

**RETHINKING THE REGULATION OF LAWYER CONDUCT:
THE CENTRALITY OF LAW FIRM MANGEMENT AND
ETHICAL INFRASTRUCTURES**

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Standards of conduct in the delivery of legal services have been regulated traditionally in this country, the US and in England and Wales by establishing systems which enable clients and others who are dissatisfied with the way lawyers conduct themselves to make complaints to the lawyers' professional bodies, and then by holding the lawyers to account when their conduct is shown to fall short of the ethical standards their professional peers expect of them.

There have been some changes to those regulatory arrangements in recent years. They have changed in most Australian states and in England and Wales, for example (but not in the US), to enable complainants to make their complaints not to the professional bodies but to independent statutory regulators like the Legal Services Commission. These changes followed criticisms that the professional bodies are inherently conflicted in dealing with complaints about their members and showed 'excessive sympathy for, and leniency' to lawyers subject to complaint.

The traditional arrangements have been further changed in response to criticism that they were too narrowly focussed on ethical misconduct to the exclusion of the vast majority of complaints that describe only minor misconduct and poor standards of service and the like. Hence we now have a concept of unsatisfactory professional conduct that sees lawyers held to account for conduct that falls short not only of the ethical standards their peers expect of them but also the standards of competence and diligence members of the public are entitled to expect.

Those are significant changes, but what hasn't changed is that the system remains focussed exclusively on the conduct of individual lawyers and, with the exception of the handling of trust monies (which has long been subject to audit), that they leave the conduct of law firms entirely beyond regulatory scrutiny. And so it is today, but for law firms which have chosen now that the option is open to them to structure themselves as companies and to trade as incorporated legal practices (or ILPs).

This regulatory schema has long past its use by date, whatever its merits in days past when lawyers went about their business largely as sole practitioners. The time has come to put the spotlight not only on individual lawyers but law firms, and the framework for regulating the delivery of legal services by ILPs shows us how it can be done.

It can be done simply by modifying the regulatory schema:

- to put the principals of all law firms under the same obligations as legal practitioner directors of ILPs, most notably to ensure that their firms keep and implement ‘appropriate management systems to enable the provision of legal services by the practice under the professional obligations of Australian legal practitioners’; and
- to empower the Commission (and our counterpart regulators elsewhere) to treat all law firms equally, by empowering us to conduct compliance audits of all law firms just as we are empowered now to conduct compliance audits of ILPs.

There are good in principle and policy-based arguments and now increasingly strong evidence-based arguments to believe that changing the regulatory framework in these ways will significantly improve standards of conduct in the profession – and in my view reforming the regulatory schema to this effect is the single most constructive thing government could do to improve standards of conduct in the delivery of legal services.¹

We currently have a great opportunity to get it right. No doubt you are all aware that COAG established the National Legal Profession Reform Project on 30 April just past and charged the Project Taskforce to draft simplified, uniform national legislation by 30 April 2010 and to recommend the regulatory structures that will be required to achieve the uniform regulation of the delivery of legal services across the states and territories. I don’t doubt that the reforms I am proposing will come under consideration as part of that exercise.

I propose in this paper:

- firstly to set out the arguments as I see them **why** those reforms are necessary and desirable (and I will include the in principle and policy-based arguments under this heading);
- secondly to give some concrete shape to the discussion by describing **how** the reforms might be implemented in practice (and I will include the evidence-based arguments under this heading); and

- thirdly to try to pre-empt the most likely counter-argument – that the **compliance costs** of implementing reforms to this effect would outweigh the benefits by imposing too great a regulatory burden.

WHY

There may be others, but I can think of three in principle or policy-based reasons why all principals should be under the same obligations as legal practitioner directors to keep and implement appropriate management systems, and why we should seize the opportunity now to make sure they are.

- **there is an argument, firstly, that in fact they already are:** it would take a brave sole practitioner or partner to argue that they are not already under the same obligation as legal practitioner directors to keep and implement appropriate management systems, albeit an obligation less well articulated and set out in the rules and not in statute.

Rule 37 of the Legal Profession (Solicitors) Rule 2007 says that ‘a principal is responsible for exercising reasonable supervision over solicitors and all other employees in their provision of legal services by the law practice’ⁱⁱ and, while that obligation looks at first blush qualitatively different from and less onerous than a legal practitioner director’s obligation to keep and implement appropriate management systems, that is by no means clear. I note for example that Riley’s Solicitors Manual says the rule implies that principals should ‘set in place procedures and systems that all employees of a law practice must follow in processing work and regularly monitor compliance at various trigger points, as well as review those procedures and systems.’ It goes on to say that ‘the supervisory duty also has an educational aspect, namely to seek to inculcate in the lawyers and other staff being supervised an awareness and appreciation of their professional responsibility.’

The rule thus understood puts principals under very similar if not the very same obligations as legal practitioner directors, and I am strengthened in that view by recent developments in the common law in relation to vicarious liability. The courts in this country and elsewhere are increasingly finding employers vicariously liable for the intentional acts of their employees provided there’s ‘a sufficiently close connection between the employee’s actions and the duties of his or her employment, the employer

materially increases the risk of the particular wrongdoing [by failure to give clear instructions, for example, or to maintain a policy of accountability or to monitor the employee's performance] and the wrong is done to vulnerable people put at risk by the employer's enterprise.'ⁱⁱⁱ

- **secondly, it's as good inevitable in any event:** ILPs comprise a sizeable minority of law firms already and it is likely on current trends that they will comprise a substantial minority and quite likely even the majority in the medium-term future. New South Wales has allowed law firms to incorporate since 2001 and has more than 800 incorporated legal practices now, or about 20% of all its law firms, and the number is steadily growing. And similarly here: there were 97 incorporated legal practices in Queensland at 30 June 2008, only a year after law firms were first allowed to incorporate, 170 at 30 June 2009 and 197 or just short of 14% of all Queensland law firms at 31 July just past.

It will make simply no sense as their numbers grow to have two regulatory regimes, one for ILPS and one for sole practitioners and partnerships.

