70103 Ethics Law and Justice Notes

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2. James and Field — Nickolas James and Rachael Field, The New Lawyer (Wiley, 2013)
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4. B&C — Paula Baron and Lillian Cohen Ethics and legal professionalism in Australia (Oxford 2015)
5. Bagust (2013) — Joanne Bagust 'The Legal Profession & the Business of Law' (2013) 35 Sydney LR 27 – work based on interviews of 50 lawyers in top 10 firms in Melbourne in 2005-2006

3 Ethics Morals and Emotions

3.1 Difference between 'morals' and 'ethics'?

1. Difference is morals are more changeable and not universal whereas ethics usually denotes an agreed framework within a particular context.
2. Clearly very closely related as the definition of ethics includes reference to morals – but ethics signals agreement and governance

- Ethics – moral principles adopted as a code or framework of behaviour in a context – LLM 204.
- Oxford dictions has 'Moral principles that govern a person's behaviour or the conducting of an activity.'
  - Ethics is the capacity to choose those values that are meaningful
  - About answering a practical question is what should I do I the context of this ethical framework
- Legal ethics –understood as professional responsibility & conduct – codified into a set of rules
- Morals – not universal & can differ significantly. Concerned with principles of right & wrong behaviour.
  - **Positive morality** – the dominant moral values of a society
  - **Critical morality** – a systematic examination of moral values and enquiry into whether they should be followed abandoned or changed
- Preston (Understanding Ethics 2014) says law and ethics are related
  - Law development has been influenced by ethics – but ethics are not derived from the law
  - Overwhelming reason for so many laws are ethical ones
  - Law is commonly the public expression and sanction for the morality of society
  - Law should be continually the subject of ethical scrutiny and critique

3.2 Ethical approaches

a) **Virtue ethics –** places emphasis on character rather than compliance with rules or consequences of actions. If a person focuses on developing a virtual character they will know what to do in a certain circumstance.
b) **Deontological ethics** – one that is universal and objective and consistent with ethical rules – it considers the act itself rather than the consequences or intentions eg divine command theory and Kantianism
c) **Consequentialist ethics –** one that produces the best possible outcomes/consequences. Eg utilitarianism
d) **Ethics of Care** - concerned with responsibility to maintain relationships & communities & contrasts with the individualistic and abstract nature of the previous approaches eg Feminists ethics

Parker and Evans (Inside Lawyers Ethics 2014) suggest 4 main strands or consideration for an Ethical approach – and which is appropriate may differ depending on the circumstances

1. **Adversarial advocacy** – requirement for lawyers to advocate on their client's behalf within the bounds of the law regardless of outcome or effect on others
2. **responsible lawyer** – accepts that as an officer of the court there is also an obligation to facilitate the administration of justice
3. **Moral activism** – taking the opportunity to improve justice through law reform, public interest law ad client counselling
4. **Ethics of care** – an approach that is about preserving relationships with clients, between parties and within communities

3.2.1 Legal Ethics is just normal Ethics

Mirko Badaric and Penny Dimopoulos, 'Legal Ethics is just normal ethics: towards a coherent system of legal ethics (2003) 02(2) QUTLGJ 367

- The rules and principles embodied in the rules which form what is known as legal ethics are devoid of an overarching framework
- The dissociation between legal ethics and considered legal theory is the reason or legal industry credibility issues
- there is no difference between business and other activities therefore ethics has a role in legal practice; but one
- Must pick a moral theory and stay with it for it to provide the stability and framework for legal ethics - that appears to be lacking ie can't just pick and choose which theory consequentialist or deontological that suits your intuitive disposition.
- They emphasis 3 moral principles (supported by both consequentialist and deontological theories)
  1. Truth telling
  2. Personal liberty
  3. Maxim of a positive duty

Introduces 3 theories and concludes that as **there is no difference between business and other activities therefore ethics has a role in legal practice** by looking at the blow thesis:

1. **Independence theory** – business and ethics do not mix. Friedman – not maximising profits is akin to stealing from shareholders. Moral rules are about conduct between individuals whereas business including law is self-contained and already governed by other clear and settled principles. Also moral principles are too subjective an imprecise for governing a business. They conclude however that as there is no basis for distinguishing business from other human endeavours this is unsound
2. **Substantive Law** – as law itself is founded on moral principles, ergo the above does not hold, but they argue While there is clearly a link between morality and the law it does not necessarily follow that moral consideration would govern the practice of law as the activities of lawyers is not itself the law ..therefore why should they not be governed by prudential/economic principles like other businesses
3. **The universalizability of moral judgements** – independence theory above is incompatible with a fundamental paradigm of morality. Moral conduct is applicable to all conduct,

What then is the content and nature of ethics in the practice of law

- Morality consists of the principles which dictate how serious conflict should be resolved.
- Not concerned with trivialities.
- Where there is actual or potential conflict between 2 or more parties.

