

- the growing diversity of the legal profession (member's socio-economic background, and variety of forms and contexts in which law is practiced) → so harder to ascertain a shared understanding of standards of conduct – so generalised principles are likely ineffective
  - the more competitive and commercial nature of law
  - increasing law firm size and a parallel loss of senior partner mentoring and role-modelling
  - greater anonymity within the profession and a less personal relationship with clients
  - institutional incentives for bad behaviour, e.g., aggressive utilisation of procedural rules
  - judicial tolerance for bad behaviour by lawyers and failure of judges to act as role models
  - 'Professionalism' has never been an effective guide for lawyers' conduct → notions of professionalism reflect the views of a 'privileged and powerful elite' – and thus block diversity → studies show that Australian law firms:
    - Are intolerant of diversity and physical differences, different ideas, thinking & approaches
    - Have a strong focus on profits over people and a related abuse of power and position
    - The culture of law firms perpetuate images of the way law should be practised, and who should be a lawyer
    - Lack inclusivity, support or encouragement amongst employees
  - Principles-based approach may not be driven by notions of 'professionalism' → but instead, increased commercialism and competition
    - The Solicitors' Regulation Authority (SRA) argued that a principles-based approach is needed to allow 'businesses to do business' and 'restrictive rules' are unnecessary since lawyers were 'already bound by core professional standard and principles such as integrity, confidentiality and independence'
2. Professionalism is rapidly being replaced by consumerism
- Consumerism rejects an essentialist view of legal services, holding that clients are similar to other consumers of goods and services, and lawyers are similar to other producers
  - Thus, consumers more likely to challenge the profession
  - Consumerism has driven an alternative model of legal professional regulation to the professionalism model. The goal of such a model is 'to provide consumers with lower cost services of better quality, while regulating providers to address market failures, such as information asymmetry'
  - Consumer-competitive models don't assume lawyers will collectively enforce ethical behaviour → so firm rules are needed
3. Professionalism has not constrained poor conduct
- Evidence of highly toxic Australian legal workplace cultures, characterised by unacceptable levels of bullying, discrimination, and harassment
    - Recent studies showed that legal workplaces have statistically significant rates of such conduct higher than other workplaces – victims (mostly women) don't make formal complaints despite being legally trained
    - Concerns about legal workplace cultures and unethical conduct have been voiced and documented since at least the early 1990s
    - Clearly, lawyers' individual values, the norms of professionalism, and even the law itself, have not restrained unethical conduct by lawyers

## Rationalisation

*Hall & Holmes ±*

- Rationalisation is an acceptable process of bringing forth the most logical and compelling reason in support of our actions and beliefs
  - A more technical definition is that it is a justification of behaviour to make it appear rational or socially acceptable by (subconsciously) ignoring, concealing or glossing over its real motive
  - This shows that rationalisation is a self-serving process designed to preserve self-image, legitimate behaviour, and facilitate decision making → and involves finding (often subconsciously) the most rational, convincing reason for behaviour with the goal of making it look better than it actually is

- E.g., “I didn’t think it was wrong”, “Everyone else was doing it”, “No-one got hurt” and “This is just the way business is done”
- Rationalisation is also useful in the context of group behaviour. Mutual reinforcement between individual and group behaviour in organisational context can transform self-serving rationalisations into organisational facts
  - Once a rationalisation is successfully used to support an unethical behaviour, that behaviour becomes normalised and entrenched in organisational decision-making
  - Entrenched rationalisations facilitate mindless decision-making as ethical decision-making relies on previous organisational behaviour, rather than engaging with any ethical issues involved
- The nature of rationalisations:
  - Self-serving explanations
  - That assist in making behaviour appear more acceptable to both self and others
  - Involve a degree of self-deception
  - Often occur outside the realm of the conscious mind
  - Can reduce feelings of responsibility and/or anxiety for the negative aspects of behaviour
  - Can neutralise the impact of legal or ethical issues involved in a decision
  - Helps us maintain a sense of self and a positive ‘self-narrative’ by rationalising information and experiences that contradict our notion of ourselves as ‘good people’