- **and thirdly, complaints-driven regimes that are directed solely to the conduct of individual lawyers are an important and useful regulatory tool but an incomplete, ineffective and inefficient means of regulating standards of conduct in the delivery of legal services:** they have at least four inherent shortcomings.
 - **complaints-driven regimes are almost entirely reactive:** they confine our gaze to the past. They confine our powers as regulators to dealing with conduct only after the horse has bolted – only after some conduct has occurred and given rise to complaint or, in the case of 'own motion' investigations, which give us at least a measure of pro-active capacity, still only after some conduct has occurred that causes us to have reasonable suspicions. Imposing disciplinary sanctions for proven misconduct sends a message, of course, and no doubt has a deterrent effect, but an effective regulatory regime will empower us as regulators to do something constructive to prevent it.
 - **complaints-driven regimes focus exclusively on minimum standards:** they confine our gaze equally to the very merest of minimum standards – to the point at which conduct becomes 'unsatisfactory professional conduct' or worse and stands to attract a disciplinary sanction. An effective regulatory regime will empower us as

regulators to do something constructive to promote best practice, not merely to deter the profession from falling below or merely treading the bottom line.

- **complaints-driven regimes are highly selective in their application:** we see the same facts replicated year after year - 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 in sole practice or 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 lawyers who work in medium sized and larger law firms are only nominally subject to any statutory oversight and in reality are almost entirely self-regulated, whether by their own consciences and character or their law firm's systems and processes or both.^{iv}

It makes no sense at a time when regulatory arrangements in the broader economy have let us down so badly to leave the majority of lawyers and law firms effectively beyond any regulatory scrutiny. But it never made sense. We can't assume for a moment that the complaints data is a measure somehow of the prevalence or distribution of misconduct within the profession. There is simply no good reason to believe that lawyers who do commercial litigation work 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 conveyances or work in sole practice or small law firms.^v

The simple fact is that complaints measure the incidence of client dissatisfaction with lawyers, not of lawyer misconduct, and the dissatisfaction only of a sub-set of clients who are deeply emotionally engaged with the issue that first prompted them to see a lawyer and even then probably not very accurately.

These are ultimately empirical questions of course and there has been precious little empirical research. The empirical evidence, scant as it is, is equally troubling^{vi} and the indirect evidence - the evidence of the extraordinarily high incidence of emotional distress and psychological ill-health among lawyers generally,^{vii} for example, or of the havoc wreaked by unreasonable pressure to meet unrealistic billings targets or

other risk factors including performance against billings targets becoming an ‘all purpose’ performance measure for promotion and other purposes^{viii} - is positively sobering.

- **regimes that are directed solely to the conduct of individual lawyers ignore the impacts of law firm culture:** they ignore the reality that individual lawyers conduct themselves in ways that are a function in part at least of the workplace cultures of the law firms within which they work. The fact is that lawyers sell their services for profit within commercial enterprises and that law firms like other commercial enterprises have workplace cultures that shape the conduct of the people who work for them, for better or worse.

Regimes that are directed solely to the conduct of individual lawyers give us a means of identifying and dealing with at least some of the ‘bad eggs’ in the profession, certainly, but they leave law firm ‘nests’ entirely off-limits. They make individual lawyers solely responsible for their conduct and absolve their law firms a priori.^{ix}

Yet there is no good reason why law firms shouldn’t be capable of being held to account for the unacceptable conduct of their employees, especially when there is reason to believe that a firm effectively condoned or tolerated such conduct by reason of its ‘inappropriate’ management systems, much less encouraged or expected it.

This audience of all audiences will hear what I’m saying. Your mission as law firm managers is to improve the quality of law firm management, not for its own sake but to improve both the efficiency of your firms’ delivery of legal services and the quality of the services they deliver – and I don’t doubt that you have regard to the ethical quality of the legal services your firms deliver as much as their profitability.

A partner in one of the large national law firms has put it his way: ‘the primary cause of client dissatisfaction and overcharging [and he might have been talking of untoward practices more generally] is not dishonest or unethical conduct but inadequate systems, training, management practices and culture. A disciplinary or compliance approach does not address the main cause of the problem’^x – unless of course we reform our compliance approaches along the lines I’m suggesting.

Surely we can find better ways to monitor and enforce standards of conduct among lawyers than simply responding to complaints about individual lawyers (important though that task is) - ways that focus on the future, not just the past; that encourage them to do the right thing as much as threaten to punish them for doing wrong; that engage all lawyers and law firms, not just a sub-set of lawyers and law firms; and that put law firm culture at the very front and centre of the regulatory regime. The framework for regulating incorporated legal practices shows us how.

HOW

Queensland's *Legal Profession Act 2007* (the Act) like its counterpart legislation in the other Australian states and territories allows law firms to incorporate and establishes the regulatory framework for the provision of legal services by ILPs. The framework reflects the current national model laws and is identical in all essential respects with the frameworks that now apply in every other state and territory but for South Australia (which has yet to enact its local version of the national model laws).

Obviously we regulate the provision of legal services by ILPs in part at least in exactly the same way we regulate the provision of legal services by any other law firm - by responding to complaints about or, if we suspect all is not as it should be, by initiating 'own motion' investigations into the conduct of the lawyers who work for them including their legal practitioner directors.

Notably however the Act requires ILPs to have at least one legal practitioner director and it imposes obligations on legal practitioner directors over and above their ordinary professional obligations as lawyers, not least obligations:

- 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 and other obligations imposed under this Act'; and
- to take 'all reasonable action' to ensure that practitioners employed by the practice comply with their professional obligations and, if they don't, to take 'appropriate remedial action' including 'all reasonable action... to deal with any unsatisfactory

professional conduct or professional misconduct of a legal practitioner employed by the practice.’^{xi}

A legal practitioner director’s failure to take ‘all reasonable steps’ to comply with his or her obligations in these respects is conduct capable of amounting to unsatisfactory professional conduct or professional misconduct – and I am arguing that all law firm principals should be under the same obligations and be similarly capable of being held to account.

And how do we as regulators monitor and enforce compliance? We have two regulatory tools at our disposal. Firstly we respond to complaints about and initiate own motion investigations into the conduct of legal practitioner directors in relation to their additional obligations under that guise in exactly the same way we respond to complaints and initiate own motion investigations in relation to their professional obligations more generally.

Secondly and crucially – and I am arguing that as regulators we should have the same powers in relation to all law firms - the Act empowers us to ‘conduct an audit [a compliance audit] of an ILP about:

- the compliance of the practice, and of its officers and employees, with the requirements of [the Act] or a regulation, the legal profession rules or the administration rules so far as they apply to incorporated legal practices; and
- the management of the provision of legal services by the incorporated legal practice, including the supervision of the officers and employees providing the services’;

and it allows us to conduct a compliance audit ‘whether or not a complaint has been made.’^{xii}

Appropriate management systems

A firm’s management systems might be designed to achieve and might in fact achieve any number of worthy management purposes but they count as appropriate in this context not because they enable the firm to be more business like or profitable, for example, or to reduce its exposure to claims on its professional indemnity insurance, but because and only because they ‘enable the provision of legal services by the practice under the professional obligations of Australian legal practitioners.’