Consequentialist - an act is right or wrong depending on the capacity to maximise a certain virtue
Deontological (non-consequentialist) – not contingent on results but based in the intrinsic features of the behaviour

- Dismiss rights based (deontological) ideals in their purest form as they are difficult as they lack a coherent foundation and fail to provide a mechanism for moving from the abstract to the ideal. Rights theories can however be included by substantiating rights in the context of a consequentialist ethic
- Utilitarianism can explain the existence of rights as bestowing them has been shown in lead to overall be more conducive to overall happiness – but rights do not have a life of their own that is they are derivative not foundational. And because of this they are not as absolute as deontological based rights.
- This approach allows us to rank rights

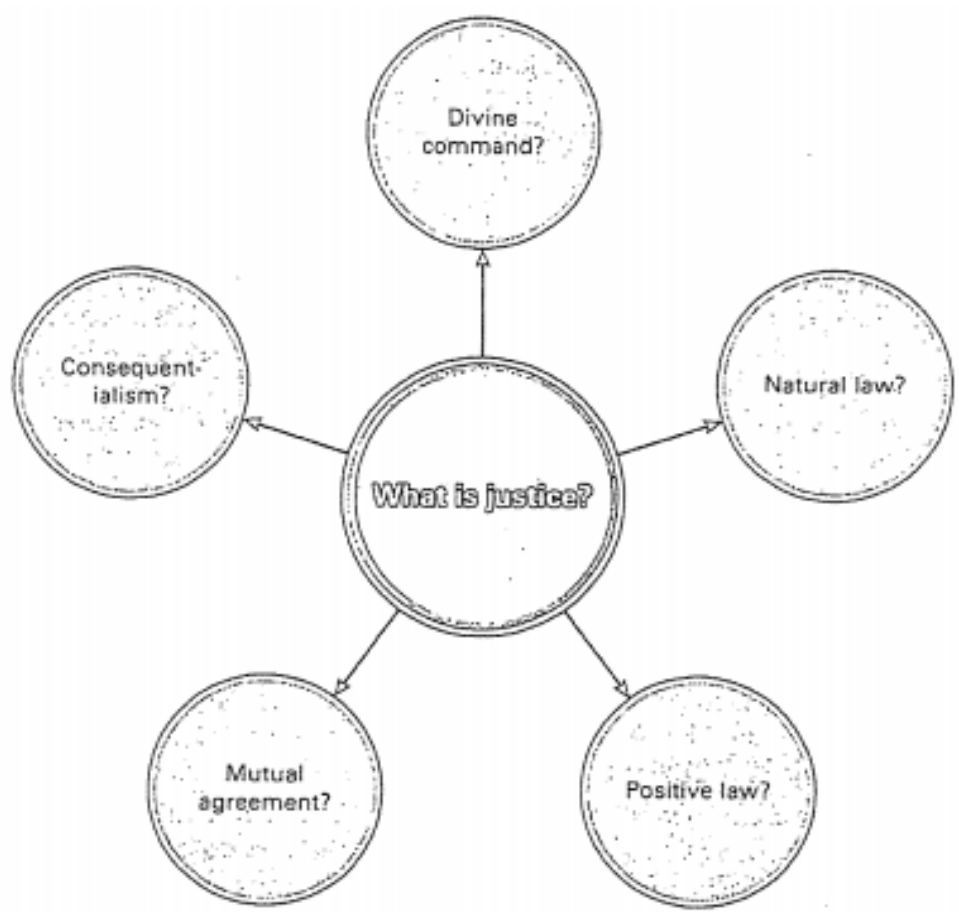
3.3 Defining Justice

- 'Justice concerns moral ideals about how societies, polities, states, legal systems and individuals ought to be governed and behave'. – Oxford Law dictionary
- James and Field – justice = a standard for which the law can be measured – p407
- Some legal philosophers believe that the law is a "reflection of universal principles", whilst others believe that "questions of legality and questions of justice are not necessarily related" – p407
- "justice provides a standard against which particular laws, legal decisions and the legal system as a whole can be measured" – p407
- justice generally equates to fairness, a fiar or right outcome. However, what is considered to be fair? And who decides what is fair?
- According to Iris Marion Young taking fr others pg 3 'a person injustice to the extent that their unfortunate circumstances are not their fault'
- Rawls " *Justice concerns ' the way in which the major institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation*" A theory of justice 1971 p 7
- IMY – 'Justice & injustice concern primarily an evaluation of how the institutions of a society work together to produce outcomes that support or minimise the threat of domination & support or minimise everyone's opportunities to develop & exercise capacities for living a good life as they define it. Social justice concerns the actions of particular individuals on the policies of particular institutions only secondary, as these contribute to constricting structures that enable & constrain persons" p7
- Structural injustices are harms that come to people as a result of structural processes in which many people participate,

3.3.1 Sources of Justice

For individuals Justice takes the form of a fair outcome – but who decides what is fair. Various **sources of Justice** have been proposed (see Field pg 407)

1. Divine command – derived fr authoritative command of a deity of higher authority
2. Natural law – a universal and absolute objective standard
3. Positive law – it's what the law says it is
4. Mutual agreement – what the community agrees it is
5. Consequentialism – the decision/action results in max total welfare



3.3.2 Types of Justice (see James and Field pg 408)

1. **Distributive** – concerned with the fair and proper distribution within a group of things such as wealth resources and power. Distributive justice is achieved when things are distributed fairly and property.
    a. **Egalitarianism** – resources should be distributed equally either in terms of equality of opportunity or equality of outcomes
    b. **Desert theory** –according to what each member deserves based not on equality but on some other criterion such as need talent or effort.
    c. **Utilitarianism** – so as to maximise total or average happiness or welfare

