

## REGULATION OF THE ETHICS OF AUSTRALIAN LEGAL PRACTICE: AUTONOMY AND RESPONSIVENESS

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### I INTRODUCTION

Why is it that the wider community finds lawyers' ethics of practice so troubling, and the responses of the profession to ethical issues so unsatisfactory? The way in which the ethics of legal practice is regulated in Australia perpetuates a mismatch between the ethics that the public expects of lawyers (an ethic of responsiveness) and the ethics that the legal profession has traditionally adopted for itself (an ethic of autonomy). Despite important reforms, the most significant regulatory controls on lawyers' ethics continue to be the traditional requirements of admission, discipline and liability for breach of fiduciary duties.<sup>1</sup> It is helpful to examine the assumptions about the role and ethics of lawyers that lie behind these regulatory controls in order to evaluate their suitability for meeting public policy goals. The traditional controls are not responsive to public concerns about justice and customer service. Rather, the profession and its regulation were intentionally built on a foundation of ethical autonomy. The profession decided for itself what was in the best interests of clients, the public and the administration of justice. Other perspectives were disregarded because non-lawyers were thought to lack the expertise (and frequently the inclination) to comment intelligently on the ethics of legal practice.<sup>2</sup>

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1 These controls are often referred to collectively as the rules of 'professional conduct' or the 'law of lawyering'. They have their origins in the 19<sup>th</sup> century, and earlier.

2 The comparative analysis of different regulatory controls for the legal profession in this paper was inspired by David Wilkins, 'Who Should Regulate Lawyers?' (1992) 105 *Harvard Law Review* 799. See also David Wilkins, 'Special Issue — Institutional Choices in the Regulation of Lawyers: Afterword: How Should We Determine Who Should Regulate Lawyers? Managing Conflict and Context in Professional Regulation' (1996) 65 *Fordham Law Review* 465. Wilkins divided enforcement/regulatory controls for the legal profession into four categories: (1) disciplinary controls (traditional self-regulation); (2) liability controls (negligence etc); (3) institutional controls (enforced by courts and state administrative agencies on lawyers who practise before them); (4) legislative controls (enforced by a special independent regulator or commission, or even by the government). Wilkins's analysis leaves out institutional controls enforced by employers of lawyers, including private employers and also government employers. It also leaves out legislative controls by general regulators that can also have some application

Part II of this paper reviews the traditional autonomous controls that the legal profession has used for self-regulation. Part III of this paper evaluates the potential of newer types of control to make the legal profession more responsive to community concerns.<sup>3</sup> A plethora of reform proposals for the legal profession show that the Australian community now expects the legal profession to fulfil its public role in the administration of justice and delivery of legal services by reference to consumer and justice concerns.<sup>4</sup> However half-hearted, reforms aiming to generate responsiveness have been patched onto a system that remains essentially autonomous. In recent times, a series of ethical scandals have prompted merely piecemeal reforms to address specific concerns — reforms to which the legal profession has acquiesced only after strong public censure.<sup>5</sup> Reforms have been reactive rather than genuinely responsive to community concerns. The conclusion to this paper suggests two ways in which the regulation of the Australian legal profession can be made more responsive.

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to the legal profession and law firms (for example competition and consumer protection regulators, anti-discrimination regulators). It also makes no reference to entry requirements, although these are generally included with disciplinary controls. This paper revisits and adjusts my earlier analysis of regulatory controls for the legal profession in Christine Parker, *Just Lawyers* (1999) 140–73. In particular, I have revised my opinion on the value of reforms in New South Wales that maintained elements of the traditional model of regulation of lawyers.

- 3 This paper does not argue the case that a more responsive ethic is appropriate. That case has been argued cogently and frequently elsewhere. See, eg, David Luban, *Lawyers and Justice: An Ethical Study* (1988); Justin Oakley and Dean Cocking, *Virtue Ethics and Professional Roles* (2001); William Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (1998). Rather, this paper takes as its starting point that proposed reforms have been intended (consciously or not) to achieve a more responsive ethic of legal practice.
- 4 Some of the more comprehensive and significant reform proposals have included: Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (1994); Law Reform Commission of Victoria, *Access to the Law: Accountability of the Legal Profession*, Report No 48 (1991); New South Wales Law Reform Commission, *First Report on the Legal Profession: General Regulation and Structure*, Report No 31 (1982) and *Second Report on the Legal Profession: Complaints, Discipline and Professional Standards*, Report No 32 (1982); Trade Practices Commission, *Study of the Professions: Legal: Final Report* (1994). For more comprehensive accounts of the various reforms proposed and implemented see Freek Bruinsma, Christine Parker and Ed Shinnick, 'Regulatory Reform of Legal Professions — Australia, Ireland and the Netherlands', *International Journal of the Legal Profession*, forthcoming (copy on file with author); Christine Parker, 'Converting the Lawyers: The Dynamics of Competition and Accountability Reform' (1997) 33 *The Australian and New Zealand Journal of Sociology* 39; Christine Parker, 'Justifying the New South Wales Legal Profession' (1997) 2(2) *Newcastle Law Review* 1; Stan Ross, 'Prospects for Structural and Economic Integration of the Australian Legal Profession' (1997) 4 *International Journal of the Legal Profession* 267; David Weisbrot, 'Competition, Cooperation and Legal Change' (1993) 4 *Legal Education Review* 1.
- 5 The most dramatic recent examples have included barristers evading tax debts through bankruptcy and a commercial law firm helping its tobacco company client to destroy documents that might provide evidence of its liability. Both have resulted in specific reforms to the regulation of the legal profession in New South Wales and then followed in other States. See below Parts III(D), IV for further discussion.

## II TRADITIONAL 'PROFESSIONAL' CONTROLS — AUTONOMY

The traditional approach to lawyers' ethics institutionalises lawyers' autonomy. Firstly, the regulation of lawyers' ethics adopts a self-regulatory model. The legal profession sets ethical standards for itself either through legal professional associations, within law firms and barristers' chambers, or using the rules of court.<sup>6</sup> This was because, supposedly, only lawyers were knowledgeable enough about the law to set standards for its practice.<sup>7</sup> If they failed to self-regulate for the benefit of the public, so the theory went, their monopoly on legal practice could always be removed.<sup>8</sup> Self-regulation also allowed the profession to remain independent of government so that lawyers could defend individuals against the state where necessary without bias or fear of reprisal.

Secondly, the traditional ethical theory of lawyers' role in society — as adversarial advocate — is also one of isolation from general community ethics and values.<sup>9</sup> The adversarial advocate ideal emphasises the lawyer's duty of loyalty and zealous advocacy to the client. The ideal of lawyers' ethics is the combination of

extreme partisanship with moral non-accountability. The *principle of partisanship* ... requires advocates to advance their clients' partisan interests with the maximum zeal permitted by law; and the *principle of non-accountability* ... insists that an advocate is morally responsible for neither the ends pursued by the client nor the means of pursuing those ends, provided that both means and ends are lawful.<sup>10</sup>

General moral considerations and community values (including any that the lawyer himself or herself personally holds) are therefore irrelevant to the lawyer's role as advocate for his or her client. The only considerations that dilute the duty to the client are the overriding duties to neither break the law, nor breach the lawyer's duty to the court. These overriding duties have traditionally been interpreted fairly weakly by courts and disciplinary authorities, and have

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6 For accounts of how this model developed historically see Julian Disney et al, *Lawyers* (1986) 6; William S Holdsworth, *A History of English Law* (2<sup>nd</sup> ed, 1937) vol VI, 443.

7 See Stephen Brint, *In an Age of Experts: The Changing Role of Professionals in Politics and Public Life* (1994).

8 For leading analyses of the social bargain underpinning lawyers' self-regulation see Terence Halliday, *Beyond Monopoly: Lawyers, State Crises, and Professional Empowerment* (1987); Alan Paterson, 'Legal Ethics: Its Nature and Place in the Curriculum' in Ross Cranston (ed), *Legal Ethics and Professional Responsibility* (1995) 175. See Christine Parker, *Just Lawyers*, above n 2, 140-7 for a critique of the social bargain approach. The legal profession's monopoly on legal practice is legislatively entrenched in Australia.

9 For descriptions and critiques of the traditional theory see Robert Gordon, 'The Independence of Lawyers' (1988) 68 *Boston University Law Review* 1; Luban, *Lawyers and Justice: An Ethical Study*, above n 3, 3-10; Simon, above n 3, 7-8; Richard Wasserstrom, 'Lawyers as Professionals: Some Moral Issues' (1975) 5 *Human Rights* 1.

10 David Luban, 'Twenty Theses on Adversarial Ethics' in Helen Stacy and Michael Lavarch (eds), *Beyond the Adversarial System* (1999) 134, 140 (emphasis in original).

rarely been applied except when a lawyer is actively dishonest to a court.<sup>11</sup> The ethical stance of the adversarial advocate is most strongly justified by the lawyer's role as agent for the client in the adversary system. However it extends beyond trial practice to all aspects of lawyers' practices. Citizens of modern liberal democracies, it is assumed, are unable to understand, exercise and protect their own rights in a complex legal and administrative world. The rule of law therefore requires partisan, loyal lawyers who will advise citizens and advocate for their rights in a variety of contexts without fear of being held ethically accountable for doing so.

In the traditional model, notionally the client 'instructs' the lawyer. However the model assumes that the client generally only determines the broad ends of the relationship. It is the lawyer who truly understands what is in the client's legal interests and how to go about advocating those interests.<sup>12</sup> In practice, lawyers frequently assume that the client's interest requires the lawyer to maximise and exercise all the client's legal rights and financial interests.<sup>13</sup> It is not the lawyer's role to concern himself or herself with preserving relationships, caring about the impact of the client's actions (or the lawyer's actions as the client's agent) on other people or things (such as the environment), or even common human decency.<sup>14</sup> However it is recognised that in rare cases the lawyer may choose to conscientiously object and decide not to act for a client in a particular way for personal ethical reasons.<sup>15</sup>

Traditional regulatory controls on the ethics of legal practice — entry to the profession, discipline (imposed by a self-regulatory organisation or via the

11 For an excellent summary of these duties and their enforcement see Justice David Ipp, 'Lawyers' Duties to the Court' (1998) 114 *Law Quarterly Review* 63. However in general the lawyer's duty to the court and when it will override the duty to the client is not adequately specified: see Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) [3.85]–[3.92].