Those are simple but powerful words. They mean that a firm's management systems count as appropriate in this context only by reference to the purposes they're intended to achieve and, even more fundamentally, by the impacts and outcomes they do in fact achieve. They count as appropriate only if they support and encourage and guide the firm's employees to do the right thing and discourage and deter them from doing the wrong thing - and, given that even the best systems might be less than completely successful in that regard, only if they maximise the likelihood any wrongdoing will be detected and dealt with, including with appropriate remedial action.^{xiii}

Notably a firm's management systems extend well beyond its formal policies and procedures. Of course it's important that law firms have policies and procedures to support and encourage compliance with ethical standards but at the end of the day policies and procedures simply describe a firm's intentions, or perhaps only what its leaders say their intentions are, and can be as honoured in the breach as the observance.

We all know it's true. We all know managers who boast about their open door but who never seem to notice how few of their employees ever come on in. We all know organizations that boast best practice policies and procedures in relation to whistle blowing and workplace bullying, including obviously policies that prohibit retaliation against employees or clients who blow the whistle or complain, but where no one ever dares to blow the whistle or complain for fear of retaliation.

Clearly a firm's systems in this context include not only its policies and procedures but the myriad other factors that influence what actually happens in practice - the unwritten rules and ways of doing things, the values, customs, practices, management behaviours and patterns of incentives and disincentives explicitly stated or otherwise that motivate and sustain the firm's lawyers to conduct themselves ethically or, alternatively, that leave them to their own ethical devices or worse, by actually encouraging them to conduct themselves unethically.

In short, then, a legal practitioner director's duty to ensure his or her firm keeps and implements appropriate management systems is a duty to ensure it develops and maintains what some commentators call an 'ethical infrastructure',^{xiv} and ultimately an ethical workplace culture.

Compliance audits

The Act is silent about how we should go about conducting compliance audits other than requiring us to give the firms we audit a report of the audit.^{xv} Notably however it gives us all the same and more powers in relation to compliance audits than we have in relation to complaints and investigation matters - powers to require reasonable help and cooperation in conducting an audit, to require the production of documents and information, to enter places including if needs be by warrant, to examine books, to seize evidence, to examine persons and to hold hearings.^{xvi}

An audit is 'a review or examination of any aspect of the operations of [a] person or body'.^{xvii} A compliance audit by that account is a review of a firm's ethical performance - of the firm's and its employees' compliance with their corporate and professional obligations and the appropriateness of its management systems in the sense that we've just described. Our audit power is a power to conduct ethics audits, in effect.

We conduct two types of audit of ILPS - internal or self-assessment audits that we will expect incorporated legal practices to undertake themselves, through their legal practitioner directors, and external audits that we undertake, looking in from the outside - and I am arguing that we should be empowered as regulators to conduct the same audits of all law firms.

Internal or self-assessment audits

We are committed along with our counterpart regulators in New South Wales and Victoria to the self-assessment audit process that has been pioneered over recent years in New South Wales. The process will be familiar to many of you and is in any event described in detail on both the Commission's and our New South Wales counterpart's websites and there is no need to add to those descriptions here.^{xviii}

Suffice it to say that we require legal practitioner directors to audit their firm's management systems and supervisory arrangements soon after it gives the required notice of its intention to commence legal practice as an ILP. We require them to complete a pro forma self-assessment audit form - a form they will be able to complete on-line in the not too distant future - which asks them to rate how effectively their systems meet ten key objectives of sound legal practice.

The process has been designed as a form of 'ethical capacity building' - to engage legal practitioner directors with problem-solving how they might best develop and continually improve their management systems and processes and workplace cultures to better support and sustain high standards of conduct, and to candidly identify any aspects of their practice's management systems that might require or benefit from improvement.

Self-assessment audits, in other words, are 'gap analyses' or 'risk assessments' or 'management reviews' that serve as a baseline for future improvements to the practice's management systems and supervisory arrangements and reports on those improvements.

We have asked the legal practitioner directors of all 171 law firms that gave notice by 30 June 2009 of their intention to commence legal practice as ILPs to complete the self-assessment audit. So far 133 of them have completed the exercise and the remaining 38 all commenced as ILPs only relatively recently and are completing the audit as we speak. We've had excellent cooperation.

Notably two-thirds of the firms that completed the self-assessment by 30 June 2009 report having made improvements to their systems as a result. Interestingly, because this is the one area where all law firms have always been subject to audit, they identified significantly less room for improvement in their systems for handling trust monies than any of their other systems.

It's too early locally to measure the impact of undertaking the self-assessment process but not in New South Wales where ILPs have been allowed since 2001. Dr Christine Parker of the Melbourne University Law School last year researched the first six years of data and found 'compelling evidence' that requiring ILPs to keep and implement appropriate management systems and to undertake self-assessment audits makes a difference for the better, and a big difference.^{xix}

She 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, and that this huge drop in complaints is 'statistically significant at the highest level'. She found that the complaint rate per practitioner per year for incorporated legal practices is also one third the complaint rate for traditionally structured firms and that while complaint rates per practitioner

per year are lower in larger than smaller firms and lower in city than rural and suburban firms, ‘the fact that an incorporated legal practice has been through the self-assessment process is a more significant predictor of the rate of complaints’.

That is powerful empirical evidence of the effectiveness of the compliance audit power – and a correspondingly powerful reason why we should have the same power in relation to all law firms, and not merely ILPs.

External audits

Clearly we need to develop and conduct a program of audits ourselves so that we can know whether the self-assessment audits legal practitioner directors undertake at our request are giving us a fair and reasonable and for that matter an honest appraisal of the actual state of play. We can’t simply take their word for it.

No doubt there are others but it seems to us that a program of external audits should satisfy at least the following criteria:

- it should be and be seen by incorporated legal practices and all our other stakeholders to be credible and robust, and sufficiently credible and robust to justify public confidence in the provision of legal services by incorporated legal practices and that we’re on the job, as it were.