    Rawls (A theory of Justice 1999) proposes a combination of Egalitarianism and desert theory. It requires an impartial distribution based on what one might do if sitting behind a veil of ignorance.
        1. Wrt basic liberties egalitarianism - Each person should be free to do as they choose without infringing upon the basic freedoms of others
        2. Wrt basic social or economic inequalities a combination of desert and Egalitarianism - they should be to the greatest benefit of the least advantaged and attached to offices and positions open to all under conditions of far and equal opportunity

    Rawls distinguishes between distributing liberties equally and social and economic goods which are to be distributed equally unless an unequal distribution would improve the position of those worst off – but won't this always be the case

2. **Procedural Justice** – when a person received a fair trial or hearing and due process. Safeguards built into system to ensure this. The right for everyone to be heard. EXAMPLES: visa cancellations, administrative law decisions

3. **Retributive Justice –** rehabilitation of the offender and the healing of the victims/community as well as offender. EXAMPLES: for drug addicts, graffiti offences, young people, Aboriginal people. Downsides: expensive.
    - Usually the community wants more of a retributive approach because people want them to get the harshest penalty possible, but it may ultimately breed more criminal like behaviour. Media attention influences it more.
    - Restorative approach is more expensive, but the prison system doesn't seem to be effective. Especially when considering the prison suicides, abuse from prison guards and re-offense rates. In the last few decades thee has been more practices in the restorative approach such as talking to the victim, community service and drug courts.
    - As much as the community want there to be a restorative approach putting it into practice can be very controversial e.g. sex offenders talking to the victim. Society sees that if you've done something wrong you should be punished not restorative, so sometimes it's better to take into consideration the degree of the charge.

6 Admission and Regulation

Australian lawyer means 'a person admitted to the Australian legal profession in this jurisdiction or any other jurisdiction' Uniform law s6 (When you complete a law degree, PLT and get admitted to the profession) DOES NOT MEAN you have a practising certificate

Australian legal practitioner means an Australian lawyer who holds a current Australian practising certificate; Uniform Law s6

solicitor means an Australian legal practitioner whose Australian practising certificate is not subject to a condition that the holder is authorised to engage in legal practice as or in the manner of a barrister only; Uniform law s6

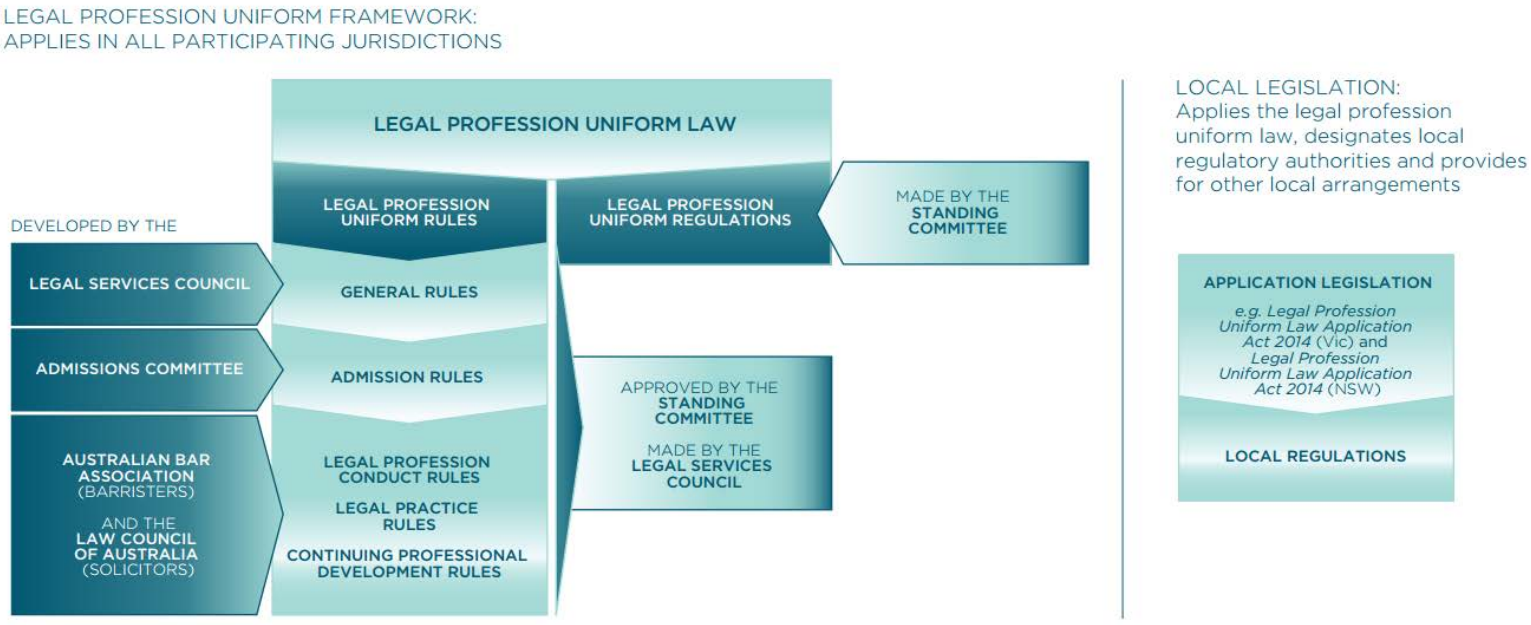
barrister means an Australian legal practitioner whose Australian practising certificate is subject to a condition that the holder is authorised to engage in legal practice as or in the manner of a barrister only; Uniform law s6