12 See *R v Birks* (1990) 19 NSWLR 677 for judicial recognition of this division of responsibility between lawyer and client.

13 This raises a moral problem known as the 'agency paradox': both the agent and the principal feel they are able to disclaim responsibility for the agent's actions. The result is that the agent (that is the lawyer) is less constrained by broader principles of ethics in acting in the principal's (client's) interests than either the principal or the agent would be were they acting on their own behalf. As one commentator has noted, [t]oo often, lawyers assume that clients would do anything lawful to prevail, while clients rely on their lawyers' judgment on the propriety of their tactics. The attorney–client relationship thus fosters mutual avoidance of responsibility, making it easier for lawyers to use professional rules unethically with a clear conscience.

John Leubsdorf, 'Using Legal Ethics to Screw Your Enemies and Clients' (1998) 11 *Georgetown Journal of Legal Ethics* 831, 836–7. See also David Wilkins, 'Everyday Practice is the Troubling Case: Confronting Context in Legal Ethics' in Austin Sarat et al (eds), *Everyday Practices and Trouble Cases* (1998) 68, 73–4.

14 Contrast this with Shaffer's 'ethics of care': Thomas Shaffer and Robert Cochran, *Lawyers, Clients and Moral Responsibility* (1994); and Luban's 'moral activism': Luban, *Lawyers and Justice: An Ethical Study*, above n 3.

15 But not if the lawyer is a barrister bound by the 'cab-rank rule' which requires barristers to accept all clients in their area of practice on a first come, first served basis if the barrister is available and the client can pay the appropriate fee and certain other exceptions (mostly concerned with avoiding conflicts of interest) do not apply. See, eg, The Victorian Bar, *Practice Rules* (effective 1 July 2002) rr 86–107, <<http://www.vicbar.com.au/pdf/Current%20Bar%20Rules.pdf>> at 23 November 2002.

inherent jurisdiction of the court to discipline lawyers as officers of the court) and liability for breach of fiduciary and other equitable obligations — are intended to promote the ideal of the lawyer as adversarial advocate. They are predicated on the assumption that clients will be largely passive since they lack knowledge about the law and legal processes. Clients cannot participate effectively in holding lawyers accountable, except perhaps to make a formal complaint if their money goes missing. Similarly, the general public lacks the expertise to contribute to the ethics and standards of the legal profession. Rather the legal profession decides what is in clients' best interests in the context of adversarial justice and the bare duties to the court that adversarial justice entails. The courts of superior jurisdiction decide what the lawyer's duty to the court entails.

### A Entry Controls

Traditional regulatory controls focus on entry requirements in the attempt to ensure that only well qualified people of 'good character' enter the profession, that is, people whom clients can trust. Lawyers are admitted into practice on the basis of academic legal qualifications, practical training and 'good fame and character'.<sup>16</sup> The character requirement disqualifies from legal practice those who have a record of dishonesty, serious criminal misconduct or continued disregard for law and legal institutions.<sup>17</sup> Consistent with a concern with 'character', candidates for admission are expected to disclose everything that might possibly cloud their character including minor convictions or charges of which they have been acquitted. A candidate who shows candour in disclosing potential issues, remorse for past wrongdoing and a change of conduct is more likely to be successful than a candidate who seeks to hide 'information which may raise eyebrows'.<sup>18</sup>

The requirement that prospective lawyers show reverence for the law and legal institutions may discourage involvement in broader social causes outside the legal system.<sup>19</sup> For example, in the controversial case of *Re B*, a prominent journalist and political activist was refused admission to the bar. It was held that she was not fit to serve the law because it was 'demonstrated that in the zealous pursuit of political goals she will break the law if she regards it as impeding the success of her cause'.<sup>20</sup> The breaches of the law included numerous arrests in relation to political activism and protests, and the candidate's dishonesty about

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16 See Gino Dal Pont, *Lawyers' Professional Responsibility in Australia and New Zealand* (1996) 30. See ch 2 of this work for a summary of the legislative regimes in the various Australian States. This paper will not cite legislative provisions for every Australian jurisdiction to support every statement about the regulatory requirements as this information is readily available in Dal Pont's excellent survey of the law of professional responsibility.

17 See *Re Davis* (1947) 75 CLR 409 and *Ex parte Lenehan* (1948) 77 CLR 403 on dishonesty and criminal misconduct. See *Re B* [1981] 2 NSWLR 372 on disregard for the law and legal institutions.

18 *Re Del Castillo* (1998) 136 ACTR 1, 7.

19 It has even been suggested that this may be a particular disincentive to indigenous law graduates seeking admission to the profession: Kevin Dolman, 'Indigenous Lawyers: Success or Sacrifice?' (1997) 4(4) *Indigenous Law Bulletin* 4.

20 *Re B* [1981] 2 NSWLR 372, 402 (Helsham CJ in Eq).

the source of bail funds that she provided for an accused in a case with political overtones. In practice, however, the admission authorities generally assume the best of the character of candidates for admission, rather than proactively investigating it.<sup>21</sup>

## B Disciplinary System

Once entry to the profession has been attained, under the traditional model, lawyers are assumed to be competent and capable of serving clients well. Ongoing regulation of lawyers' practice focuses mainly on maintaining standards of character, not competence.<sup>22</sup> Sanctions are mostly imposed for dishonesty (particularly knowingly or deliberately misleading a court or tribunal, or falsifying a document), breach of trust account rules (including misappropriation of funds) and other fiduciary duties (particularly conflicts of interests, discussed in Part III(C) below). Thus traditional self-regulation is disciplinary and usually has no role to play in resolving disputes with clients about competence or standards of service. This is despite the fact that the vast majority of complaints clients make about lawyers concern poor service — delay, incompetence, overcharging and discourtesy or failure to communicate. These complaints were not even investigated by disciplinary authorities until recently.<sup>23</sup> Only in the case of 'gross negligence' could a lawyer be sanctioned for lack of care and competence.<sup>24</sup> Disciplinary authorities are also unlikely to act against lawyers for conduct that is in the interests of clients but is against the public interest. This means that lawyers are very rarely disciplined for abuse of the court process by frivolous or vexatious claims or claims for an ulterior purpose, or for excessive adversarialism that wastes the resources of the court and the parties.<sup>25</sup> For example, prosecutors have explicit and fulsome duties to act as ministers of justice, and a number of convictions have been overturned because of prosecutorial misconduct. Yet prosecutors' duties have rarely, if ever, been enforced in any disciplinary context by the court or the disciplinary authorities.<sup>26</sup>

21 Dal Pont, above n 16, 32–3. See also *Re Del Castillo* (1998) 136 ACTR 1, 7.

22 The only ongoing regulation of lawyers' competence is a requirement to attend a certain number of hours of continuing legal education in most States.

23 See Christine Parker, *Just Lawyers*, above n 2, 13–17. See also William Felstiner, 'Professional Inattention: Origins and Consequences' in Keith Hawkins (ed), *The Human Face of Law* (1997) 121. See also the discussion of 'consumer controls' below Part III(C).

24 See *Re W C Mosley* (1925) 25 SR (NSW) 174. Mere incompetence or deficiency in professional service is still not sufficient to amount to professional misconduct: see *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197. Similarly, only gross overcharging was sufficient to amount to professional misconduct: see *Veghelyi v The Law Society of New South Wales* (Unreported, Supreme Court of New South Wales, Kirby P, Mahoney and Priestley JJA, 6 October 1995).

25 Only very recently have some Australian courts indicated that they will enforce these duties more proactively: see, eg, Supreme Court of New South Wales, *Practice Note No 108: Costs Orders Against Practitioners* (2000).

26 See Ken Crispin, 'Prosecutorial Ethics' in Stephen Parker and Charles Sampford (eds), *Legal Ethics and Legal Practice: Contemporary Issues* (1995) 171; Steve Bolt and Jane Mussett, 'The Tim Anderson Decision: The Chief Justice Cites the System' (1991) 16 *Legal Services Bulletin* 126. Similarly, despite judicial criticism of lawyers' behaviour in bringing an unfounded action for a collateral business advantage in *White Industries v Flower and Hart* (1998) 156 ALR 169 (Federal Court), (1999) 163 ALR

Disciplinary offences are generally investigated and prosecuted by self-regulatory legal professional associations (or in some cases by an independent ombudsman) and enforced in specialist tribunals dominated by practising lawyers. Courts of superior jurisdiction in Australia also retain an inherent jurisdiction to discipline lawyers.<sup>27</sup> The court can therefore enforce appropriate standards of conduct particularly in relation to the duty to the administration of justice and to resolve costs disputes.<sup>28</sup>

The main disciplinary sanction is expulsion of the lawyer from the profession, in order to protect the public (and the reputation of the profession). However a series of lesser sanctions including reprimands, restrictions on practising certificates, fines and the requirement to attend continuing legal education are also available. The courts and tribunals consistently claim that neither punishment nor deterrence is the aim of professional discipline. Rather the aim is to protect the public by putting the practitioner out of the profession if necessary. The assumption is that the misbehaving lawyer is an individual anomaly. Therefore there is no great need to use disciplinary proceedings to educate and deter the rest of the profession. Similarly, punishment of misconduct for punishment's sake is not significant if it can be shown that the lawyer's character is suitably reformed. Rather the possibility of rehabilitation is often encouraged (for example by making orders to attend continuing legal education courses). Remorse, contrition and a demonstrated change of behaviour are frequently rewarded via penalising the offending lawyer with a low-key reprimand instead of suspension or disbarment or by granting readmission to the profession.<sup>29</sup>

The disciplinary approach is one that can easily lead to making a scapegoat of an individual practitioner for character failure rather than systemic change to address public concerns about consumer service quality and the administration of justice. This may be exacerbated by the fact that legal professional associations are in effect both unions and prosecutors of their practitioner members. It is assumed that the practices of the profession as a whole are ethical and that it is appropriate to sacrifice one or two members when there is a public scandal rather than to change the whole culture and structure of legal practice among all members.

### C Fiduciary Duties and Other Equitable Obligations

In equity the relationship between a lawyer and client automatically gives rise to various fiduciary obligations which are enforceable at the suit of the client. The main obligation of a fiduciary is one of supreme loyalty to another person. Thus, the lawyer must avoid situations involving a conflict of interest between the lawyer's personal interest and her or his duty to the client, or between the

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744 (Full Federal Court), no disciplinary action has been initiated against any lawyer for their conduct in this case.

