for same time period**

	Partners (n=81)			**Others (n=236)**		
	Yes	**No**	**Maybe**	**Yes**	**No**	**Maybe**
Bill both clients	4%	93%	4%	14%	77%	9%
Culture in firm encourages this practice	7%	90%	3%	14%	67%	19%

- 'only 18% of respondents reported that their firm audited fee earners' billing practices before the firm paid bonuses; 23% reported that their firm did not audit billing practices and 59% did not know either way. There was a very large difference between partners and employed lawyers - 41% of partners said their firms audited a fee earner's billing practices before paying a bonus (47% said they did not) but only 10% of employed lawyers (14% said it was not the case)… The difference is statistically significant for all items.'

- 'in many firms there was no clear majority one way or another as to whether a particular aspect of ethical infrastructure was in place. If we consider a clear majority to be either 25% or less or 75% or more reporting the same way, then respondents from 18 of the 25 firms could not agree about whether an internal discipline policy for improper billing existed. Respondents from 14 of the 25 firms could not agree whether the firm had a policy in place for detecting improper billing practices. Respondents from 11 of the 25 firms could not agree whether a specifically designated ethics partner had been appointed. Respondents from 11 of the 25 firms could not agree whether the firm offered scheduled training on ethics issues.'

Parker and Ruschena argue that the survey results confirm the proposition that 'many of the legal profession's contemporary woes intersect at the billable hour' but they resist the temptation to point the finger at billable hours or time-costing per se. They argue that a lawyer's judgment is vulnerable to the extent that her budget is or is perceived to be the all-important performance measure for promotion and remuneration purposes but add, importantly, that 'private law firms exist so that the partners [or owners] can make a profit, and it would be easy to quantify the fees each lawyer earns and to compare them regardless of what system – time-costing or some other system – is used to calculate those fees.'

I note digressing for a moment that time-costing can be argued to reward inefficiency and over-servicing but equally that fixed-fee billing can be argued to reward short-cuts and under-servicing. It seems to me that any billing system can be abused, and any billing system stands to be abused whenever it is applied as a mere mechanical exercise or formula. A bill at the end of the day should be arrived at transparently and honestly, and should be fair, reasonable and proportionate in amount. It follows that deciding a bill is always and ultimately a matter for ethical judgment.

In any event, returning to the theme, Parker and Ruschena conclude that the survey results reveal 'a series of clear phenomena that influence lawyers' working environments in ways that push them towards unethical behaviour'. Importantly however the results also suggest ways in which law firms can adjust their ethical environments to mitigate the risk. Those measures will include, for example, if money isn't the all-important performance measure, spelling out exactly what the firm's true performance measures are, having transparent processes for assessing its lawyers' performance against those measures, and devising strategies to communicate those arrangements to their lawyers and so to counter perceptions to the contrary.

CONCLUSION

We are delighted that the Billing Practices and other Ethics Checks we've developed at the Commission are promoting and contributing to a more informed debate about ethical issues facing the profession both within participating law firms and in legal ethics academia.

We plan to write once again over coming months to all 172 Queensland law firms which employ seven or more practising certificate holders to invite the 132 of them which declined our invitation to participate in the Billing Practice Check last year to consider participating this year. I urge you to encourage your firm to take part. The firms that participated previously tell us it was well worth it - that it prompted useful discussion both in their corridors and their boardrooms and lead them to strengthen their systems and processes both for their benefit and their clients'. That is exactly what we as regulators hoped to achieve: win-win-win.

ANNEXURE 1

The billing practices check 2010: selected questions and results

Billing Practices Survey

If you have a daily billable hour target or expectation, what is it?

	Response Percent	Response Count
No daily billable hour target	23.3%	111
5	11.1%	53
5.5	13.7%	65
6	12.8%	61
6.5	28.8%	137
7	8.2%	39
7.5	1.5%	7
8	0.0%	0
8.5	0.4%	2
9	0.0%	0
9.5	0.0%	0
10	0.2%	1
answered question		476
skipped question		41

Billing Practices Survey

Does your firm have a policy and/or procedure in place for:

	Yes	No	I don't know	Response Count
monitoring the billing practices/ activities of the legal practitioner directors/partners?	**63.6% (292)**	8.5% (39)	27.9% (128)	459
reviewing the billing practices of individual partners or legal practitioner directors?	**58.2% (267)**	10.0% (46)	31.8% (146)	459
detection of improper billing practices?	**50.2% (229)**	13.2% (60)	36.6% (167)	456
regular review (at least monthly) of all solicitors timesheets	**60.5% (277)**	16.8% (77)	22.7% (104)	458
regular review (at least monthly) of all non-legal staff timesheets	25.9% (118)	29.0% (132)	**45.1% (205)**	455
reviewing all accounts rendered by the practice?	**61.6% (282)**	9.8% (45)	28.6% (131)	458
supervisors to review all your accounts each month?	**66.9% (307)**	15.9% (73)	17.2% (79)	459
dealing with complaints by clients about an account?	**80.6% (370)**	2.6% (12)	16.8% (77)	459
dealing with employee concerns about an account?	**64.5% (296)**	9.4% (43)	26.1% (120)	459
dealing with ethical concerns, or queries about billing practices by solicitors, other staff or partners?	**63.2% (289)**	10.5% (48)	26.3% (120)	457
reporting improper billing practices to the Legal Services Commissioner?	30.3% (139)	20.5% (94)	**49.1% (225)**	458
			answered question	**460**
			skipped question	**57**

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Billing Practices Survey

Does your firm have billing policies and/or procedures in respect of when it is appropriate to bill for any of the following:

	Yes	No	I don't know	Response Count
Drafting	73.1% (334)	11.6% (53)	15.3% (70)	457
Research	71.3% (326)	12.3% (56)	16.4% (75)	457
Travel	69.1% (315)	12.3% (56)	18.6% (85)	456
Waiting (eg for Court/meetings)	61.0% (278)	14.5% (66)	24.6% (112)	456
Internal conferences	70.0% (319)	14.0% (64)	16.0% (73)	456
Internal reviews of files	64.4% (293)	16.3% (74)	19.3% (88)	455
Preparing internal memoranda	66.4% (302)	15.4% (70)	18.2% (83)	455
Supervision	65.9% (300)	12.5% (57)	21.5% (98)	455
File Management	64.5% (294)	15.4% (70)	20.2% (92)	456
Administration	68.1% (309)	13.9% (63)	18.1% (82)	454
			answered question	457
			skipped question	60

Billing Practices Survey

Does your firm measure and manage a fee earner's performance in relation to:

	Always	Sometimes	Mostly	Never	I don't know	Response Count
the amount you have billed	**64.0% (293)**	13.1% (60)	13.1% (60)	0.2% (1)	9.6% (44)	458
the accurancy of your cost estimates	14.3% (65)	28.6% (130)	5.9% (27)	20.3% (92)	**30.8% (140)**	454
the use of costs updating	14.0% (63)	24.4% (110)	6.4% (29)	20.2% (91)	**35.0% (158)**	451
the number of pro-bono hours worked	8.6% (39)	17.7% (80)	3.3% (15)	**35.3% (160)**	35.1% (159)	453
the amount of supervisory work undertaken	17.6% (80)	24.6% (112)	8.8% (40)	15.4% (70)	**33.6% (153)**	455
the ethical reputation of the fee earner	23.3% (106)	15.0% (68)	4.6% (21)	18.3% (83)	**38.8% (176)**	454
the level of the fee earners diligence and competence	**44.7% (204)**	15.4% (70)	12.3% (56)	5.5% (25)	22.1% (101)	456
the efficiency of work performed	**43.5% (199)**	18.6% (85)	12.9% (59)	5.7% (26)	19.3% (88)	457
Client satisfaction	**44.0% (199)**	20.1% (91)	12.2% (55)	4.2% (19)	19.5% (88)	452
					Other (please specify)	7
					answered question	**459**
					skipped question	**58**

Billing Practices Survey

Before the payment of any bonus or promotion within the firm, are a fee earner's billing practices audited to ensure that they have complied with their professional obligations?

	Response Percent	Response Count
Yes	17.7%	79
No	20.8%	93
I do not know	61.5%	275
answered question		447
skipped question		70

Billing Practices Survey

Have you ever had concerns about the billing practices of other legal practitioners/staff in your firm?

	Response Percent	Response Count
Yes	29.7%	135
No	70.3%	320
answered question		455
skipped question		62

Billing Practices Survey

A client retains a firm on the basis that they will be charged on an hourly rate. Partner A provides a client with an estimate of work for $10,000.00. At the conclusion of the matter, the account comes to $5,000.00 on a time costing basis. Partner A charges the client $9,000.00 as the work performed by the firm was, in his view, of a high quality and the outcome exceptional.

	Yes	No	Maybe	Response Count
in your opinion, is the billing practice ethically appropriate?	10.2% (46)	**74.0% (335)**	15.9% (72)	453
would the culture of your firm encourage this practice?	11.1% (50)	**74.7% (337)**	14.2% (64)	451
does your firm have a policy/procedure in relation to this issue?	37.1% (166)	**38.6% (173)**	24.3% (109)	448
have you ever been given guidance/advice in relation to the practices descibed above?	37.8% (169)	**58.8% (263)**	3.4% (15)	447
		If you selected "maybe" please explain why		96
			answered question	**453**
			skipped question	**64**

Billing Practices Survey

You are taking a two hour plane trip from Brisbane to Melbourne to conduct an interview in a matter involving client A. While on the plane, you review materials for another file you are working on for client B for the following week. Your firm has a billing procedure whereby you normally bill clients for your time spent travelling/waiting on their behalf.

	Yes	no	Maybe	Response Count
Would you bill both client A and B two hours each?	12.4% (56)	**77.8% (350)**	9.8% (44)	450
Would the culture of your firm encourage this practice?	10.2% (46)	**72.4% (325)**	17.4% (78)	449
Does your firm have a policy/procedure in relation to this issue?	33.2% (148)	**43.7% (195)**	23.1% (103)	446
Have you ever been given guidance/advice in relation to the practices descibed above?	35.0% (157)	**61.8% (277)**	3.1% (14)	448
		If you selected "maybe" please explain why		70
			answered question	**451**
			skipped question	**66**

Billing Practices Survey

You research an area for one client which takes two hours. A few months later the same issue arises in respect of a second client and as a result of the previous work product, the time to complete the advice for the second client takes only one hour.

	Yes	No	Maybe	Response Count
Do you bill the second client the same as you did for the first client?	5.6% (25)	**84.0% (377)**	10.5% (47)	449
In your opinion, is it ethical to use re-cycled work product which leads a practitioner to billing more than the number of hours actually worked?	10.1% (45)	**76.1% (340)**	13.9% (62)	447
Would the culture of your firm encourage this practice?	10.6% (47)	**73.3% (326)**	16.2% (72)	445
Does your firm have a policy/procedure in relation to this issue?	28.1% (124)	**48.6% (215)**	23.3% (103)	442
Have you ever been given guidance/advice in relation to the practices descibed above?	30.9% (137)	**64.6% (287)**	4.5% (20)	444
			If you selected "maybe" please explain why	100
			answered question	**449**
			skipped question	**68**

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