6.1 Governing Acts

- Legal profession Uniform Law Application Act 2014 (Vic) – S1 is the Legal Professional Uniform Law which provides for mutual recognition across jurisdictions
- Legal Profession Uniform Application Act 2014 (NSW)
    a. allows for the application of the Victorian Uniform Law schedule 1 to their application act as if it were an act on NSW
    b. provides for NSW specific interpretation of the Uniform Law
    c. Provides for NSW Admission Board Rules at s 21A – and administration of the LPAB
    d. Schedule 2 Costs in civil claims where no reasonable prospect of success
        - not an offence but can be grounds for Professional Misconduct or UPC (4)
- Other states/territories all have Legal Professional Acts still in place
- Civil procedures Act 2005 (NSW) – s 99 Liability of Legal practitioner for unnecessary costs

Regulations under Legal Professional Uniform Law (NSW) No 16a

1. Legal Profession Uniform General Rules 2015 – The Legal Services Council – Commissioner is the CEO of the LSC -can develop and make rules about anything that is necessary to give effect to the Uniform Law. Contain much of the detail about practising certificates, trust money, trust accounts and Controlled money (accounts processes and procedures), and billing rules for legal practices including renewal of Australian practicing certificates (particularly fit and proper test), foreign lawyers, PII, Fidelity cover
2. Legal Profession Uniform Admission Rules 2015 - Legal Services Council
3. Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015
4. Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015
5. Legal Profession Uniform Legal Practice (Solicitors) Rules 2015 - regulation of legal practice around transferring, debt collection, conduction another business, litigation lending and loan and security documents
6. Legal Profession Uniform Conduct (Barristers) Rules 2015
7. Legal Profession Uniform Continuing Professional Development (Barristers) Rules 2015
8. Legal Profession Uniform Regulations 2015 – defines the relationship between the Uniform Law and other Legal Professional Acts (from other states) and defines the role of the Legal Services Council and the Commissioner for Uniform Legal Services Regulation to be public agencies/offices etc as required under several acts eg GIPA, PPIP State Records and Ombudsman Acts.



6.2 Admission: Uniform law Part 2.2 and specifically s16

- "right conferred by the Supreme Court …to suitably qualified and honourable persons in the administration of justice" LLB 49[5]
- must have current compliance certificate from LPAB Uniform law s16(1)(a) But Supreme court is ultimate authority with inherent jurisdiction to admit regulate and discipline lawyers
- Must attend an admission ceremony at the Supreme Court to take an oath/affirmation of office
- Become entitled to sign the roll of lawyers and entitled to work in the courts – (subject to also holding a practising certificate)
- admission is effective from time of signing roll Uniform law s22(2) → then you can call yourself a lawyer
- becomes an officer of the supreme court upon admission Uniform law s25
    - 'Admission does not of itself entitle a person to engage in legal practice, but is a prerequisite for being able to apply in this jurisdiction for an Australian practising certificate, which entitles the holder to engage in legal practice.' Uniform law s15

6.2.1 Applying for Admission – first need a Compliance certificate ('CC')

- **Legal Profession Admission Board** (in NSW) issues compliance certificate required for Admission.
- From 23 September 2016, applications for Admission in NSW made to the Legal Profession Admission Board (LPAB) website through the Online Admission Portal.
- Must make a disclosure statement on the site and provide to referees – but can separately disclose medical type disclosures. Admission disclosers required until approved.
    - Criminal convictions and charges (s 10 Legal Uniform Act- even if conviction was not recorded)
    - Academic misconduct
    - Disciplinary findings (when you had a career before law) even overseas
    - Bankruptcy and tax admission
- Hard copies of your Law degree, PLT requirements, Dean's Certificate and two character references (see Rule 16 Admission rules) with original signatures must be provided in hard copy.
- Prerequisites for issuing cc Uniform law s17

1(a) Academic qualifications Uniform law s17(1)(a) specified under Admission Rule 5
1(b) PLT Uniform law s17(1)(b) as specified under Admission Rule 6
1(c) Fit and proper person Uniform Law s17(1)(c)

Defined Rules 5-11 of LP Admission Rules

2(a) **LPAB *may*** regard ***any*** matter
2(b) LPAB *must* regard matters in Admission Rule 10

- Applications for CC must be published on website Uniform law s19(6) in accordance with Admission Rule 12(2)
- Anyone can object to issuing of a cc Uniform law s19(7) or admission Uniform law s16(3)
- Revocation of compliance certificate does not automatically impact admission if already admitted Uniform law s19(5)