27 Mostly the inherent jurisdiction has been exercised reactively where another party (usually a Bar Association) has made an application to discipline a lawyer on more traditional grounds of professional misconduct such as dishonesty.

28 See Ipp, above n 11. Other courts also have these powers by virtue of their legislation and court rules.

29 Dal Pont, above n 16, 594.

interests of multiple clients, and refrain from using the fiduciary relationship as a conduit to personal gain (apart from a reasonable professional fee).<sup>30</sup> The lawyer should fully disclose to the client any conflicts or personal gains, and obtain the client's fully informed consent before continuing to act for the client where there is a conflict. In cases of lawyer–client conflict the lawyer will also generally be required to advise the client to seek independent legal advice before proceeding with the transaction or representation.<sup>31</sup> This may also apply in cases of client–client conflict where an actual conflict has arisen.<sup>32</sup> The lawyer should also generally disclose all material information coming into her or his possession concerning the client's affairs. Lawyers also owe clients obligations in equity to maintain confidentiality of information relating to the representation, and to account for moneys held on behalf of another, although these are not strictly fiduciary duties.<sup>33</sup>

The objective of these duties is to protect clients from their lawyers. However the actual capacities and wishes of the client in any particular case are largely irrelevant. It is simply assumed that the lawyer will always dominate the relationship with the client, and that he or she should be required to make decisions for the client on the basis of benevolent paternalism unalloyed by conflicting interests. It is for the court, not the client, to determine whether and when the client is capable of consenting to a conflict of interest.<sup>34</sup> As a result, fiduciary duties are interpreted strictly by the courts and it is no defence to a breach for a lawyer to maintain that they acted bona fide, or even that the client benefited by the breach.

Furthermore in the case of lawyers, the courts have stated their decision is made on the basis of the public interest in the administration of justice, as defined by judges.<sup>35</sup> The law of lawyers' fiduciary obligations is not responsive to the justice concerns of particular clients. As Drummond J pointed out in a case concerning client–client conflicts in a large commercial law firm:

much greater emphasis has been placed in more recent times on the special fiduciary role of the solicitor ... '[E]ven among fiduciaries, solicitors stand in a special position' ... The reason for this new emphasis on the special fiduciary position of a solicitor, where a question arises as to his freedom to act against the interests of former client who has given him confidential information is twofold. Firstly there is a public element in the work that a solicitor does in that he is an officer of the court

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30 See *ibid* 147 ff for an overview.

31 *Law Society of NSW v Harvey* [1976] 2 NSWLR 154.

32 *Clark Boyce v Mouat* (1993) 3 NZLR 641 (PC); Steven Fennell, 'Conflicts of Interest: *Clark Boyce v Mouat*' (1994) 10 *Professional Negligence* 22.

33 See Dal Pont, above n 16, 149–50. Lawyers' responsibilities in relation to trust accounts and client funds are usually exhaustively specified in separate rules and regulations, although they are essentially a species of fiduciary or equitable obligation.

34 See *ibid*, 163–4. This is particularly true where the conflict of interest is between the lawyer and the client.

35 Indeed, while in the case of successive (though not concurrent) client conflict it is theoretically possible for a practitioner to act if the former client waives confidentiality (because no duty of loyalty is owed to the former client), some courts (notably the Family Court) may take the view that it is, notwithstanding the waiver, improper for a practitioner to continue to act because of the appearance of conflict and the damage this does to the public perception of the integrity of the profession.

and, in performing his professional function, he plays an integral part in the administration of justice. In this regard, he is unlike a private fiduciary ...<sup>36</sup>

This approach overprotects clients who may have been perfectly capable of protecting themselves or trading off fiduciary protection for other benefits. For example, it is often noted that the rules relating to client–client conflicts are too restrictive where sophisticated, commercial clients are willing to consent to potential conflicts and consider themselves capable of monitoring the risk for themselves.<sup>37</sup> Similarly the rules hinder, or possibly prohibit, two or more parties to the same transaction choosing to use the same lawyer because they want to save money, solve a problem harmoniously rather than adversarially, or buy legal services as a family unit.<sup>38</sup> Simultaneously the law of fiduciary obligations under-protects clients in relation to more mundane concerns about the quality and costs of the service they are receiving from their lawyers. These mundane issues are assumed to lie within the purview of the lawyer to control as they wish.

Fiduciary duties dominate lawyers' conception of ethical quandaries. When solicitors are asked to nominate ethical problems they have faced in practice, they most frequently nominate conflicts of interest, usually client–client conflicts.<sup>39</sup> Most breaches of fiduciary duty also amount to professional misconduct under the self-regulatory disciplinary system. Therefore clients can sue lawyers for breach of fiduciary duty and claim trust funds lost through defalcation from a fidelity fund. Simultaneously they can bring their lawyer's conduct to the attention of a disciplinary authority, so that the lawyer would most likely be sanctioned or struck off the rolls of practitioners. Lawyer–client conflicts (especially commercial dealings with clients where the client is unaware of the lawyer's interest in the matter) and breaches of trust of the most serious kind (misuse of trust funds and misappropriation of client money) are the most commonly disciplined forms of misconduct.

The lawyer's obligation to maintain client confidentiality is also applied inflexibly on the basis of an administration of justice rationale — that is, to encourage full and frank disclosure between client and lawyer, so that clients can

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36 *Carindale Country Club Estate Pty Ltd v Astill* (1993) 42 FCR 307, 310–11.

37 See Elizabeth Nosworthy, 'Conflicts of Interest' from 'Ethics and Large Law Firms' in Stephen Parker and Charles Sampford (eds), *Legal Ethics and Legal Practice: Contemporary Issues* (1995) 57; Roman Tomasic, 'Chinese Walls, Legal Principle and Commercial Reality in Multi-Service Professional Firms' (1991) 14 *University of New South Wales Law Journal* 46. Contrast the view of Adrian Evans, 'The Business of Conflicts' (2000) 74(10) *Law Institute Journal* 23.

38 See Richard Tur, 'Legal Ethics, Overview' in Ruth Chadwick (ed), *Encyclopedia of Applied Ethics* (1998) for an important analysis of the consequences in family law practice. See *Clark Boyce v Mouat* [1993] NZLR 641 where the Privy Council had to determine to what extent a client was able to consent to a conflict of interest where she was to share a solicitor with her son for whom she was going guarantor.

39 See, eg, Debra Lamb's analysis of her interviews with Australian lawyers about ethical problems they had faced. Conflicts of interest were the single most common dilemma and one that more than half her sample believed arose frequently and even 'almost on a daily basis': Debra Lamb, 'Ethical Dilemmas: What Australian Lawyers Say About Them' in Stephen Parker and Charles Sampford (eds), *Legal Ethics and Legal Practice: Contemporary Issues* (1995) 217, 222. See also Susan Shapiro, *Tangled Loyalties: Conflict of Interest in Legal Practice* (2002) which compares lawyers' awareness of conflicts of interest favourably with other professions on the basis of extensive interview data.

seek and obtain legal advice without apprehension of prejudice by disclosure. It is backed up in certain situations by client legal privilege (also known as legal professional privilege).<sup>40</sup> Clearly there may be circumstances where ordinary ethics might suggest that the public interest requires lawyers to breach client confidence in order to avert injustice or serious physical or financial harm.<sup>41</sup> Yet professional conduct rules and the general law of confidentiality recognise only an obligation on lawyers to maintain client confidentiality, but not a positive duty to breach confidentiality in the public interest. There is some scope for the obligation of confidentiality at general law to be responsive to broader justice concerns via the 'public interest defence' for breach of confidence actions.<sup>42</sup> The public interest defence allows information disclosure despite a secrecy obligation if the information relates to serious wrongdoing which it is in the public interest to disclose; or, probably, if the disclosure will avert apprehended serious harm to the public or to members thereof.<sup>43</sup> However there is considerable uncertainty about the extent of the public interest defence, and there has been no reported case in which a lawyer has availed themselves of the defence in order to break client confidence in the broader interests of justice.

The public interest defence is, however reflected in an exception to the confidentiality rule set out in professional codes of conduct. This exception is narrower than the case law on confidentiality. It applies where

the practitioner discloses information in circumstances in which the law would probably compel its disclosure, despite a client's claim of legal professional privilege, and for the sole purpose of avoiding the probable commission or concealment of a serious criminal offence.<sup>44</sup>

The need to balance maintaining client confidences against broader considerations of justice is also reflected in the 'unlawfulness' exception to client legal privilege, which in Australia is interpreted very broadly.<sup>45</sup> While the equitable obligation to maintain confidentiality is taken very seriously by the

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40 See *Evidence Act 1995 (Cth)* and *Evidence Act 1995 (NSW)* ss 118–119 for a statement of the privilege. See Deane J in *Attorney-General (NT) v Maurice* (1986) 161 CLR 475, 490 for a statement of the rationale of the privilege.

41 See the examples and following discussion given in Deborah Rhode, *In the Interests of Justice: Reforming the Legal Profession* (2000) 106–15 ('Confidentiality' chapter). See also Simon, above n 3, 54–62.

42 See Paul Finn, 'Professionals and Confidentiality' (1992) 14 *Sydney Law Review* 317; Karen Koomen, 'Breach of Confidence and the Public Interest Defence: Is it in the Public Interest? A Review of the English Public Interest Defence and the Options for Australia' (1994) 10 *Queensland University of Technology Law Journal* 56.

43 Finn, above n 42, 323.

44 Law Council of Australia, *Model Rules of Professional Conduct and Practice* (2002) r 3.

45 See *Attorney-General (NT) v Kearney & Northern Land Council* (1985) 158 CLR 500 where the privilege did not protect legal advice from disclosure where the advice was intended to help a government department fail to comply with the requirements of administrative law.

legal profession, the ethical obligation to avert injustice or harm by breaching confidence in some situations has not been seriously considered.<sup>46</sup>

### III CONTEMPORARY REGULATORY CONTROLS — RESPONSIVENESS

The three sets of traditional professional controls discussed above present a consistently autonomous model of the lawyer's role in the justice system vis-à-vis clients, the profession, the courts and the law. In summary, they assume that the client must trust the lawyer to act in their best interests. Therefore fiduciary duties are enforced in paternalistic way through the courts and self-regulation to protect clients' interests regardless of the client's actual opinions and capacity to protect their own interest. Lawyers are required to determine and vigorously advocate the best legal interests of their clients (subject to the overriding duty to the court and the administration of justice). Traditional regulatory controls require little in the way of client participation and mostly ignore client concerns about the quality and costs of legal services. It is assumed that the ethics of practice are mostly instilled into lawyers via entry controls, however gross breaches of duty can also be disciplined via the self-regulatory process. Furthermore, lawyers are not generally called to account for the effects of their work for clients on the integrity of the law, the courts and of justice. Nor are they expected to consider the broader, non-legal interests of their clients (such as the harmonious resolution of disputes, reconciliation or preservation of relationships, protection of reputation, and acting in accordance with whatever ethical and religious beliefs clients might have).