That implies that we should have regard both to the frequency of our audit interactions with law firms and their quality. We will have to do better in relation to frequency, surely, than getting around to auditing law firms once every few years or so. We shouldn’t be in their face but we should be visible and have a presence. Similarly we should be able to say in relation to quality that our audit program adds value in ways we can point to and defend – that it makes a difference and a difference for the better;

- it should encourage and support lawyers and law firms to aspire to best practice, not to risk manage to minimum standards. It should be fully consistent with and complement the ‘ethical capacity building’ thrust of the self-assessment audits. It should value-add by encouraging legal practitioner directors to stay engaged or to re-engage with efforts

to continually improve their management systems and supervisory arrangements and to further their conversation with us as regulators about their progress in that regard;

- it should allow for the fact that we don't and won't ever have the resources we need to conduct regular and comprehensive reviews of every aspect of every law firm's management systems and supervisory arrangements, and that we are under an obligation to direct the resource at our disposal to where it is most needed and can be most effective.

It follows that we conduct comprehensive external audits only occasionally, and only of those law firms we believe are most likely to fall short of expectation - and even then only of those particular aspects of a firm's systems we believe are most likely to fall short of expectation. We need to rapidly acquire the data and the skills and the analytical capacity necessary to make evidence based risk assessments of those kinds.

That will be a two-pronged exercise. It will demand of us that we identify not only the law firms that are the least likely to deliver legal services 'under the professional obligations of Australian legal practitioners' but also the aspects of legal practice most likely to be problematic in this regard - billing practices, perhaps, or supervision.

We should maintain a credible presence even so among those firms we assess to be least at risk. We should allow for the fact that we'll sometimes get our risk assessments wrong - it will always be an art not a science - and we should be at pains not to encourage legal practitioner directors in low risk firms to drop the ball by too often directing our attention elsewhere.

A program of external audits should satisfy several other criteria also:

- it should be directed not to reviewing policy and procedure manuals and the like and checking them against the best practice characteristics of documents of that kind but to trying to find out how they're perceived and implemented and what's actually happening down the line - we should be collecting evidence about their ethical impacts and outcomes in practice;^{xx}

- it should be directed to ‘the measurement of impacts within small, specific and well defined problem areas’ and we should design ‘creative-tailor made solutions [that] procure compliance while recognising the need to retain enforcement as the ultimate threat’; ^{xxi}
- last but not least, it should be designed specifically not to add unnecessarily to the ‘regulatory burden’. It should keep the compliance costs to law firms proportionate to the potential significance of the information we’re seeking to obtain ^{xxii} - and we can expect resistance it doesn’t, and rightfully so.

Accordingly we conduct two kinds of external audit of ILPs – short, sharp web-based surveys we expect them to undertake at regular intervals, currently annually, and more comprehensive but tailor-made on-site reviews. We conduct on-site reviews only as needs be, and only of those ILPs we assess to be most at risk of non-compliance - we have designed our audit program deliberately and as a matter of principle so as not to add any significant additional regulatory burden unless we have some demonstrable risk-related reason that justifies a more intrusive approach. I am arguing that we should be empowered to audit all law firms similarly.

That demands of us that we make what we hope and expect will become increasingly sophisticated risk assessments based on a range of evidence including a firm’s complaints history, our analysis of the firm’s self-assessment audit and a range of other information we have at our disposal including, for example, the nature of any ‘show cause’ events reported by practitioners employed by the firm, any anomalies that have arisen in audits of the firm’s handling of trust monies or unreasonable delays in its compliance with statutory notices and renewals, the number and nature of any claims against its professional indemnity insurance and the like. We are building a ‘risk alerts’ capacity into our database to support us in making risk assessments of these kinds.

Web-based surveys (ethics checks for law firms)

We have commenced building a varied and ever-expanding suite of short, sharp web-based surveys which test discrete aspects of law firms’ ethical infrastructures. We are drawing on a set of design principles, as follows:

- the surveys should minimise the compliance costs to the firms subject to audit by taking no more than and preferably less than 30 minutes to complete. They should be equally resource-friendly our point of view also. We will use software that automatically calculates the key results.
- they should be directed not just to a firm's legal practitioner director(s) but to all its employees, or in large firms at least significant samples of the different levels and classifications of their employees – directors, senior lawyers, junior lawyers, paralegals and other non-legal staff. We want the employees to give us, and the firm, a window on how the firm's policies and procedures and systems are understood and implemented 'down the line' by the different levels and classifications of their people.
- they should encourage respondents to be frank, by guaranteeing their anonymity.^{xxiii}
- they should have an educational value by prompting individual respondents to reflect on the significance of the questions and the implications of their answers both for them as individuals and their firm.
- they should add value from a firm's point of view also, by 'taking its ethical pulse' and, because we will give a firm its results, by allowing it 'hold an ethical mirror' to itself. The individual respondents will remain anonymous, but their answers and in particular the patterns of their answers across the different levels and classifications of the firm's employees and, if the firm has more than one office, the patterns of their answers across its different offices will be a handy indicator of which of its management systems if any might need improvement.
- they should add value from our point of view, too, as a risk indicator. The answers and the patterns of answers across the different levels and classifications of a firm's employees might be positively encouraging or they might be anomalous, by suggesting that the firm's systems are not always reflected in what actually happens 'down the line' and stand to be improved by clarification or further training and the like. Equally they might hint at deep-seated problems that warrant a closer look by means of a comprehensive on-site review. Certainly the information we obtain in this way will add powerfully to the risk information we will already have at our disposal,

including the self-assessment and annual survey data and the firm's complaints history.

- they should have potential to add further value again, if as we envisage we publish the aggregated and de-identified results. That will enable law firms to compare their performance with the performance of their law firm peers; it will enable both them and us to identify not only problem areas but also how the best firms are resolving them; and it will serve the public interest by exposing aspects of law firm culture to public scrutiny.

We have developed three web-based surveys at the time of writing and they are all readily accessible on the Commission's website - an audit of practice culture, or workplace culture check; an audit of billing practices in medium to large law firms; and an audit of complaints management systems in law firms.

We designed those surveys in close consultation with sympathetic lawyers and legal academics and we road-tested early versions with several equally sympathetic law firms. They are all the better and more practical and relevant for that and we will continue that collaborative approach into the future. We have several further surveys in various stages of development including surveys about civility, supervision practices and duties to the courts and third parties.

The feedback thus far has been encouraging:

- **the workplace culture check:** 15 firms volunteered to participate in the survey in February this year, and, because some of them have more than one office, 30 law firm offices took part. They encouraged their staff to complete the survey and they did – there were 478 individual respondents. Only 3 of those firms were ILPS.