6.2.1.1 Practising certificate following admission

- An Australian practising certificate is defined as a certificate granted to an Australian lawyer entitling them to engage in legal practice: s 6(1)
- Part 3.3 of UL provides for a system of issuing Practising certificate
- Prerequisites set out at s 45
- Conditions set out at Division 2 ss 47-42
    - Australian Lawyer – ie admitted
    - No other PC
    - PII
    - Still Fit and proper – set out s 13(1) of LPUGeneral Rules set these out
- Application/renewal process and requirements set out under s 3.3 of LPUGeneral Rules
    - Every year
    - Will be supervised for first 18m – 2 yrs (6 moth of PLT)
    - Must provide S 12 (b) show cause events – s 51 of Uniform Law plus some summaray offences under s 15 LPU General Rules
    - Must address Fit and proper at s 13 of LPU General Rules
    - Must pay a fee
    - Continuing legal education - s52 UL Continuing Professional Development Rules
    - Lawyers must also contribute annually to the Fidelity Fund in addition to the annual practising certificate fee, covered in part 4.5 of the Uniform Law. The purpose of this is to provide compensation to clients whose money or property has been embezzled or stolen by a defaulting or dishonest lawyer

6.2.2 Fit and Proper Person Test – Character tests in practice (incl. Cases)

- Requirement to 'pass' to get a compliance certificate under Uniform law s17(1)(c)
- Defined by long list of suitability matters in Admission Rule 10 including:

1. Character tests
    i. **Good fame and character Rule** 10(1)(f) – focuses on reputation but no exclusive test for this
        - precedent set in Ex parte v Lenehan (1948)
            - applicant admitted dishonest acts 20yrs previously - refused admission by NSWSC
            - **Overturned** by HCA '*false steps of youth…are not always final proof of defective character and unfitness [and] may surely be overcome by subsequent blameless character'* also noted his distinguished war service
            - Need to be a person in whose integrity the public can have confidence; must not have previously disrespected the law and need to be trustworthy (at 426 per Rich J)
        - words assume their ordinary meaning – Health Care Complaints Commission v Karalasingham [2007] NSWCA 267 at [45] per Basten JA
        - Tziniolis, Ex parte (1966) 67 SR (NSW) 448 further defines good fame and character
            - Registration of a medical practitioner.
            - at 475 per Holmes JA. - Fame focuses on the applicant's public reputation and character focuses on the objective evaluation of the applicant's quality according to their acts or motives:
            - Walsh JA at 450 set the precedent that the court was entitled to consider professional as well as personal misconduct in determining whether a man was of good character
    ii. Sstat dec as to the person's character-**Rule 16,** student conduct report-**Rule 19,** certificate of good standing **Rule 20**

7.3.1.1 Arguments for and Strengths of Pro Bono

- David Hillard of Clayton Utz 'Toward a Voluntary Minimum Pro Bono Target' Law Society Journal Feb 2004
- Mirko Badaric and Penny Dimopoulos, 'Legal Ethics is just normal ethics: towards a coherent system of legal ethics (2003) 02(2) QUT Law & Justice Journal 367

1. **Reduced cost and duty to administration of justice to facilitate access**
   - Reduced costs for 'worthy' clients and causes
   - Provides a (small) Increased access to justice (small)
   - have a duty to administration of justice, therefore also a duty to provide access to justice, because not doing so is not performing the duty of administering justice when participants are disadvantaged by lack of advice or representation because of their financial circumstances.
   - Bargaric & Dimopoulos arguments assume Governments have the will ***and resources*** to meet the need if pro bono lawyers opt out LLM [3]
   - Argues '*Publication of a voluntary minimum target within our professional conduct rules would send a powerful message that the conduct of pro bono work is a fundamental professional responsibility of all Lawyers*' 63 Hillard
   - '*There is not an equitable system for providing access to justice, and many people are left behind in the current. justice system, unable to afford and obtain legal advice or representation*' 63 Hillard
2. **Lawyers Owe a duty to give back as part of Professional identity of altruism and Service**
   - '*Lawyers owe something to the community and State in return for the lucrative monopoly over the legal services that the community has granted them*.' Bargaric & Dimopoulos 381[2] citing Y Ross, Ethics in Law (Butterworths. 3' ed, 2001) 109.
3. **Skills improved and professional satisifaction**
   - Makes you a better lawyer as broader experience particularly advocacy and communication skills LLM 152 [4]
   - Greater professional satisfaction LLM 152 [3]
   - Create a feel-good factor/uplift employee moral Bargaric & Dimopoulos, 381)
4. **Image of Profession and Commercial advantage**
   - Fosters a positive public image of the profession / public service, which leads to commercial benefits. LLM 152 [4]
   - Pro bono schemes allow big firms to redefine themselves as vehicles of public justice leading to market and marketing advantages. big law firms in Australia have pro bono budgets of up to $2million Bargaric & Dimopoulos, 383[1])
5. **Has widespread support**
   - 'Universally condoned and common in legal practice.' B&G
   - National Pro Bono Centre has a target of 35 hours per lawyer per year.
   - Actively encouraged by professional organisations: referral schemes, awards, resolutions encouraging participation, LLM 143[2]
   - ALRC, 2000 Managing Justice: A Review of the Federal Civil Justice System.' "Recommendation 37. Legal professional associations should urge members to undertake pro bono work each year in terms similar to that stated in American Bar Association Model Rules of professional conduct rule 6.1". (cited by Hillard below)
   - In March 2001, the Law Society Discussion Paper on pro bono services by the NSW legal profession, Pro Bono Work - Promoting Cultural Change'" received 13 responses All encouraged the creation of a voluntary pro bono target - but not adopted (cited by Hillard below)
6. **Encouragement and support for Government to fund more legal assistance**
   - '*Leadership from within the profession itself would remove any suggestion that encouraging the conduct of pro bono work is a ploy by government to further reduce funding for legal aid and community legal centres*' 63 Hillard
   - '*provide the profession with greater authority to convey to government that pro bono assistance cannot be a substitute for a properly-funded system of legal aid, and that the private profession is unable to fill many of the gaps left by the present legal aid arrangements*.' 63 Hillard