The traditional ethical conception of the lawyer is an 'amoral' one in the sense that ordinary moral concerns are irrelevant to legal professionals when they are acting as lawyers because the administration of justice gives them a certain role as an adversarial advocate. They must act solely according to the dictates of that role so that the legal system will function as intended — 'role morality'.<sup>47</sup> More contemporary controls on the legal profession are more diverse in the range of values, perspectives and interests they seek to apply to the legal profession. They have in common the assumption that lawyers should not be immune to ordinary ethical obligations that apply to other business people and other citizens. This implies an ethical conception of 'moral activism' in legal practice:

[Moral activism is] an approach to practice in which lawyers view themselves as co-equal agents of their clients (and therefore as equally accountable). As such, lawyers who find the ends or means they must use in representing a client objectionable must engage the client in dialogue. Lawyers will be open to the possibility that

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46 By contrast the American Bar Association recently attempted to revise its rules of ethics to permit lawyers to disclose client secrets to prevent fraud, injury or death. The revision proposals were only partially successful. See William Glaberson, 'Lawyers Considering Easing Restriction on Client Secrecy', *The New York Times* (New York), 31 July 2001, 1; Jonathan Glater, 'Lawyers May Reveal Secrets of Clients, Bar Group Rules', *The New York Times*, (New York), 8 August 2001, 12.

47 See Gerald Postema, 'Moral Responsibility in Professional Ethics' (1980) 55 *New York University Law Review* 63.

clients will persuade them that their misgivings are misplaced. Lawyers must also be prepared to refuse to employ tactics that they find morally objectionable or even to terminate the representation.<sup>48</sup>

A morally activist conception of the ethics of legal practice means that lawyers should be responsive to broader ethical concerns than merely the narrow self-interest of clients. They will consider the impact of all their actions on justice, the integrity of the legal system and, perhaps, other social values (for example preservation of relationships, protection of the environment). Moral activism also has implications for the relationship between lawyer and client. It implies an attempt to even up the power and knowledge imbalance between lawyers and their clients so that they can both participate equally in determining the quality and cost of services, and more importantly share ethical responsibility for the lawyer's actions on the client's behalf. Unlike the traditional model, the client is not a passive, trusting recipient of the lawyer's advice. Rather it is the lawyer's responsibility, as much as possible, to put the client in a position where they can make an informed contribution to the way in which they are represented by their lawyer. Ultimately, however, the lawyer should not continue to act against their own conscience or the broader dictates of conscience regardless of what their client says.

Consistent with moral activism, contemporary regulatory controls on legal practice seek to make lawyers' practices more responsive to consumer concerns, competition and economic efficiency, and the need for speed, fairness and the appropriate use of alternatives to adversarialism in the resolution of disputes. Most attention has been paid to putting clients in a position to protect themselves from the dominant bargaining power of the lawyer through lawyer disclosure obligations and consumer dispute resolution schemes. These reforms see the lawyer-client relationship as a consumer contract in which the consumer should no longer be required to trust the lawyer and put up with bad customer service. To a more limited extent, contemporary controls also attempt to make lawyers more responsive to broader access to justice concerns and general social values.

However, the traditional controls described above all continue to function in much the same way that they always have. More contemporary 'responsive' controls have merely been grafted onto the traditional model, and must now compete with it. Even in the area that has received most attention, consumer-oriented reform, the new controls are weak, incomplete and overpowered by disciplinary and fiduciary controls. Little attention has been paid to improving the ethical responsiveness of lawyers in their relationships with clients beyond consumerism.

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48 Luban, 'Twenty Theses on Adversarial Ethics', above n 10, 134, 152. There are many alternatives to the role morality of the adversarial advocate proposed by various ethicists. But David Luban's is probably the leading one. Elsewhere Luban states that a morally activist approach might also lead a lawyer to devote themselves to public interest lawyering and law reform activity: Luban, *Lawyers and Justice: An Ethical Study*, above n 3, 171.

## A Liability Controls for Consumer Care and Quality: Negligence and Contract

The oldest alternative to the traditional regulatory controls on the legal profession is lawyer's liability to clients for breach of the duty of care and skill. From late in the 19<sup>th</sup> century, at least, clients have had the benefit of a term implied into the contract of retainer that the lawyer would carry out the retainer with due care and skill.<sup>49</sup> Following the decision in *Hedley Byrne v Heller*,<sup>50</sup> that liability in negligence extends to liability for pure economic loss, lawyers also owe a (concurrent) duty of reasonable care and skill to a client in tort.<sup>51</sup> The expansion of lawyers' tort liability in the 20<sup>th</sup> century opened up the possibility for a much more responsive and contextual approach to regulating lawyers' conduct towards clients, and even in some cases to third parties.

In theory, the law of contract allows the lawyer and client to make and enforce a bargain that suits their own circumstances. In practice, of course, a client may not be in a position to strike a suitable bargain with a lawyer because of either lack of information or lack of bargaining power. In tort the scope of the duty of care and skill is conditioned by reasonable foreseeability and public policy considerations. This means that in tort cases (unlike fiduciary or contract cases) the courts must conduct a sophisticated and fine-grained analysis of the consumer's expectations and experience, the lawyers' perspective on the retainer, and any public policy context in determining lawyers' liability to clients.<sup>52</sup> This means that tort law can (and should) draw a distinction between sophisticated clients who can protect their own interests through contract, and those who suffer an information disadvantage so that the client is more deeply reliant on the lawyer.<sup>53</sup> The latter category of clients may need the protection of lawyers' liability beyond the strict terms of the retainer, subject to the court's weighting of consumer needs against public policy considerations.

Secondly, the tortious duty is not confined by privity of contract, and therefore may be applied to third parties. In a series of cases, beneficiaries of improperly executed or poorly administered wills have been able to sue the lawyers who

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49 *Groom v Crocker* [1939] 1 KB 194. See Dal Pont, above n 16, 99. Stephen Charles, 'Professional Liability and Lawyers' (1988) 4 *Australian Bar Review* 222, 236 points out that the very early history of actions against attorneys treated the liability as in tort. However cases after 1885 were quite unequivocal that the liability was in contract only. At common law, barristers had no contractual capacity, and therefore even liability in contract is an advance upon the strictures of the most traditional model which saw no direct mechanism for a client to enforce a lawyer's obligations. This is now remedied by legislative provision: eg, *Legal Profession Act 1987* (NSW) s 38L.

50 (1964) AC 465.

51 *Astley v Austrust Ltd* (1999) 197 CLR 1. Cf *Hawkins v Clayton* (1988) 164 CLR 539, 574, 584 (Deane J) suggesting that it was unnecessary to imply such a term into the contract if there is liability in tort. See also Aviva Freilich, 'Contributory Negligence and Breach of Contract: The implications of *Astley v Austrust Ltd*' (2000) 29 *Western Australian Law Review* 18.

52 However note that in practice contractual liability itself has been heavily influenced by many public policy considerations in recent times: see Hugh Collins, *Regulating Contracts* (1999). Lawyers' contracts of retainers are not immune from this trend — see discussion of disclosure requirements below Part III(C).

53 See David Partlett, 'Roaming in the Gloaming: The Liability of Professionals' (1992) 14 *Sydney Law Review* 261.

negligently prepared or kept the wills for the loss of their interest in the estate of a deceased client.<sup>54</sup> Liability to third parties, and perhaps the general public, for negligent misstatement may become more prominent in the future. For example, lawyers may now be liable under State equivalents to s 52 of the *Trade Practices Act 1974* (Cth) for misleading and deceptive conduct, for example, in the course of negotiations on behalf of a client.<sup>55</sup> These cases illustrate the capacity of tort law to hold lawyers accountable to range of values and interests beyond the traditional professional controls.

Thirdly, tortious liability also has a deterrent effect on the profession as a whole. Tort law sets out standards of care that all lawyers are expected to follow. Unlike disciplinary determinations, decisions in tort signal to lawyers how they should improve their conduct and practices in order to avoid liability.<sup>56</sup> This means that in principle, tortious liability can have a positive impact on the conduct of the legal profession as a whole. However, the courts have significantly restricted the availability of tort (and contract) remedies by the advocate's immunity from suit for the conduct of a case in court or work 'intimately connected' with the conduct of the cause in court.<sup>57</sup> It is to be hoped that the immunity will be abolished soon.<sup>58</sup>

## B Consumer Complaints — Grafted on to Disciplinary Controls

Throughout the 20<sup>th</sup> century, self-regulatory professional associations pointed to the ability of clients to sue their legal representatives in tort or contract for compensation as a justification for not concerning themselves with consumer-type complaints about lawyers. Even if a complaint were investigated, no compensation or restitution was available to the client through the disciplinary process. The law of negligence does recognise a consumer, and occasionally even a third party, perspective on lawyers' obligations. However the remedy is limited by the advocate's immunity and it is expensive for consumers to pursue lawyers through the courts in tort. Only cases that are very serious, particularly

54 *Hawkins v Clayton* (1988) 164 CLR 539; *Hill v Van Erp* (1997) 188 CLR 159. See Reid Mortensen, 'Solicitors' Will-Making Duties' (2002) 26 *Melbourne University Law Review* 60 for a comprehensive analysis of these cases.

55 Stephen Corones, 'Solicitors' Liability for Misleading Conduct' (1998) 72 *Australian Law Journal* 775. See also *Tahche v Abboud* [2002] VSC 42 (Unreported, Smith J, 1 March 2002) in which it was held that a prosecutor can be liable in tort for misfeasance in public office for breach of prosecutors' special duties of disclosure. This decision was reversed by the Court of Appeal, Victorian Supreme Court: *Cannon and Rochford v Tahche* [2002] Aust Torts Reports ¶81-669.

56 However, as I shall argue below Part III(C), the signals from individual negligence cases may be rather unclear compared with the more precise guidance that can be provided in legislation or codes of practice etc.