We have published the results on the Commission's website, both the aggregated results and the results for each of the (anonymous) 15 firms and 30 branch offices. They make interesting reading, not least the cross-tabulation reports which compare the individual respondents' answers against their seniority within the firm, the length of their employment with the firm, the length of their post-admission experience and

their gender. Notably 73% of the 478 individual respondents said they found the exercise either very helpful or helpful and only 3% said they found it unhelpful.

We asked the 15 senior partners / legal practitioner directors to give us their feedback after we published the results and, notably again, all but 1 of them said the survey was either helpful or very helpful in helping them assess the ethical culture of their firm and none of them said it was unhelpful.

We were struck by the fact that 8 of them said their firm decided to adjust some of its systems following the survey – by changing their induction program, for example, and including ethics as a standard agenda item at partners meetings – and that 9 of them answered ‘no’ and only 5 of them answered ‘yes’ to the question ‘would expecting firms to undertake the workplace culture check of similar survey annually as a mandatory regulatory exercise be too great a regulatory burden?’ Notably 4 of the 5 who answered ‘yes’ qualified their answer and only 1 of them appears to have rejected the proposition outright.

- **the complaints management systems check:** we required 35 ILPs to complete the survey in May-June 2009 as a form of compliance audit, and 271 of their people responded. We have published the aggregated results on our website including several cross-tabulation reports. We asked the 35 legal practitioner directors to give us feedback and we have published that information also.

Notably 64% of 271 individual respondents said they found the exercise either very helpful or helpful and only 9% said they found it unhelpful. Oddly, 14 of the 22 legal practitioner directors who gave us their feedback answered ‘yes’ and 7 answered ‘no’ to the question ‘would expecting firms to undertake the workplace culture check of similar survey annually as a mandatory regulatory exercise be too great a regulatory burden?’

I say ‘oddly’ because 14 of them said they found the survey to be either very helpful or helpful assessing the adequacy of their firm’s complaints management systems and only 1 of them said it was unhelpful, and similarly 14 of them said their firm had adjusted their firm’s systems as a result. One of them said ‘I just wanted to thank you and your team for your proactive approach in assisting firms step up to the mark on

complaints management. Clearly we have a lot of work to do, and your work has provided me with some great ideas on preparing the materials we need to ensure everyone understands our complaints management procedures.’

I suspect in these circumstances that the legal practitioner directors who answered ‘yes’ might have answered the question differently had they subtracted the time it took them and their people to complete the survey not from the time they expect fee earners and other staff to put towards billable work but from the time they set aside for professional development and other like non-billable activities. I note that the majority of the law firms which completed the survey say that they do in fact set aside time for non-billable activities of these kinds (including as it happens annual complaints management training).

- **the billing practices in medium to large law firms check:** a partner from one of the large national law firms who road-tested the survey volunteered that it ‘was a useful reminder of the issues that arise in best billing practice. It has prompted us to review our own management systems to see how effectively they deliver best billing practice and given us some very good ideas as to how to improve our systems.’^{xxiv}

That is encouraging, and so too the fact that Jonathan Shaw, a partner at Blake Dawson, saw fit with my permission to include a large slab of the survey in a paper he presented at the 2009 QLS Symposium.^{xxv} I include that same slab of the survey here, to illustrate the concept:

1. **Does your firm have a daily billable hour target expectation of fee earners?**
 - Yes
 - No

2. **Does your practice use IT systems (time recording/accounts) to prompt you when you meet milestones in terms of accrued WIP (e.g. to prompt a costs update)?**
 - Yes
 - No
 - I do not know

3. **Does your practice regularly measure client satisfaction in relation to costs disclosure and billing?**
 - Yes
 - No
 - I do not know

4. **Does you practice audit and measure the promptness of costs updates?**
 - Yes
 - No
 - I do not know

5. **Does your practice have a procedure for giving estimates to clients?**
 - Yes
 - No

6. **Does your practice offer training to all fee earners on providing reasonable estimates to clients?**
 - Yes
 - No

7. **Does your practice measure estimate accuracy? (That is, does it compare initial estimates to the final bill)**
 - Yes
 - No
 - I do not know

8. **Does your practice measure and manage a fee earner's performance in relation to estimate accuracy and costs updating?**
 - Yes
 - No
 - I do not know

9. When you commenced employment with the firm, were you advised about the firm's billing procedures? (That is, what could or could not be billed for)

- Yes
- No

10. Excluding billing guidelines imposed by clients, does your firm communicate any guidelines dealing with billing practices?

- Yes
- No
- I do not know

11. If yes, does the practice have billing procedures in respect of when it is appropriate to bill for any of the following:

	Yes	No	I don't know
Drafting	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Research	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Travel	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Waiting	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Internal conferences	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Internal reviews of files	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Preparing internal memoranda	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Supervision	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

12. Approximately how much training or instruction has your firm provided you on billing practices?

- None
- Less than one hour
- Less than two hours
- More than two hours

13. During any training offered by your firm regarding overcharging or improper billing practices, did you discuss relevant case law (e.g. D'Alessandro v Legal Practitioners Complaints Committee (1995) 15 WAR 198; De Pardo v Legal Practitioners Complaints Committee [2000] FCA 335; Re Law Society of the Australian Capital Territory and Roche (2002) 171 FLR 138; Law Society of New South Wales v Foreman (1994) 34 NSWLR 408; Legal Practitioners Conduct Board v Hannaford (2002) 83 SASR 277)

- Yes
- No

14. Does your firm have a policy or system for dealing with the ethical concerns about billing practices by solicitors, other staff or partners?

- Yes
- No
- I do not know

15. Which of the following does your firm use to address ethical concerns of employees (check all that apply)

- Designated ethics partner/solicitor
- Ethics committee
- Written policy encouraging reporting of misconduct
- Scheduled in-firm meetings
- Scheduled training on ethics issues
- Other (please specify)

16. During your employment with the practice, have you observed any instances of “padding” bills for work not actually performed?

- Yes
- No

- 17. Does your firm solely measure and manage a fee earners performance by reference to the amount they have billed?**
- Yes
 - No
 - I do not know
- 18. Does your practice have a system of rewarding fee earners who exceed their budget by way of bonuses or extra remuneration?**
- Yes
 - No
 - I do not know
- 19. Before the payment of any bonus or promotion within the firm, is a fee earner's billing practices audited to ensure that there has been compliance with their professional obligations?**
- Yes
 - No
 - I do not know
- 20. Does your firm have an internal discipline process for practitioners who engage in improper billing activities?**
- Yes
 - No
 - I do not know
- 21. Have you ever had concerns about the billing practices of other legal practitioners/staff in your firm?**
- Yes
 - No
- 22. How did you handle those concerns? (Check all that apply).**
- I did nothing
 - I discussed the matter with a supervisor or managing partner/legal practitioner director
 - I discussed the matter with another legal practitioner

- I discussed the matter with the legal practitioner who practices I questioned
- Other (please specify)

23. Please indicate the extent to which you agree with each of the following statements. (Pick a number from the following scale and mark it beside each statement).