7.3.1.2 Arguments against and Weakness of Pro Bono

1. Not available for all and often capped
   - 'those who obtain pro bono legal assistance is typically luck. It is simply a lottery who gets free legal assistance. This is wrong - so much should never turn on so little.' Bargaric & Dimopoulos, 384[4])
2. Don't have same commitment access or time as if paying for a lawyer- Quality of lawyer and ability to choose / control
3. Potential for conflicts of interest
4. No duty if mandatory akin to slavery - and 'lawyers do not have a duty to work for free' B&G 379[6]
   - More than is required in other professions Bargaric & Dimopoulos 'Legal practice is the only profession where there is an organised system of free labour… verging on an expectation.' (Bargaric & Dimopoulos, 380[5])
   - Absolves MAXIM OF POSITIVE DUTY: 'we must assist others in serious trouble, when assistance would immensely help them at no or little inconvenience to ourselves - the maxim of positive duty' Bargaric & Dimopoulos 393[3]
   - ' the situations in which morality demands performance of a positive action are on the whole infrequent, when they do arise the obligations can be so clear, pronounced and unwavering' Bargaric & Dimopoulos 393[3]
   - 'It is a fundamental moral prescription that one is not responsible for remedying situations that one has not caused (subject to the maxim of positive duty) – this is the reason (the only reason) that most of us can sleep easy at night despite knowing that there are millions of starving people around the world. (Bargaric & Dimopoulos, 384[4])
   - 'The monopoly was never granted to the legal profession, rather, it exists because the law is complex and private citizens are often unable to assert their legal entitlements without professional assistance. Hence lawyers do not have a reciprocal obligation to grant something (namely pro bono services) in return' (Bargaric & Dimopoulos, 381[2])
   - Complexity of function is also not a relevant criterion for voluntary assistance. Washing machines, tax forms, televisions sets and car engines are also a constant source of confusion for the untrained but experts in those areas are not criticised for not providing free assistance. (Bargaric & Dimopoulos, 381[3])

7.3.4 Self-Represented Litigants – 'litigants in person'

(see 4.5 Self-Represented litigants/defendants p11)

- Acting for yourself without a lawyer
- 'In the family Court, around 30% of people are not represented in court hearings.' (Community Law Australia, Unaffordable & out of reach, 10)

Pro's/Strengths

- Reduced costs

Cons/Weaknesses

- Increased strain on the judiciary accommodating them
- Not achieving objectives with Less ability in general
- Lengths case for other side and wastes court time
- Often do not understand complex law and court proceedings
- Unable to be objective and fully rational
- Often forced to give up their rights – too stressful for many
- For every person who represents his or herself, there is presumably many, many more who can't afford help but cannot bear the stress burden of self-representation and thus do not proceed with litigation.
- '*self represented litigants, who cannot hope to master the procedural and substantive learning lawyers spend years acquiring, themselves add to the cos and delays of litigation and exacerbate these problems for other litigants*' George Brandis as SAG The Australian June 1, 2012
- Australian Institute of Judicial Administration has suggested opposing counsel has an obligation as a duty to the court to assist self-represented litigants even though it may not be in their own client's best interests – including bringing to the court attention evidence essential to their case. AIJA Litigants in person Management Plans: Courts and Tribunals (2001) 9.
- LLM 367 however says it 'seems unreasonable … to suggest …the lawyer must assist the SRL in the presentation of their case' as a core tenant of the adversarial system is each side presenting their own case
- '*While a prosecutor has a duty of fairness to an accused person, it is not a prosecutor's function to advise an accused person about legal issues, evidence, inquiries and investigations that might be made, possible defences or the conduct of the defence*.' ODPP Guidelines 23
- Not obvious nor measurable, but real and substantial '*is the cost of delay, disruption and inefficiency, which results from absence or denial of legal representation… Providing legal aid is costly, so is not providing legal aid*.' (CJ Gleeson, 'the state of the Judicature, cited in B & C,

7.3.5 Alternative Dispute Resolution

- Resolution of disputes without the need to resort to litigation
  - i. Mediation
  - ii. Arbitration
  - iii. conciliation

  } Main forms
  - Tribunals
  - Expert appraisals
  - Private ordering is when reach consent orders after litigation has commenced
  - Collaborative law – working with your lawyer and other side outside of court room
- Lawyers as part of professional conduct rules are required to advise clients of ADR see ASCR 7.2