57 *Giannarelli v Wraith* (1988) 165 CLR 543. The 'intimately connected' test was set out in *Rees v Sinclair* [1974] 1 NZLR 180, 187. It was adopted by the House of Lords in *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 and applied in Australia in *Keefe v Marks* (1989) 16 NSWLR 713.

58 The House of Lords recently abolished the immunity in *Arthur J S Hall v Simons* [2000] 3 WLR 543. Some members of the High Court of Australia, most strongly Kirby J, indicated that they were willing to restrict the immunity in *Boland v Yates Property Corporation* (2000) 167 ALR 575. See Belinda Baker and Desmond Manderson, 'Advocate's Immunity: *Boland v Yates* Re-opens Case Against Counsel's Immunity' (2001) 39(11) *Law Society Journal* 74.

intractable, or raise significant issues of public policy should have to be litigated through the courts. Clients should have ready access to less expensive, informal fora that provide resolution or redress for consumer concerns about lawyers. This is important to justice, as well as consumer rights, since even apparently minor breaches of customer care can have severe impacts on clients' rights, financial liabilities and perhaps even their liberty. The impact can be especially severe when it is combined with the fact that our legal system does not automatically recognise a right to appeal court decisions because of lawyer incompetence.<sup>59</sup>

In the 1980s and 1990s the disciplinary process for lawyers in most Australian jurisdictions was reformed in an attempt to improve its accountability and transparency to the public as well as to improve consumer redress. At first, lay representatives and lay observers were included on investigatory and disciplinary bodies. Now, consumer complaints handling functions and independent ombudsmen have been patched onto the traditional self-regulatory disciplinary processes of all jurisdictions. These reforms have put disciplinary processes under the strain of having to fulfil multiple tasks. However, they have not been adequately resourced and legislatively empowered for one of those tasks — consumer dispute resolution. Nor has the traditional culture of the disciplinary process, which is based in the self-regulatory core of the system, been changed to make consumer dispute resolution an important priority.

The most far-reaching reforms — those under the *Legal Profession Act 1987* (NSW) in New South Wales ('NSW') — increase the consumer remedies available to clients and blur the distinction between discipline and consumer complaints handling. The Office of the Legal Services Commissioner ('OLSC') receives all complaints in the first instance and resolves many consumer-type complaints informally by giving complainants advice over the phone or by a simple phone call to the lawyer involved.<sup>60</sup> However many of those complaints that are not easily resolved are still referred to the (self-regulating) Law Society and Bar Association Councils for investigation.<sup>61</sup> The codes of professional conduct and practice also remain self-regulatory.<sup>62</sup>

NSW is the most progressive jurisdiction in relation to consumer dispute resolution because the OLSC receives all complaints about lawyers in the first instance. It therefore has a chance to informally resolve many consumer-type

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59 Lawyer incompetence may occasionally amount to a miscarriage of justice in criminal cases: *R v Birks* (1990) 19 NSWLR 677.

60 In the 2000–01 reporting year, the number of written complaints was 28.9 per cent of the total of 9110 calls to the inquiry line. This means that up to 71.1 per cent of complaints or inquiries were resolved by informal advice over the phone, educational material sent out to inquirers or simple action such as a phone call to the lawyer involved: Office of the Legal Services Commissioner, *Annual Report 2000–2001* (2001) 5, <[http://www.lawlink.nsw.gov.au/olsc1.nsf/pages/ar2000\\_2001\\_mission](http://www.lawlink.nsw.gov.au/olsc1.nsf/pages/ar2000_2001_mission)> at 17 November 2002.

61 Thirty one point four per cent of complaints were referred to the Law Society of NSW or NSW Bar Association in 2000–01: *ibid.*

62 However in Victoria at least, the *Legal Practice Act 1996* (Vic) s 64 does set out the 'general principles of professional conduct' that should be 'reflected' in these codes. Under s 77, the Legal Practice Board may disallow practice rules that are inconsistent with the Act including s 64.

complaints. The provision of a single gateway for complaints about lawyers that is independent of self-regulatory professional bodies has been resisted in other States. It is only now being seriously suggested (and strongly resisted by professional associations).<sup>63</sup> However even the NSW system leaves a gaping hole in the remedies and resolution available to consumers of legal services. If the dispute is not easily resolved, the only option is disciplinary action. There is no capacity for modest amounts of compensation to be awarded (or even recommended) by an ombudsman. Nor can a lawyer and client be required to attend mediation to resolve the dispute.<sup>64</sup> Nor does the OLSC or the client have any power to take consumer disputes to a tribunal. In dealing with a misconduct case, the Administrative Decisions Tribunal can order compensation of not more than A\$10 000 be paid by a lawyer to a client but only if there is no action for negligence available.<sup>65</sup>

Contrast this with best practice in relation to ombudsman and consumer dispute resolution schemes.<sup>66</sup> The features of these schemes include: independence from the industry they regulate; consumer standards that have been determined with appropriate stakeholder input; the requirement that the business or individual complained about agrees to mediation as a condition of joining the scheme (which in itself may be a licence requirement); power for the ombudsman or facilitator to recommend or award modest compensation or other redress; enforceability and/or contestability of awards in a court or tribunal; and expulsion from the scheme or other penalty in the event of non-compliance with

63 In other states the ombudsman mostly reviews self-regulation by the legal professional associations. Recent reform proposals suggest that other states should follow the NSW model: Chris Merritt, 'Patmore Moving to Control Complaints', *Australian Financial Review* (Sydney), 16 November 2001, 49 (Tasmania); Marcus Priest, 'Law Society May Lose Power on Ethics', *Australian Financial Review* (Sydney), 11 September 2001, 50; Peter Sallman and Richard Wright, *Regulation of the Victorian Legal Profession: Report of the Review of the Legal Practice Act 1996* (2001), <<http://www.justice.vic.gov.au/CA2569020010922A/All/1BA6982D1F141D14CA256C13007855E8?OpenDocument&l=Resources-&2=Publications-&3=Review+of+Regulation+of+the+Legal+Profession+i+n+Victoria+-+Final+Report->> at 17 November 2002. See also Peter Cereche, 'Leashing the Lawyers' (2001) 88 *Consuming Interest* 26.

64 'Consumer disputes' can be referred to mediation instead of or in addition to disciplinary action, but only with the consent of the lawyer: *Legal Profession Act 1987* (NSW) ss 143-7. In fact the OLSC has asked for powers to force lawyers to mediation and to award modest amounts of compensation in the latest round of reform consultations in NSW: Office of the Legal Services Commissioner, *OLSC Submission to the NSW Law Reform Commission Review of Part 10 of the Legal Profession Act 1987 Final Submission* (2000) [6.4] <[http://www.lawlink.nsw.gov.au/olsc1.nsf/pages/olsc1rcsubmission\\_title](http://www.lawlink.nsw.gov.au/olsc1.nsf/pages/olsc1rcsubmission_title)> at 17 November 2002; NSW Law Reform Commission, *Lawyers and Complaints: Review of Part 10*, Issues Paper 18 (2000).

65 Compensation is usually only ordered where it is easy to calculate, eg, fees paid or disbursements.

66 See Department of Industry, Science and Tourism, *Benchmarks for Industry-Based Customer Dispute Resolution Schemes* (1997). See Rhoda James and Mary Seneviratne, 'The Legal Services Ombudsman: Form Versus Function?' (1995) 58 *Modern Law Review* 187 for a comparison of the English Legal Services Ombudsman against the criteria established by the British and Irish Ombudsman Association. As they point out, an 'ombudsman' that performs only a review function, as most legal services ombudsman offices in Australia do, is not really an ombudsman at all as it provides no effective grievance resolution mechanism and few remedies. The Australian Banking Industry Ombudsman is widely considered to be a fairly successful consumer dispute resolution scheme: see Ruth Campbell, 'Australian Banking Industry Ombudsman Scheme: the First 10 Years' (2001) 16 *Australian Banking and Finance Law Bulletin* 123.

the award by the subject of the complaint. Generally, separate government regulators enforce more serious breaches of appropriate standards of conduct for other businesses and services. It is rare to encounter regulatory systems that attempt to combine both comprehensive consumer dispute resolution and enforcement of discipline and other serious regulatory offences. Consider the regulation of financial services (including financial advice) where the Australian Securities and Investments Commission ('ASIC') is the main enforcement body, but financial services providers must provide internal complaints handling schemes and also join an external, independent consumer dispute resolution scheme. ASIC oversees and approves these schemes, but does not attempt to offer consumer dispute resolution itself. It does, however, use consumer complaints to identify patterns of behaviour or serious misconduct that might warrant enforcement action.<sup>67</sup>

Where consumer dispute resolution fails, clients of legal services are left with the sole option of using disciplinary processes for redress. In most jurisdictions, legislation has added a new category of conduct falling short of 'professional misconduct' that is aimed at failures of consumer service.<sup>68</sup> This new category of misconduct is called 'unsatisfactory' or 'unprofessional' conduct (or in NSW, 'unsatisfactory professional conduct'). At common law, 'professional misconduct' was defined in a circular and self-regulatory way as '[s]omething which would reasonably be regarded as disgraceful or dishonourable by *his professional brethren* of good repute and competency'.<sup>69</sup> The new categories of unsatisfactory or unprofessional conduct, by contrast, are defined as conduct in legal practice 'that falls short of the standard of competence and diligence that *a member of the public* is entitled to expect of a reasonably competent legal practitioner'.<sup>70</sup> This is clearly a much more responsive definition of misconduct. However, in practice failures relating to consumer service generally warrant only a reprimand and, even in NSW where the most liberal consumer remedies are available, compensation can only be ordered if there is no liability in negligence.<sup>71</sup> At the same time the mainly self-regulatory nature of complaints investigation maintains the conflict between the legal professional association as 'union' and investigator-prosecutor for its own members.

The thinking of both the legal profession and policy-makers appears to be so immersed in traditional professional models of discipline that they have not even begun to seriously consider what consumer remedies actually require to be effective. Under the current regimes of discipline and complaints handling, it is unclear to what extent the goal is resolution and/or compensation for consumers

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67 See *Corporations Act 2001* (Cth) s 912A(1)(g); Australian Securities and Investments Commission, *Policy Statement 139: Approval of External Dispute Resolution Schemes* (1999); Australian Securities and Investments Commission, *Policy Statement 165: Licensing: Internal and External Dispute Resolution* (2001).

68 See Dal Pont, above n 16, 587 for a summary.

69 *Allinson v General Medical Council* [1894] 1 QB 750, 761 (Lord Esher), 763 (Lopes LJ) (emphasis added).