### Rationalisation and Lawyers’ Professional Role

- Lawyers’ self-conception of themselves as advocates for clients, as neutral, non-judgemental facilitators of transactions, or as professionals trained to make ‘arguments’ on either side allows for a high degree of rationalisation of their conduct which is not in their client’s or the public interest
- Notions of professional roles are often reasons used to rationalise behaviour:
  - Lawyers’ role of advocacy means that it is permissible to do things for clients that are morally questionable, so long as they are not illegal
  - This conception of lawyering considers it moral for a lawyer to suppress their own moral/ethical opinions of their client’s motives, as this enables them to advocate for their client
- Lawyers will seek to use all ‘legal means’ to further enhance their client’s objectives → this routine work around the edge of legality and illegality can dull a lawyer’s sensitivity to the line between moral and immoral behaviour

### CASE STUDY: Australian Wheat Board (AWB)

- In 2005, AWB was alleged to have made US\$300 million in illicit payments to the Iraq regime – which would be in breach of UN sanctions against Iraq due to its invasion of Kuwait (which prevented UN members making funds available to Iraq)
- AWB officers denied their behaviour despite clear evidence of their involvement
- The AWB’s action was for the purpose of doing business in Iraq – to benefit Australian wheat growers
- Iraq had halved the amount of wheat it would buy from Australia, since Australia supported USA’s stance on Iraq
- AWB’s in-house lawyers were aware of the kickback payments, yet had not advised against it
- The lawyers’ professional and commercial rationalisations:
  - Lawyers may have advised AWB how to get around the UN sanctions – by rationalising behaviour that it was necessary for commercial imperatives (i.e., the news had portrayed Australia selling wheat to Iraq as a ‘big success story’ for AWB, Australian wheat-growers, and the nation)
  - Professional rationalisations were also at play – that the lawyers were simply doing what the client asked despite knowing the immorality of it – they suppressed their moral and legal responsibility for the transactions by ‘leaving it to the business managers to decide whether to proceed’
  - The client’s actions were not technically illegal under Australian ‘hard’ law – it was only illegal under international law (which was not ratified in Australia)
  - This ambiguity around what is acceptable behaviour in commercial contexts limits lawyers’ ability to challenge the ethicality of commercial transactions

- In law, one in three female respondents and one in 14 male respondents had been sexually harassed in a workplace context.
- Statement by Kiefel CJ:
  - “The findings are of extreme concern to me, my fellow Justices, our Chief Executive and the staff of the Court. **We're ashamed** that this could have happened at the High Court of Australia. We have made a sincere apology to the six women whose complaints were borne out. **We know it would have been difficult to come forward.** Their accounts of their experiences at the time **have been believed.**”

*Laura Tingle and James Elton ±*

### Justice Dyson Heydon

- In 2019, the High Court (Chief Justice Susan Kiefel) commissioned an inquiry into multiple allegations of sexual harassment of female staff at the High Court against former justice Dyson Heydon
- Attorney-General Christian Porter also ordered an internal investigation into whether Heydon had faced any complaints of workplace behaviour during his time as a royal commissioner
- The Attorney-General's Department said the investigation's report was handed to Mr Porter's office last week
  - The Department revealed that there were two former female staff who made ‘relevant disclosures’ – but did not want the Department to proceed
  - The Department has finalised its internal investigation – but said that it would consider re-opening the investigation if future contact with former employees raises further issues
- There are calls for an independent inquiry into the allegations faced by the retired judge

### Christian Porter

- The Attorney-General; Christian Porter faces allegations that he raped a 16-year-old girl 30 years ago – in an anonymous letter
- Porter denied the accusations – NSW Police closed their investigations due to lack of admissible evidence, with the alleged victim not wanting to proceed with her complaint
- There are calls for an independent inquiry into Porter’s allegations, similar to the one ordered by Kiefel CJ into Heydon’s allegations
  - It will allow Porter the opportunity to clear his name – allowing him to prove his fitness to remain as Attorney-General and retain public confidence and the confidence of the Prime Minister whom appointed him
  - Porter will be responsible for many sensitive issues (like the one with Heydon) and issues under the *Sex Discrimination Act* → and it will be difficult for the public to trust him in this role with unresolved allegations over his head
  - It will allow the victim’s story to be heard
  - Critics agree that anyone facing allegations has the presumption of innocence, but say the public must be confident that the allegations have been fully investigated.
- Porter objected against inquiries into his allegation – and thus has received much criticism since he had ordered Heydon’s inquiry
  - Porter differentiated the circumstances of the Dyson Heydon investigation by the High Court from any proposed investigation into the allegation he was facing, arguing that the Heydon case had been "about workplace relations accusations, which were contemporaneous, required by health and safety laws."