	Strongly agree	Disagree	Neither agree nor disagree	Agree	Strongly agree
Clearing billing guidelines would help eliminate questionable billing practices	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Clear billing guidelines would help solicitors and non-legal staff to practise ethically	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
It feels as if there is pressure to bill from the management of the practice	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

24. Please indicate the extent to which you agree with each of the following statements. The requirement to time bill:

	Strongly agree	Disagree	Neither agree nor disagree	Agree	Strongly agree
Affects the quality of mentoring within a law practice	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Results in solicitors competing against each other within the practice	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Risks affecting a solicitors integrity	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Fails to discourage excessive duplication of effort	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Does not encourage project or case planning	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Encourages cutting corners when there is
pressure to meet a client budget

25. You act in litigation and schedule court appearances for three clients on the same day dealing with the same issues. You spend a total of four hours at court.

What do you bill clients?

- 4 hours each
- The actual time spent on each matter
- Other (please specify)

26. You are appearing in a mediation for 5 clients. It is agreed between the parties that as the legal issues all arise out of the same factual basis, all 5 matters can be dealt with together. You spend a total of four hours at the mediation. What do you bill the clients?

- 4 hours each
- The actual time spent on each matter
- Other (please specify)

27. You research an area for one client which takes two hours. A few months later the same issues arises in respect of a second client. Do you bill the second client, who agreed to be billed on a time basis, the same amount as you did for the first client? (e.g. as a result of the previous work product, the time to complete the advice for the second client takes only one hour)

- Yes
- No

28. In your opinion, is the use of re-cycled work product which leads a practitioner to billing more than the number of hours actually worked an ethical practice?

- Yes
- No

29. **Has your firm or supervising partner/legal practitioner director given you guidance on the practices described in the previous scenarios?**
- Yes
- No
30. **Does your firm have any policies or procedure which address the issues raised in this scenario?**
- Yes
- No
- I do not know
31. **Does your practice have a procedure in place to report improper billing practices to the Legal Services Commission?**
- Yes
- No
- I do not know

I am keen to run the billing practices survey with, say 15 or more volunteer law firms over coming months – and I take the opportunity to call for volunteers. You know how to reach me, and I guarantee your and your firm’s anonymity.

On-site reviews

On site reviews by their very nature are a more resource intensive exercise both from our point of view and point of view of the law firms subject to review, and it follows that we envisage conducting reviews of this more intensive kind significantly less frequently than web based surveys and only on an ‘as needs’ basis - on the basis of a risk assessment that tells us that a firm or some aspects of its practice are or are very likely to be non-compliant.

We envisage on-site reviews comprising tailor-made combinations of some or all the following kinds of activities:

- further and tailor-made ethics checks of the kinds we’ve already described;

- traditional desk-top policy and procedure reviews;
- detailed analyses of the firms' complaints history, including detailed analyses of the investigation files held by the Commission;
- interviews with legal practitioner directors, supervisors and managers;
- interviews with and / or focus groups of individual employees 'down the line';
- interviews with and / or focus groups of clients, including but not only clients who have lodged complaints with the Commission;
- interviews with third parties including, for example, practitioners from other law firms that have regular dealings with the law firm subject to audit;
- reviews of selected or randomly selected client files^{xxvi} and bills, in-house complaints registers and the like;
- client satisfaction surveys; and possibly
- mystery or 'shadow' shopping and / or complaints - having real or pretend clients deal with the firm and behave exactly as a genuine client (or complainant) might behave and asking them to report their experience.^{xxvii}

We have commenced 2 but completed only 1 on-site review thus far. It comprised a detailed analysis of the firm's complaints history; a tailor-made web-based survey that addressed the issues that arose in the complaints; structured interviews with the legal practitioner director, employed solicitors and paralegals 'down the line'; and a review of randomly selected client files.

It was a useful exercise from our point of view and I would have thought from the firm's point of view also. It identified significant discrepancies in professional practice between the firm's head office and a branch office that exposed the firm, its employees and its clients to risk of both negligence and misconduct, and it resulted in correspondingly significant remedial action and improvements to the firm's management systems: a win-win result.

COMPLIANCE COSTS

I have argued that the arrangements for regulating standards of conduct in the delivery of legal services should be enhanced in two ways: by requiring the principals of all law firms

and not just legal practitioner directors of ILPs to keep and implement appropriate management systems ‘to enable the provision of legal services by [their] practice under the professional obligations of Australian legal practitioners’; and by empowering regulators to conduct compliance audits of not just an ILP’s but any firm’s management systems and supervisory arrangements.

I have argued that those enhancements would complement the complaints-based system for regulating standards of conduct by enabling us as regulators to focus on the future, not just the past; to encourage and support lawyers and law firms to do the right thing, not just to threaten punish them for doing wrong; to engage with all lawyers and law firms, not just a highly selective sub-set of lawyers and law firms; and to put law firm culture where it belongs - at the very front and centre of the regulatory regime.

I have described in some detail what a compliance auditing program might look like and the growing body of empirical evidence to the effect that a regulatory regime of that kind will improve standards of conduct in the delivery of legal services.

No doubt the counter-argument is that the compliance costs would outweigh the benefits. That is of course a risk if the compliance auditing program is poorly designed and implemented but it is by no means inherent in the concept. Quite the contrary: we have recognised the cost-benefit tension and designed a compliance auditing program deliberately and as a matter of principle not to add any significant additional regulatory burden to law firms unless there is some demonstrable risk-related reason in all the circumstances that justifies a more intrusive approach.^{xxviii}

No doubt some lawyers and law firms won’t be convinced. No doubt some of them will find it hard to resist the belief that it is just too great a risk to give potentially over-zealous regulators compliance audit powers in relation to all law firms. But there is no evidence the power would be abused - no-one is arguing to my knowledge that the compliance audit power has been abused in relation to ILPs and it’s hardly likely if that were true that we would be seeing such a steady increase in the number of ILPs, or anticipate such a dramatic increase including among the big firms if and when the current stamp duty and taxation disincentives are resolved. Nor is anyone arguing to my knowledge that the power has been abused in New South Wales where all law firms are already subject to audit.