70 Both Victorian and NSW legislation use this phrase: *Legal Profession Act 1987* (NSW) s 137(3); *Legal Practice Act 1996* (Vic) s 137 (emphasis added).

71 *Legal Profession Act 1987* (NSW) ss 139, 171D.

and to what extent it is discipline of the lawyer. For ombudsman offices like the NSW OLSC and the Victorian Legal Ombudsman, two quite different models — one of empowerment of consumers and one of discipline based on character and trust — are trying to co-exist in all of their activities. As a result nobody is very happy with the current system of complaints handling and discipline, and participants in reform debates are talking at cross-purposes with each other.<sup>72</sup> For the legal profession, the ombudsman is simply a legitimacy-enhancing add-on to the disciplinary process. The main game of the disciplinary process is still determining which lawyers are essentially trustworthy and which should be struck off for failure of character. For consumer advocates and the ombudsman offices, by contrast, lawyers should be regulated by agencies with their own powers and a philosophy of consumer dispute resolution and redress.<sup>73</sup>

Attempts to graft consumer-oriented redress onto traditional, self-regulatory discipline have failed to meet all the objectives of both types of model. It is now time to recognise that there are two separate regimes required for

- (a) consumer dispute resolution; and
- (b) regulation and discipline of lawyers.

The legal profession has been incapable of adopting a consumer-oriented focus in its self-regulatory disciplinary processes and codes of conduct, despite being given ample opportunity and encouragement to do so over the last 30 years. Therefore, comprehensive ombudsman or consumer dispute resolution schemes will have to be set up independently of the professional associations to meet ordinary standards for such schemes.<sup>74</sup> The profession has been much more successful at performing its disciplinary functions with respect to traditional professional misconduct. However, the range of misconduct that should be disciplined is and should be broadening beyond breaches of trust and honesty to failures of consumer service and abuse of the justice system. This suggests that an independent regulator will be required to oversee, if not perform, the regulatory function too, in order to ensure that community values about what conduct should be disciplined are implemented.

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72 In Victoria the debate has been particularly heated; see, eg, Katherine Towers, 'Ombudsman Raises Profession's Hackles', *Australian Financial Review* (Sydney), 1 December 2000, 44; Katherine Towers, 'Fresh Attack on Vic Ombudsman', *Australian Financial Review* (Sydney), 2 February 2001, 47; Chris Merritt, 'Proposed System a Step Backwards: Hamond', *Australian Financial Review* (Sydney), 30 November 2001, 51; Ashley Crossland, 'Proposed System Would Silence Critics: Ombudsman', *Australian Financial Review* (Sydney), 3 August 2002, 51.

73 In a number of States the ombudsman offices are asking for more proactive, regulatory powers such as those exercised by the Australian Competition and Consumer Commission and ASIC. See Office of the Legal Services Commissioner, above n 64, [3.18]–[3.33]; Marcus Priest, 'Nimmo Seeks Greater Role', *Australian Financial Review* (Sydney), 9 November 2002, 51 (Queensland); Kate Hamond, 'Watchdog Bites Back at Critics of Her Investigations', *Australian Financial Review* (Sydney), 15 December 2000, 29 (Victoria). The Tasmanian Attorney-General is considering similar reforms; see Merritt, 'Patmore Moving to Control Complaints', above n 63. The Queensland Attorney-General has warned the solicitors' association that its response to current investigations will determine whether it will keep its self-regulatory powers: Sam Strutt, 'Former Judge to Scrutinise Law Society', *Australian Financial Review* (Sydney), 14 August 2002, 10.

74 See Department of Industry, Science and Tourism, above n 66.

### C Consumer Empowerment — Reforming Lawyer–Client Contracts Through Disclosure

Another raft of consumer-oriented reforms have been aimed at empowering clients to make lawyers more responsive to their consumers' needs when they first engage a lawyer and before any dispute with the lawyer has arisen. These reforms consist mostly of legislative changes<sup>75</sup> that require or allow lawyers to disclose information to clients about their services, their fees, the frequency of communication between lawyer and client, complaint handling options and other terms of their retainers. These reforms aim at redressing the information imbalance between the lawyer and client. They give the lawyer an incentive and an opportunity to change the terms of the traditional lawyer–client contract to address the routine, everyday problems that clients regularly complain about such as lawyers' fees and charges, and the level of communication and customer service they get from their lawyers. They also give the client a greater opportunity to find out how the lawyer proposes to conduct the representation (including frequency of communication and basis for billing) and to suggest a different way of doing things. This is more consumer-oriented than the law of fiduciary obligations which requires disclosure of certain matters by the lawyer only in the special situation of conflict of interests, and then simply gives the client the option of opting out of the retainer with that client. These reforms are also more useful to both clients and lawyers than liability in negligence, which is a very blunt instrument for guiding lawyers as to how they should behave. Statutory intervention in the form of disclosure obligations (and other terms of the contract) can meet certain defined public policy goals more precisely than wider ranging and less predictable liability in negligence and provide much clearer guidance to lawyers on how they should service their clients.<sup>76</sup> For all its benefits, this type of consumer-empowering reform is massively under-utilised in the legislation governing the professions in the various States.<sup>77</sup> These disclosure obligations exist in legislative form only in NSW and Victoria. In NSW and, to a lesser extent, in Victoria, lawyers are now also required to disclose to clients estimated fees and other costs in a matter at the beginning of each retainer and in writing.<sup>78</sup> The provisions make it more difficult for lawyers to recover their fees when disclosure has not occurred and also where there is no written costs agreement with the client.

The other significant development in the disclosure of information to clients was the abolition of the traditional prohibition on advertising by lawyers. Advertising by lawyers is now allowed in all jurisdictions, subject to general

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75 Some reforms to empower consumers have also been included in self-regulatory guidance or codes of conduct issued by the legal professional associations.

76 See Angus Corbett, 'A Proposal for a More Responsive Approach to the Regulation of Corporate Governance' (1995) 23 *Federal Law Review* 277 for a similar analysis of the use of negligence-type provisions for directors' duties.

77 See Dal Pont, above n 16, 76–7, 348–9 for a summary of the relevant 'client care' and costs disclosure rules. NSW, Queensland, Tasmania and Victoria have disclosure requirements to various extents enshrined in legislation.

78 *Legal Profession Act 1987* (NSW) pt 4; *Legal Practice Act 1996* (Vic) pt 4.

prohibitions on false and misleading conduct. This is a huge improvement on client's ability to compare prices and services offered by different lawyers.<sup>79</sup> However it may be necessary to provide lawyers with more guidance as to what advertising is likely to mislead or deceive.<sup>80</sup>

A number of legal professional associations have promulgated non-binding 'client care' guidelines that provide that solicitors should give clients in writing a description of the work to be done, the name of the lawyer responsible for doing it and the name and details of another solicitor from whom the client can obtain help or advice if they cannot satisfactorily resolve a problem with the solicitor responsible for their work. Under these guidelines, solicitors should give the client progress reports at reasonable intervals and explanation for any delay in the completion of the work beyond two months.<sup>81</sup> The main objective is to promote realistic expectations on both sides about frequency of communication and progress reports early on and to ensure that clients have easy ways to raise and resolve complaints about the provision of legal services. The NSW OLSC also promotes the idea that lawyers and clients should enter into 'communication agreements', as well as fee agreements, in order to specify the frequency of progress reports and timeframe for return of phone calls and letters.<sup>82</sup> A more limited version of 'client care' disclosure obligations are legislated in the Victorian costs disclosure provisions.<sup>83</sup> These client care requirements have achieved some prominence in the United Kingdom through Law Society and regulatory promotion and also because they are enforced by the conditions on funding provided by the Legal Aid Commission.<sup>84</sup> However in Australia client care guidelines have undeservedly faded into the background.

Client perceptions of lawyers' failure to be responsive to clients' consumer concerns is a significant source of dissatisfaction. For example, the most

79 However in NSW the government has recently legislated to ban all advertising for personal injuries work except for a statement setting out the name and contact details and legal practitioner's areas of specialty in print and Internet publications: *Legal Profession Amendment (Advertising) Regulation 2002* (NSW). The Queensland government has passed similar reforms to ban 'no win, no fee' advertising and the Western Australian government has proposed similar reforms: Sam Strutt, 'Queensland Passes Public Liability Reform Law', *Australian Financial Review* (Sydney), 21 June 2002, 16. These reforms are partially in response to the perceived crisis in negligence litigation, but also because 'no win, no fee' advertising has prompted many consumer complaints in relation to the charging of disbursements and uncertainty about what counts as 'no win'.

80 See Department of Industry, Science and Tourism, *Guidelines for the Advertising of Legal Services* (1996).

81 Summary of Law Society of New South Wales, *Client Care Guideline to Best Practice* (1996), quoted in Ysaiah Ross and Peter MacFarlane, *Lawyers' Responsibility and Accountability* (2002) [8.4]. In the same paragraph Ross and MacFarlane report that the Law Society of Queensland has promulgated a similar guideline.

82 Office of the Legal Services Commissioner, *Annual Report 1996–1997* (1997) 49–52.

83 *Legal Practice Act 1996* (Vic) s 86. In addition to information about costs, the lawyer must disclose to the client in writing: (a) the name of the practitioner who will primarily provide the legal services and whether they are a principal or employee; (b) the client's right to request a written progress report; (c) the avenues open to a client in the event of a dispute or complaint in relation to either costs or the provision of legal services; and (d) the name and address of the regulatory body for the lawyer.

84 See Avrom Sherr, *Client Care for Lawyers* (1999); Patrick Stevens, *Keeping Clients: A Client Care Guide for Solicitors* (1997).

common grounds of complaint to the NSW OLSC in 2000–01 were negligence (19.6 per cent), communication (13.1 per cent) and over-charging (11.7 per cent).<sup>85</sup> Similarly, the dominant issues of complaint received by the Victorian Legal Ombudsman in 2000–01 were costs and bills (1183 complaints), negligence (997 complaints), communication (including failure to return calls, give progress reports or correspond) (557 complaints) and delay (326 complaints).<sup>86</sup> Clearly clients' satisfaction with the delivery of legal services could be vastly improved if lawyers followed client care and costs disclosure guidelines.