Pro's/Strengths LLM 146

- Evidence Act 1995 (Cth) s 131 provides that unless expresses as open offers all settlement negotiation are without prejudice – that is they cannot be admissible as evidence, except on the issue of costs. – encourages openness and willingness to negotiate LLM 147[3]
- Reduced costs – no court costs LLM 146[6]
- Lightens burden of courts
- Less delay and LLM 146[6]
- Minimises risk of an unfavourable result through litigation LLM 146[6]
- More flexibility - Private agreement more flexible than a court-ordered outcome LLM 146[6]
- Maintain confidentiality avoid publicity for commercial matters LLM 146[6]
- Better relationships given process may not be so adversarial LLM 146[6]
- Effective for some things eg NSW Community Justice Centres report 79% success rate 2013/2014

Cons/Weaknesses

- Assumed relatively equal power, skill and knowledge balance. If not the case people may get steamrolled, LLM 148[2] – however has also been argued this may be no less pronounced in the courtroom '*ADR is flawed*..' ' Lancken cited in Susskinds August Law Society journal
- opt for peace over justice etc LLM 147[5]
- Tribunals could cause inadequate access to justice by disadvantaging unrepresented applicants presenting cases against advantaged applicants (aka applicant on Admin tribunals v the govt)
- Assumes people will act reasonable
- Creates opportunity for further abuse in DV situations
- Lack of court scrutiny of agreement reached - LLM 147[5]
- Emotional stress - LLM 147[5]
- Provides less precedents and less scope therefore for the courts to develop principles in all circumstances LLM 147[6]
- Sometimes ends up being lawyer determined anyway on the advice they give as to best possible outcomes – which may be incorrect.
- Marginalised people cannot participate effectively due to mental illness, DV and homelessness
- Needs very specialist legal and social education on the part of mediators which is just not there – see article by Anne Susskind in Law society journal August 2012

7.4 Injustices be caused by economic access issues

- The economics of lawyering have disturbing implications for access to justice (Hadfield, cited in B & C, 210)

1. People not pursuing their rights
   - 'If Australian's can't protect their legal rights, the law becomes meaningless' (Community Law Australia, Unaffordable & out of reach, 10)
   - '*Access to legal advice and the courts*…[is] *a key element of' access to justice'* LLM 134[1]
   - Prospect of losing a case and being ordered to pay costs is prohibitive to someone bringing a legal matter. (Baron & Corbin, 210)
   - 'A first class system and a first class legal profession are of no avail to a person who cannot afford them' (Mason, Fr CJ of the High Court)

8 Access to Justice – Discipline

8.1 Objectives of Disciplinary Proceedings: Protect not Punish

1. Protect members of the public from lawyer's misconduct –
   - ***Clyne v New South Wales Bar Association (1960) 104 CLR 186, 202***
2. Maintain public confidence in the legal systems
   - ***New South Wales Bar Association v Cummins (2001) 52 NSWLR 279***
3. Safeguard the reputation of the profession
   - '*legal education and training and experience are all subservient to the importance of maintaining a reputation as an honest and ethical lawyer*" LLM 221
4. Maintain proper standards
   - ***Legal Practitioners Complaints Committee v Fleming [2006] WASAT 352 at [78]***
5. Set an example to others … deterrent
   - ***Legal Services Commissioner v Mullins [2006] NSWADT 27 (27 February 2002)***
     - [35] '*The misconduct warrants a public reprimand and a substantial fine. The reprimand publicly signifies disapproval of his misconduct. It and the fine should also deter similar misbehaviour, by the respondent and others. The protection of the public does not require more severe sanctions*.'
   - ***New South Wales Court of Appeal in Law Society of New South Wales v Walsh [1997] NSWCA 185***
     - that disciplinary proceedings are concerned with the protection of the public. Beazley JA said that it is "undisputed that disciplinary proceedings are concerned with the protection of the public" and that the "*Court's duty to protect the public is not confined to the protection of the public against further misconduct by the particular practitioner who is the subject of the disciplinary proceedings. It extends to protecting the public from similar defaults by other practitioners. Thus, it is relevant to take into account the effect the order will have upon the understanding in the profession and amongst the public of the standard of behaviour required of solicitors*".
6. Protect lawyers from public – point to the rules
7. Filters out corruption in system given monopoly on legal services by lawyers
8. Commercial interests of lawyers kept in check to ethical interests and clients

8.1.1 Factors relevant to disciplinary actions: Determination and penalty

1. Frequency of conduct – rules UL s 297 UPC can become PM is consistent
2. Previous behaviour
3. Attitude and Appreciation and acceptance of wrongdoing
   - ***Legal Services Commission v O'Donnell [2015] NSWCATOD 17*** noted at [67] '*the absence of any indication of remorse, contrition or insight into the conduct*
4. Experience level and age
   - ***Legal Services Commission v Ge [2016] NSWACATOD 25 (18 February 2016)***
5. Medical conditions
6. Testimonials'
7. Sums of money involved (trust account issues)
   - ***Council of the Law Society of New South Wales v Nguyen [2016] NSWCATOD 141***
     - [49] "a case where an exceptional order was made, … Solicitor's Statutory Committee in 1980 in the matter of Colin Walter Peck. In that case the order was that the solicitor be reprimanded and suspended from practice for a period of two years. However, that case involved a very small sum of money."
8. Likelihood of re-offending
   - ***Legal Practitioners Complains Committee v Pepe 2009 WASC 39***
9. Circumstances surrounding
10. Motives
    - ***New South Wales Bar Association v Murph (2002) 55 NSWLR 23***
    - ***Legal Services Commissioner v Mullins [2006] NSWADT 27 (27 February 2002)***
      - [33] '*the references indicate that there is good reason for optimism that the respondent will not set about deceiving a colleague again. And his misconduct was not designed to derive a personal advantage: an anxiety to advance his client's interests accounts for his grave misjudgement*.'