Indeed the compliance audit power is comparable to the ‘investigation matter’ power that I already have and that my counterparts elsewhere also have to commence investigations on our own motion ‘if [we] believe an investigation should be started into the conduct of an Australian legal practitioner.’^{xxix} No-one to my knowledge is arguing that power has been abused either.

My plea to the doubters is this: structure the regulatory reform to deal with the risk of the potentially overzealous regulator, if you can’t put your suspicions to rest, but don’t try to manage the risk by avoiding it altogether – by opposing the reform in its entirety. That would be throwing out the ethical capacity building baby with the bathwater. It would aid and abet poor standards of conduct, prevent us from preventing any number of preventable accidents waiting to happen and let down those lawyers, their law firms and their clients alike.

ENDNOTES

ⁱ I have argued the case in a number of papers over the past year or so, most recently in speeches at the 47th Annual Vincent’s QLS Symposium in March this year under the heading *The Changing Face of Lawyer Regulation* and at the Third International Legal Ethics Conference in July 2008 (ILEC3) under the heading *Incorporated Legal Practices: Dragging the Regulation of the Legal Profession into the Modern Era*. Both speeches are published on the Commission’s website at <www.lsc.gld.gov.au>. An edited version of the ILEC speech has since appeared in the journal *Legal Ethics*, Volume 11, Part 2, 2008.

ⁱⁱ This is Rule 37 of the Queensland Solicitor’s Rules. The same rule applies elsewhere – see Rule 5 of the Solicitor’s Regulation Authority Code of Conduct for England and Wales, for example, or the American Bar Association’s rule 5.1.

ⁱⁱⁱ see Joshua Teague, *Vicarious liability: a comparative review of the common law after Ffrench*, (2008) 16 *Tort L Rev* 39 and more generally the *Insurance Law Bulletin*, Vol 21 No. 5, April 2006. I am grateful to Jonathan Shaw, a partner at Blake Dawson, for drawing my attention to these developments and their potential application to law firm principals. He argued in a paper at the QLS Symposium 2009 headed *Managing Costs and Billing within Your Practice* that ‘it seems quite conceivable that where a firm through its poor management practices introduces the risk of over-charging that the partners responsible for the introduction of that risk will be help responsible’ (p.17).

^{iv} The Commission publishes detailed complaints data by way of appendix to its annual reports which can be accessed at www.lsc.qld.gov.au. About half the complaints the Commission deals with are about the conduct of lawyers in family law matters (about 20%), residential conveyances (about 20%) and personal injury matters (about 10%). We know that 60% of all the complaints we dealt with in the 2006-07 reporting year were about sole practitioners; 84% were about lawyers who worked for firms with five or fewer partners (including sole practitioner firms); and only 3% were about lawyers who work in firms with 10 or more partners – yet only 30% of Queensland lawyers are sole practitioners; only 55% work in firms with five or fewer partners (including sole practitioner firms); and almost 30% work in firms with 10 or more partners.

^v It is likely that the typically wealthy and corporate clients who use the services of the larger law firms are not only better equipped to look after their own interests when they believe they've been dealt with less than appropriately but that they do, by using or threatening to use their economic leverage by taking their business elsewhere. They are also less inclined than the ordinary folk who use the services of small law firms to complain to statutory regulators. It might also be that lawyers in larger law firms typically work in teams and accordingly that it's hard to attribute responsibility for some perceived shortcoming to any particular member of the team.

No doubt some people will argue that the complaints data simply reflect a reality in which lawyers in medium sized and larger law firms are less likely to act unethically than their small firm peers. They might argue, for example, that lawyers in larger law firms have more and better opportunities to seek advice and guidance from their peers and supervisors and generally to discuss ethical issues, and that their firms have economies of scale that allow them to better support them to act ethically through in-house training programs and the like. They might also argue that there will be more people to notice misconduct in larger firms, too, and hence that lawyers who do the wrong thing are less likely to be able to hide what they're doing or otherwise to get away with it.

No doubt this is all true of the best firms. The problem however is that team environments are a double-edged sword. They can just as easily discourage ethical conduct – they can make it less likely that individual team members will take personal responsibility for the actions of the team, make team members unwilling to rock the boat by questioning whether some team decision or strategy or course of action is ethical, and diminish the team members' capacity even to 'see' ethical issues that might be staring them in the face. See 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*, 2008, University of New South Wales Law Journal 31(1): 158-188, especially pp.161-166.

^{vi} See Elizabeth Chambliss and David B Wilkins, *Promoting Effective Ethical Infrastructure in Large Law Firms: A Call for Research and Reporting*, 30 Hofstra Law review 691, 2001-2002 especially pp.698-699.

^{vii} Let me quote from a paper I gave at the BAQ 2009 Annual Conference (which includes relevant references): ‘the BeyondBlue and Beaton Consulting Annual Professions Survey of April 2007 found that lawyers are two and a half times more likely to suffer from clinical depression than other professionals. Late last year Sydney University’s Brain and Mind Research Institute put it at four times more likely. That research involved 2400 lawyers and found that one in three solicitors and one in five barristers report depression. And it seems lawyers are more likely to turn to non-prescription drugs and alcohol to manage their depressive symptoms than their professional peers, and that about one in three ‘self-medicate’ in this way.

The local data closely mirrors the data elsewhere. Various North American studies show that lawyers are twice as likely to suffer depression as the general population, three and a half times more likely than other employed people and four times more likely than other professionals. Studies show that lawyers are twice as likely to become alcoholics and, if they are male lawyers, twice as likely as men in general to commit suicide. According to one leading Canadian psychiatrist, one in every eleven lawyers contemplates suicide every month.’

^{viii} See Parker at al 2008 and also Christine Parker, *Peering Over the Ethical Precipice: Incorporation, Listing and the Ethical Responsibilities of Law Firms*, a paper first presented as the J. Donald Mawhinney Lecture in Professional Ethics at the University of British Columbia Law School on 12 February 2008, in particular the discussion above footnotes 38 and 40 and the references cited in those footnotes. Dr Parker presented a later version of the same paper at The Future of the Global Law Firm Symposium held at the Center for the Study of the Legal Profession, Georgetown Law Center, 17-18 April 2008.

See also Chamblis and Wilkins, 2002-03, above, at pp.342-343; 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; and Lisa G Lerman, *A Double Standard for Lawyer Dishonesty: Billing Fraud Versus Misappropriation*, 34 Hofstra Law Review, 847, 2005-2006. More generally, see Patrick J Schiltz, *On Being a Happy, Healthy and Ethical Member of an Unhappy, Unhealthy and Unethical Profession*, 52, Vanderbilt Law Review 871, 1999 and the other articles Chambliss and Wilkins (2002-03, above) cite at p.242, note 10. Numerous articles to similar effect appear regularly in legal journalism such as *Lawyers Weekly*.