### D Competition Policy

Throughout the 1990s, competition policy dominated legal profession regulatory reforms. The threat of federal reform and regulation of State professions through the Trade Practices Commission's inquiry<sup>87</sup> into the legal profession and the *Hilmer Report*<sup>88</sup> prompted a number of State governments and legal professional associations to announce reviews of the profession, and to introduce significant changes to traditional self-regulation.<sup>89</sup> Most of these changes took the form of 'self-deregulation', the abolition of various restrictive practices that were previously enshrined in self-regulatory codes of practice. This included abolishing scale fees (mandatory minimum fees), relaxing or abolishing the traditional prohibition on advertising, allowing clients direct access to barristers, and abolishing other price restrictions such as the 'two thirds rule' (that a Queen's Counsel must always work with a junior counsel who will be paid at a rate equivalent to two thirds of the QC's fee). In those States that did not already have an undivided profession, there was now common admission to the profession for barristers and solicitors, common practising certificates, and solicitors were allowed to act as advocates and as juniors for senior counsel. Contingent fee contracts were also allowed in some jurisdictions for the first time<sup>90</sup> and some State governments even allowed, or threatened to allow, licensed conveyancers to compete with lawyers.<sup>91</sup>

By 1996 a cooperative scheme of federal and State legislation applied the competition principles of the *Trade Practices Act 1974* (Cth) to all businesses throughout Australia including the professions, and committed the State governments to ongoing review of all their legislation on competition

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85 Office of the Legal Services Commissioner, above n 60, 5.

86 Legal Ombudsman Victoria, *Annual Report 2000–2001* (2001).

87 Trade Practices Commission, above n 4.

88 Frederick Hilmer, Moira Rayner, and Geoffrey Taperell, *National Competition Policy (The Hilmer Report)* (1993).

89 For a summary see Bruinsma, Parker and Shinnick, above n 4.

90 *Legal Profession Act 1987* (NSW) ss 186–8; *Legal Practice Act 1996* (Vic) ss 97–9. Note that the amount to be paid to the legal practitioner cannot be calculated as a percentage of the amount recovered in proceedings.

91 See, eg, *Conveyancers Licensing Act 1995* (NSW). In some states, including Victoria and South Australia, lay conveyancers were already permitted to compete with lawyers.

principles.<sup>92</sup> The *Trade Practices Act 1974* (Cth) can be enforced on the legal profession via litigation by the regulator or other affected parties. However, the main competition controls on the profession continue to be via the political process and the ongoing threat of competition-oriented legislative reforms to the organisation and regulation of the profession.

These reforms have restructured the market for legal services in a way that makes it easier for clients, especially larger, organisational clients, to require better service and lower prices from lawyers. However, in their zeal to demolish anti-competition regulations (either self-regulation or State regulation), competition reformers may forget about the need for other types of responsive reform to the regulation of legal ethics. During the 1990s the legal profession reform agenda in Australia was captured by the need to create a national market for legal services for the sake of large commercial law firms and their corporate clients. It is in the interest of these firms to develop a national profession unhindered by State barriers in order to save money on practising certificates and insurance, avoid the cost of complying with differing rules in different jurisdictions, and provide a national base for international expansion (perhaps through mergers with international law firms). It is in their clients' interests to have a nationally competitive market for legal services. The Law Council of Australia (the federation of State professional associations, which is numerically dominated by solicitors) drove and continues to drive the micro-economic reform agenda for nationalisation of the profession by agreement between its constituent State legal professional associations.<sup>93</sup> The State and federal Attorneys-General are currently discussing how to progress this further and the Law Council of Australia has suggested a model for national harmonisation and ultimately national administration of practice standards and regulation.<sup>94</sup> The Law Council of Australia have already adopted a set of *Model Rules of Professional Conduct and Practice* based on the Law Society of New South Wales' *Professional Conduct and Practice Rules*. A national model code of trust account rules is also being developed.

The need for the introduction of uniform national standards for discipline was recently made more urgent by the public scandal surrounding evidence of lawyers' advice to a tobacco company about the destruction of documents that might have helped a plaintiff win her case against the company for damages for

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92 *Competition Policy Reform Act 1995* (Cth) (and corresponding legislation in other States and Territories). See Stephen Corones, 'Solicitors Subject to Trade Practices Act' (1996) 16(6) *Proctor* 10.

93 Law Council of Australia, *Blueprint for the Structure of the Legal Profession: A National Market for Legal Services* (1994); Daryl Williams, 'Competition Law and the (Legal) Profession(s) — A Commonwealth View' in Commonwealth of Australia, *Can the Professions Survive Under a National Competition Policy?* (1997) 1 (A joint conference on competition law and the professions, Perth, 11 April 1997).

94 Law Council of Australia, *Submission to the Standing Committee of Attorneys-General: Towards National Practice* (2001). The Commonwealth Attorney-General has made it clear he wants nationally uniform professional conduct rules; see Chris Merritt, 'Williams Gets Tough on States', *Australian Financial Review* (Sydney), 8 March 2002, 51.

smoking-related cancer.<sup>95</sup> It is to be hoped that this will create an opportunity to fundamentally rethink legal professional regulation, discipline, professional conduct standards and consumer dispute resolution along the lines discussed above. The worst case scenario is that instead, the competition-driven concern to harmonise regulatory structures will simply result in a lowest common denominator approach. During the 1990s the priority given to competition reforms did provide an opportunity for some positive consumer-oriented reforms to be introduced (as discussed above in Part III(B)), in addition to the restrictive practices that were abolished.<sup>96</sup> However the bulk of the diverse reforms for improving access to justice and client service that have been proposed have not been implemented. As Andrew Goldsmith and Guy Powles comment:

Any advancement in legal ethics at a national level has ridden on the coat-tails of initiatives aimed at mutual recognition of qualifications within Australia, uniformity of admission requirements, agreement on other ingredients of a national market for legal services and the promulgation of model rules of professional conduct and practice.<sup>97</sup>

Consider the fate of the report by the Access to Justice Advisory Committee in 1994, a report that summarised the previous 20 years of law reform proposals and proposed an action plan for their implementation.<sup>98</sup> That report is now largely forgotten and un-implemented. Meanwhile the *Hilmer Report* has formed the basis for an ongoing program of reform of the legal profession, and the Australian Competition and Consumer Commission has made it clear that the professions, including the legal profession, are again a priority.<sup>99</sup>

## E Other Responsive Controls

The regulatory controls mentioned above are some of the more significant and comprehensive attempts to make lawyers' ethics and practices more responsive to community values. There have been some other attempts to make lawyers more responsive.

The courts are taking a more active role in elaborating and enforcing lawyers' duty not to abuse court processes (or allow their clients to do so). In the past, lawyers were able to prevent matters being heard on their merits using trial tactics, or to waste the resources of the courts or the parties via delay, lengthy

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95 *McCabe v British American Tobacco Australia Services Ltd* [2002] VSC 73 (Unreported, Eames J, 22 March 2002); Chris Merritt, 'Crackdown on Document Shredding', *Australian Financial Review* (Sydney), 2 August 2002, J, 55; Chris Merritt, 'Call for Ethics Debate After BAT Case', *Australian Financial Review* (Sydney), 2 August 2002, 55.

96 A number of reforms that had been proposed and then left to languish in the doldrums since the 1970s and 1980s were finally implemented. The introduction of the Victorian Legal Ombudsman and the NSW Legal Services Commissioner are the most important examples. In both cases, the State government was prompted to legislate to stave off potential federal legislation. See above n 4.

97 Andrew Goldsmith and Guy Powles, 'Lawyers Behaving Badly: Where Now in Legal Education for Acting Responsibly in Australia?' in Kim Economides (ed), *Ethical Challenges to Legal Education and Context* (1998), 119, 126.

98 Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (1994).

99 Allan Fels, 'Regulation, Competition and the Professions' (2001) (Paper presented to Industry Economics Conference, Melbourne, 13 July 2001); Hilmer, Rayner and Taperell, above n 88.

interlocutory proceedings and unnecessary dispute of issues that could have been agreed. Hopeless cases were threatened or instituted for collateral advantage, and cases with a low chance of success were brought for the sake of the fees.<sup>100</sup> Case management reforms are also giving lawyers obligations to assist in the resolution of disputes via mediation and case conferences or speedy trials that are heard on the merits.<sup>101</sup>

There is more active application of general law social regulation to individual lawyers and law firms than there once was, including the *Trade Practices Act 1974* (Cth),<sup>102</sup> anti-discrimination and equal employment opportunity legislation,<sup>103</sup> financial services regulation,<sup>104</sup> and Australian Tax Office compliance.<sup>105</sup> Breach by lawyers of some of these regulatory obligations also now has disciplinary consequences.<sup>106</sup> There is also now a greater public expectation that law firms will systematically take responsibility for offering pro

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- 100 See *McCabe v British American Tobacco Australia Services Ltd* [2002] VSC 73 (Unreported, Eames J, 22 March 2002); *White Industries (Qld) Pty Ltd v Flower & Hart* (1998) 156 ALR 169; (1999) 87 FCR 134 (Full Court); Supreme Court of New South Wales, *Practice Note No 108: Costs Orders Against Practitioners* (2000). See also the *Civil Liability Act 2002* (NSW) sch 2, introducing the new *Legal Profession Act 1987* (NSW) s 198r which says that lawyers must refrain from providing legal services where they do not 'reasonably believe on the basis of provable facts and reasonably arguable view of the law' that the claim or defence has 'reasonable prospects of success': see J S, 'Ethical Threshold for Litigation' (2002) 27 *Alternative Law Journal* 193.
- 101 Justice Geoffrey Lance Davies, 'Fairness in a Predominantly Adversarial System' in Helen Stacy and Michael Lavarch (eds), *Beyond the Adversarial System* (1999) 102; Stephen Parker, 'Islands of Civic Virtue: Lawyers and Civil Justice Reform' (1997) 6 *Griffith Law Review* 1.
- 102 In addition to its interest in removing further restrictive practices in the legal profession (see Fels, above n 99), the Australian Competition and Consumer Commission is also taking action against lawyers who are knowingly involved in contraventions of the Trade Practices Act by their clients: *ACCC v Real Estate Institute of Western Australia* (1999) 95 FCR 114; *ACCC v David Charles Miller* (Unreported, Federal Court of Australia, 21 April 1999) (case disposed of by consent order. See Australian Competition and Consumer Commission, 'Action Against Lawyer Highlights Risk for Legal Profession' (Press Release, 7 May 1999, MR 54/99)).
- 103 See Fiona McLeod, 'Equality of Opportunity for Women at the Bar: The Victorian Bar Council's Response' (1999) 12 *Australian Feminist Law Journal* 111; Katherine Towers, 'Victoria Forces Law Firms to Toe New Guidelines', *Australian Financial Review* (Sydney), 22 March 2002, 58 (firms must commit to equal opportunity obligations in order to be able to tender for provision of legal services to the Victorian government).
- 104 Solicitors' provision of investment services are now subject to the managed investment provisions of the *Corporations Act 2001* (Cth) and regulation by ASIC.
- 105 See, eg, *NSW Bar Association v Cummins* [2001] NSWCA 284 (Unreported, Spigelman CJ, Mason P and Handley JA, 31 August 2001).
- 106 After heated debate, the NSW Attorney-General promulgated the *Legal Profession Regulation 1994* (NSW), regs 69B, 69C to prohibit unlawful discrimination (including sexual harassment) by lawyers in legal practice and require them to complete a certain number of continuing legal education hours on equal employment opportunity and unlawful discrimination. For further discussion of this debate and other initiatives to eliminate gender-based discrimination in the profession see Christine Parker, 'Justifying the New South Wales Legal Profession', above n 4, 19–20. In NSW, lawyers must now disclose any tax offences they have committed and bankruptcies to their self-regulatory organisations and these may have disciplinary consequences: *Legal Profession Act 1987* (NSW) pt 3, div 1AA. Other jurisdictions are likely to follow suit: see Law Council of Australia, *Model Rules of Professional Conduct and Practice*, r 31.