8.2 Complaints

- Supreme Court has inherent jurisdiction over disciplinary matters and any complaints system outlined in the Uniform Law doesn't oust that power: s 264 Uniform Law
- UL S 261 defined lawyers broadly to include current and former Australian Legal practitioners, Australian registered foreign lawyers as well as current and former Australian lawyers – ie all those admitted whether practitioners or not

Complaints about legal practitioners in NSW are made to the Office of the Legal Services Commissioner.

- Legal services council is not a disciplinary body makes rules under the Uniform Law and monitors implementation. Says LLM but – not really true as some things they can find like UPC
- After investigation may take to NCAT
- 2500 complaints received by the office in that year: (OLSC website)
- OLSC says communications complaints - second only to negligence – and its about managing expectations about prospects of success and costs. OLSC 2013-2014 Annual report

12.2 Importance of Civility

- ASCR 4.1.2 'be honest and courteous in all dealings in the course of legal practice'.
- Most complaints regarding incivility to the NSW Office of the Legal Services Commissioner about un civil practitioners are not in fact the opposition counsel, but rather reports made by clients complaining about their own representative. (B & C, 189)
- '*The majority of complaints are dismissed because they do not constitute unsatisfactory professional conduct or professional misconduct*.' (B & C, 189)
- **Note that most examples where significant disciplinary proceedings are taken involve discourtesy to the other officers of the court**
- You are an officer of the court- represent the court and justice. The public perception of the legal profession is important.

❖ As Kirby ACJ held in Gerrard t/as Arthur Anderson & Co v Email Furniture Pty Ltd (1993) 32 NSLR 662, 667, solicitors who act rudely without observing the proper courtesies "*run the risk of destroying the confidence and mutual respect which generally distinguishes dealings between members of the legal profession*" and other dealings in the community.

12.2.1 Rationale for Courtesy

- **Pragmatically makes negotiations harder**
- This is consistent to the overriding duty to the court and to the client and reflects the lawyer as an officer of the court.
- This is a formality for the practitioners. If you are hostile to the others- not having a big fight. You could put a real dint to the negotiations and run this to the group. When you get hot-headed, you lose it. It is about acting in the client's best interest.
- You are an officer of the court- represent the court and justice. The public perception of the legal profession is important.
- '*The rude and difficult lawyer damages relationships with colleagues, causing unpleasantness within the profession and harming the image of the profession in the eyes of the public*' LLM 356
- Justice system must run as smoothly and efficiently as possible- you are an advocate for the court to help them reach a conclusion in those rules.

12.2.2 Issues with Courtesy

- But in the adversarial system- what will happen to justice? Can justice be achieved- important messages get lost. Delays and costs- draw it out.
- **But not always clear where to draw the line between incivility and freedom of expression and vigorous defence of a client – see** Lander **below**

12.2.3 Cases Law on Lawyers acting uncivility

❖ Lander v Council of the Law Society of ACT (2009) 231 FLR 399
- Supreme court found while the principle of courtesy is important it should not diminish the right of the solicitor to represent their client interest without fear.

❖ T0070 of 2004 The Victorian Bar Inc. v David Anthony Perkins (unreported 21 Dec 2004)
- barrister guilty of offensive, denigrating language:
- Charged with 'disgraceful and dishonourable conduct; conduct that was dishonourable or otherwise discreditable to a barrister; and conduct that was prejudicial to the administration of justice, and likely to diminish public confidence in the legal profession as a whole.'
- Professional misconduct. Reprimanded and suspended him for three months.

❖ NSW Bar Association v Jobson [2002] NSWAST 171
- solicitor alleged barrister verbally abused him and grabbed him outside court. Tribunal concerned it happened in public and what more in the court precinct.
- The tribunal held his conduct departed from the standards of responsibility expected toward another lawyer and therefore unsatisfactory professional conduct. They accepted it was a one off however under stress and issued a reprimand.
- unsatisfactory professional conduct and issued a reprimand

❖ Legal Services Commissioner v Winning [2008] LPT 13
- solicitor made derogatory comments about a Crown prosecutor in a 'private' conversation with the barrister he was instructing, but spoke sufficiently loud that court staff heard.
- Unsatisfactory professional conduct.

❖ Legal Professional Complaint Committee v in de Braekt [2013]WASC 124
- cumulative offensive incidents. 'Persistent discourtesy and offensiveness to a Magistrate; discourteous and abusive actions directed towards a security supervisor at court; discourteous and offensive emails to police officers.' (B & C, 191)
- held that importance of courtesy in the legal system in relationship with legal profession, court system and general public "*should not be understated*" [28]
- Although the individual incidents not enough to strike off, cumulatively they '*demonstrated a character and course of conduct on the part of the practitioner which was inconsistent with the privileges of practice as a member of the legal profession*' [29]
- Court found solicitor has 'a *complete lack of insight and understanding as to the impropriety of her conduct*' [41] and this confirmed she was not fit and proper person to remain in legal practice.
- Professional Misconduct and stuck off