^{ix} I can't help but note that the laws which regulate the professional conduct of lawyers stand in stark contrast in this respect to the laws which regulate our workplace conduct more generally and that are intended to set a standard. The laws in this and every other state and federally in relation to sexual harassment, for example, make employers vicariously liable for the proven misconduct of their employees and agents unless they can prove they took all reasonable steps to prevent the conduct from occurring – and, as I've mentioned already, the common law of vicarious liability appears to be heading in this same direction (see note iii, above).

^x Jonathan Shaw, *op.cit.*, at p.11.

^{xi} See the *Legal Profession Act 2007* (Qld) Part 2.7, especially sections 117-129, 132 and 143, and also section 574. Note that legal practitioner directors, employees of incorporated legal practices, the corporation itself and in certain circumstances other people are liable for disciplinary and / or criminal sanction for a range of 'misconduct' that goes well beyond the additional duties of legal practitioner directors that we specifically mention in the main body of the text.

^{xii} section 130

^{xiii} This is the effect of sections 117(3), 117(4), 118(2) and 118(3) of the Act taken together.

^{xiv} 'the legislative provisions that... require incorporated legal practices to have an appropriate management systems [are] in effect a requirement that incorporated legal practices consciously implement an ethical infrastructure as part of their new business structure' - Parker *et al*, 2008. Dr Parker and her colleagues discuss and develop the concept of ethical infrastructure in some detail. They say 'the term 'ethical infrastructure' was originally coined in the United States to refer to policies and structures that support compliance with professional conduct rules' and they refer to the work of Ted Schneyer (see below) and Chambliss and Wilkins (above). They go on to say they use "a broader conception of ethical infrastructure that is concerned with positively promoting individual and corporate behaviours, structures and cultures that support the ethical values that lie behind the rules... The ethical infrastructure of a firm should not be seen merely as the formal ethics policies explicitly enunciated by management. All management policies, priorities and initiatives – formal and informal, and explicitly stated or implicitly assumed – can undermine or support ethical practice within a firm... The most important aspects of ethical infrastructure are less tangible than management systems for ensuring compliance with ethical rules. They have much more to do with the way the culture of the law firm connects with and empowers individual lawyers to express their own ethics and values in their work, especially by feeling free to raise ethical issues with colleagues and supervisors - and have those queries taken seriously, discussed, and, where necessary, acted on."

^{xv} section 130(3)

^{xvi} sections 131 and 540-581

^{xvii} Australian National Audit Office, *General Guidance on the Conduct of Performance Audits*, July 2003, p.1.

^{xviii} Go to <www.lsc.qld.gov.au> and <www.lawlink.nsw.gov.au/olsc> respectively.

^{xix} The research report is available on the website of our counterpart Commission in New South Wales (www.lawlink.nsw.gov.au/olsc). We have published on our website also, (www.lsc.qld.gov.au), at the bottom of the Incorporated Legal Practices and Multi-Disciplinary Partnerships page., under the heading *Research report: Assessing the impact of management based regulation on NSW incorporated legal practices*, 25 September 2008.

^{xx} We have drawn heavily on Dr Christine Parker's work in getting our thinking to where it is not least her empirical study several years ago now of the compliance audit programs conducted by the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC) under the title *Regulator Required Corporate Compliance Program Audits*, Law and Policy, Volume 25, No. 3, July 2003. She describes 'a tendency for [the] audit methodology to focus on management systems at the expense of forensic investigation of harm done or likely to be done to consumers and investors'. She noted that most of the audits she studied 'relied primarily on documentation of the system and discussions with senior management, [that] there is no inspection, let alone testing of the processes in action, [that] most of these desk audits are really only capable of providing a view about the intended *design* of the compliance program p[and that] the methodologies were not rigorous enough to discover how compliance programs are actually *implemented* [or] what *outcomes* they are achieving.' We note that we understand both the ACCC and ASIC have since responded to Dr Parker's criticisms and adjusted their methodologies accordingly.

^{xxi} Australian Law Reform Commission Discussion Paper 65: *Securing Compliance – Civil and Administrative Penalties in Australian Federal Regulation*, paragraphs 4.100-4.103 at pp.137-138.

^{xxii} This principle echoes one of the best practice principles (principle 19) enunciated in the draft report of the Administrative Review Council published earlier this year under the title *Government Agency Coercive Information-Gathering Powers*.

^{xxiii} The evidence suggests that respondents answer on-line surveys more honestly than face to face surveys. See Peter Comley, *Online Survey Techniques: Current Issues and Future Trends*, Interactive Marketing, Vol 4, No 2, October/ December 2002, pages 156-169 at page 160

^{xxiv} The comment was made in private correspondence.

^{xxv} Jonathan Shaw, op.cit.

^{xxvi} This would almost certainly require a legislative amendment in Queensland to allow us to require a legal practitioner director to produce the client files notwithstanding any duty of confidentiality the firm owes its clients (and requiring us of course not to disclose the information we obtain or to use it for any purposes other than discharging our regulatory responsibilities under the Act).

^{xxvii} This is a familiar strategy in the context of testing the quality of customer service provided by retailers, for example, but it can and has also been used to test the quality of professional advice including legal advice. ASIC have used mystery shoppers to test the quality of financial planning and superannuation advice (for example, see ASIC Report 18, *Survey on the quality of financial planning advice*, February 2003 and Report 69, *Shadow shopping survey on superannuation advice*, April 2006) and researchers in the UK have used mystery shoppers to test how lawyers respond to clients who approach them for advice in areas of work outside their areas of specialist expertise (for example, see Richard Moorhead and Avrom Sherr, *An anatomy of access : evaluating entry, initial advice and signposting using model clients*, 2003, <http://www.lsrc.org.uk/publications/modelclientpaper.pdf>)

^{xxviii} That is to say, we have designed the compliance auditing program to be consistent with the Administrative Review Council's best practice principled that agencies should have 'reasonable grounds' before using coercive information powers and should exercise their powers so that the compliance costs are 'proportionate to the potential significance of the information sought' – principles enunciated in the draft report of the Administrative Review Council headed *Government Agency Coercive Information Gathering Powers*.

^{xxix} section 435(1)(c) of the *Legal Profession Act 2007*.