bono services. Governments are enforcing this expectation as a condition for law firms to be able to tender for the provision of legal services to government.<sup>107</sup>

#### IV CONCLUSION

Quite different models of lawyers' ethics underlie different regulatory controls. The traditional controls are justified by the ethics of the autonomous legal profession and the adversarial advocate lawyer. But as a community, we now expect lawyers to be more responsive to general community values. Yet governments and professional associations have not sufficiently challenged and changed the traditional controls to make them responsive. Considerable effort has been made in NSW and Victoria, in particular, to regulate the consumer quality of legal services. Yet these reforms are incomplete, unsatisfactory and do not deliver effective consumer remedies. There is little prospect of them doing so where they remain tied to self-regulatory disciplinary processes or where legal ombudsman officers have few powers and little independence. Nor have we specified what new justice obligations lawyers should have. Some courts have gone some way towards elucidating more clearly lawyers' 'officer of the court' responsibilities to ensure justice is done according to law on the substantive merits of a case and to assist in speedy, fair and just dispute resolution. But it is still unclear how rigorously these newly clarified obligations will be enforced.

As for other ethical duties, there is plenty of public criticism of lawyers when particular scandals come to public attention and there are isolated cases of lawyers being brought to account and disciplinary rules being changed to reflect public concern.<sup>108</sup> However, the professional codes of conduct and disciplinary processes still largely reflect the traditional model of ethical autonomy. They are not set up to be proactively responsive to issues such as lawyers abusing bankruptcy to avoid their tax debts, harassment and discrimination in some parts of the profession, or public expectations that lawyers should advise against corporate irresponsibility and law-breaking and blow the whistle if it does not stop.

Frequently both governments and professions have acted to improve the reputation of the profession as a whole only when public attention makes it absolutely necessary. The scandal of early 2001 reported in the pages of the *Sydney Morning Herald* of certain barristers who owed huge debts to the Australian Tax Office and, in some cases, used bankruptcy to avoid paying those

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107 Chris Arup and Kathy Laster (eds), *For the Public Good: Pro Bono and the Legal Profession in Australia* (2001) 19 *Law In Context* (Special Issue); David Weisbrot, *Report of the National Pro Bono Taskforce and Recommended Action Plan* (2001), <[http://www.ag.gov.au/aghome/commaff/flad/legal\\_aid/finalreport/finalreport.html](http://www.ag.gov.au/aghome/commaff/flad/legal_aid/finalreport/finalreport.html)> at 17 November 2002; Towers, above n 103 (firms must commit to pro bono and equal opportunity obligations in order to be eligible to tender for government legal services).

108 Recently governments, especially the NSW government, have added particular professional conduct rules in reaction to particular scandals of barristers using bankruptcy to avoid tax, lawyers advising document shredding and sexual harassment.

debts, is a good example of this dynamic in action. The scandal was brought to the attention of the public by the media which had some information from the Australian Tax Office. The self-regulatory NSW Bar Association said that it had not done anything about the barristers' conduct because no complaint had ever been made to it. The Tax Commissioner stated that under the privacy provisions of his legislation, he was unable to make a complaint. At first the Bar Association reacted defensively seeking to justify its inaction. But ultimately it had to respond to public pressure by investigating and recommending discipline for a number of barristers who had been identified in the newspaper. However, the Bar Association did not show any sign of implementing more proactive reforms to try to ensure that such a scandal did not occur again. Its focus was on discipline of the barristers identified as problems. In the meantime, the NSW Attorney-General acted to change the rules to put in place a more sustainable system for identifying potential misconduct in the future and for investigating all misconduct from the past. However, these were special provisions simply tacked onto the existing system and forcing a more proactive role onto the self-regulatory Bar Association than it would otherwise have chosen.<sup>109</sup>

What then can be done to make the regulation of the ethics of legal practice match up better with public expectations that the legal profession should be more responsive? Firstly, it is clearly time for federal and State Attorneys-General to convene a thorough reform process in order to determine which ethical values should ground regulatory controls on lawyers' practice and to redesign conduct standards, disciplinary processes and consumer dispute resolution systems to achieve them. This is not to say that government should necessarily impose a new system on the legal profession. Regulatory reform is usually more effective where key stakeholders (including in this case the professional associations and consumer groups and business) are engaged in dialogue about implementing changes.<sup>110</sup> However, all governments need to show a willingness to change the rules and the processes beyond facilitating ethical autonomy and also beyond a narrow competition policy perspective, in order to get legal professional associations to sit down at the table and negotiate what should change. They also need to insist that stakeholders of all types should be included in the discussion, and that the new rules and processes should take stakeholder concerns seriously, and provide real remedies. This does not mean that the traditional regulatory controls should be completely thrown out. There is clearly still a need for admission requirements, disciplinary controls for gross misconduct and fiduciary liability where lawyers abuse the trust of their clients. However the way in which these controls are applied and the requirements that they impose must be reworked more consistently with an ideal of ethical responsiveness.

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109 Richard Ackland, 'Time to Stop Fudging About Bankrupts at the Bar', *Sydney Morning Herald* (Sydney), 2 March 2001, 12; Paul Barry, 'Rich Lawyers Dodging Income Tax', *Sydney Morning Herald* (Sydney), 26 February 2001, 1; Ruth McColl, 'Disclosure Will Give Barristers' Watchdog a Real Bite', *Sydney Morning Herald* (Sydney), 2 March 2001, 12.

110 Christine Parker, 'Converting the Lawyers: The Dynamics of Competition and Accountability Reform', above n 4, 39.

Secondly, if we wish to make legal practice more responsive to ethical concerns and community values, then a fruitful strategy might be to bypass the traditional professional associations and look to more specific groups of lawyers to elaborate their own standards of ethical responsiveness.<sup>111</sup> These would include the institutions where lawyers are employed (particular law firms, companies, government departments, legal aid commissions, community legal centres etc) and regional or special interest lawyers' associations (for example women's lawyers groups, special interest subgroups of the Law Council of Australia etc).<sup>112</sup> We might also look to State regulatory agencies (for example an environmental or occupational health and safety regulator) and specialist tribunals to engage with the lawyers who practise in their regime to develop guidelines, and, in some cases, rules about the ethical obligations of practice in that area.

The advantages of this approach are that there is more capacity to be contextually specific in setting obligations to various stakeholders than there is in developing conduct rules for the whole legal profession. For example lawyers at the Director of Public Prosecutions could consider and specify what ethical obligations they owe to victims of crime as well as to accused in a way that a general legal professional association is unlikely to do. Each of these bodies has the organisational capacity to elaborate, implement and enforce ethical expectations through its normal management channels.<sup>113</sup> Many large law firms already exercise quite strict controls over their lawyers through supervision by partners, billing targets and time sheets. Why not harness these controls to achieve ethical goals as well? Many organisations that employ lawyers already do consciously implement some responsive ethical agendas. For example, most government agencies provide better equity, equality of opportunity and flexible, family-friendly work practices than private firms. Legal aid offices and community legal centres have been set up to deliver better service standards to individual and low status clients than private firms. Some private firms and community services have specialised in developing practices and ethics of negotiation and alternative dispute resolution that are quite different to the ethics of adversarialism.

An outdated ideal of lawyers' ethics is the foundation for much regulation of the legal profession. Part II of this article showed that the most significant regulatory controls on lawyers' ethics (admission, discipline and liability for breach of fiduciary duties) are built on ethical autonomy. They are not

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111 I have previously argued that companies and other large organisations should be made responsible to implement internal programs to ensure they comply with regulation and are responsive to social responsibilities. Similar principles could be applied to law firms, other employers of lawyers and lawyers' associations: Christine Parker, *The Open Corporation* (2002).

112 See Ted Schneyer, 'A Tale of Four Systems: Reflections on How Law Influences the "Ethical Infrastructure" of Firms' (1998) 39 *South Texas Law Review* 245; Julian Webb and Donald Nicolson, 'Institutionalising Trust: Ethics and the Responsive Regulation of the Legal Profession' (1998) 2 *Legal Ethics* 148, 161. For a specific proposal along these lines see Stephen Parker, above n 100, 1.

113 See Christine Parker, *The Open Corporation*, above n 111 for a detailed analysis of organisational self-regulation in general as a way of making organisations permeable to democratic regulation and social values.

responsive to public concerns about justice and customer service and are therefore unsustainable in the long term. The newer types of regulatory control (liability controls in negligence and contract, consumer complaints schemes, consumer disclosure requirements, competition policy) have much potential to make the legal profession more responsive to community concerns. However customer service reforms have been half-heartedly patched on to a system that remains essentially autonomous, while justice-oriented reforms have been rare and reactive rather than responsive to community concerns. In the 1990s the ethical reform agenda for the legal profession was overwhelmed by competition policy. The ethical regulation of the Australian legal profession must now be made more responsive through both legislative reform and by moving responsibility (and accountability) for self-regulation from the traditional professional associations to local, organisational and interest-based groups of lawyers.