## 3(A) Legal Needs, Access to Justice and Delivery of Legal Services in Australia

### Access to Justice

#### What is access to justice?

- The ‘critical test’ for our justice system is whether it is “fair, simple, affordable and accessible.” (per Attorney General Robert McClelland) - *Community Law Australia ±*
- Access to justice is about the rule of law, and equality before the law

- Law Commission of Australia (2013) – stated in its submission to the Productivity Commission – that “equality before the law is meaningless if there are barriers that prevent people from enforcing their rights”
- Access to justice and equality should extend beyond formal legal dispute resolution mechanisms to ADR schemes – e.g., low cost, non-bias etc.

*Toohey et al. (2009) ±*

- Access to justice a foundational pillar of our society
- It is a promise that all who need the assistance of the law should be able to access our courts and other institutions of justice.
  - ‘The existence of justice institutions is a public good, crucial for a well-ordered society and for a functioning economic system.’ (Genn, 2012)
- Cappelletti and Garth set out two requirements for access to justice –
  - i. The system must be accessible, with access not contingent on financial means or expertise.
  - ii. Any system delivering access to justice must ensure that results 'are individually and socially just'
- The concept of access to justice has changed substantially over time, with the mechanisms by which we can 'make rights effective' developing along with successive reforms to the civil justice system.
- The Australian civil justice system has struggled to provide accessibility, with cost and complexity being the two primary obstacles to achieving access to justice in the civil sphere.
- There is great potential for technology to help make rights effective for the millions of individuals with civil justice problems.
- **Toohey et al. (2009)** → noted that access to justice includes results that are individually + socially just
  - Law survey – “**access to justice**” for the purposes of their study included non-legal pathways to resolving legal problems. Aside from formal dispute resolution and obtaining assistance or representation from legal professionals, these mechanisms included the use of websites or self-help guides, communicating with the other party in the dispute or problem, and obtaining informal advice from relatives or friends (Coumerelos et al., 2012, p.46-47)

### Access to justice principles

- Accessibility
- Appropriateness
- Equity
- Efficiency
- Equity
- Efficiency
- Effectiveness

### Improving access to justice

- Improving access to legal info and advice
- Promoting early intervention and preventative legal services
  - E.g., in ATSI communities – there is involvement of Indigenous elders – circle sentencing – where Indigenous knowledge is incorporated into the legal justice system to enhance engagement by the ATSI offender
- Promoting ADR schemes
- Simplifying court procedures
- Improving pro bono schemes
- Significant increase to funding of legal services: LACs, ALSs, CLCs
- Educating judges, lawyers and legal actors
  - Page 146 (**Ransley & Marchetti, 2001**) → they refer to commentary from the judge’s assessment of testimony of indigenous witnesses – the judge saw the officers as intelligent and smart, but that the evidence of the ATSI claimants was ‘unreliable’ due to intense distress of the claimants when restating the traumatic experiences they had – clear discrimination by the judge

### How does the legal service industry facilitate access to justice?

*Community Law Australia ±*

- Extensive internal dissemination of legal advice may result in a waiver of privilege (e.g., emails to unintended persons may create a waiver of confidentiality and privilege)
- Confidential legal advice should not be referred to in correspondence with third parties, including experts
- Keep confidential documents in separate filing systems and counsel have separate office

## 10(B) Competence, Liability and Immunity

### Duty to Clients – Tort, Contract, Professional and Fiduciary (equitable) obligations

#### Duty in Tort:

- Action in Tort for negligence (or breach of scope of works in retainer agreement) – what is the lawyer's standard of care? [see **SR 4.1.3** – duty of competence, diligence and promptness]
  - Junior solicitors has similar standard of care as all other lawyers who have been admitted to court
  - Junior solicitors' (admitted under 2 years) practicing certificates are restricted – provides that the solicitor must be supervised by a partner (and cannot practice as a principal)
  - In-house counsel = in house practicing certificates
  - Principal = partner → 'partner' is used for a firm that is structured as a partnership – 'principal' is used for a firm that is structured as a company
- Tort = can claim damages
- Liability in Tort
  - A legal practitioner in NSW owes a client a duty of care in tort
    - Hence, any legal practitioner who falls below the standard of competence expected of her or him is liable under the relevant tort laws in NSW
  - **First inquiry:** scope of a legal practitioner's duty of care?
  - **Second inquiry:** Has the legal practitioner's conduct satisfied the required standard of care?
    - Is the duty qualified by advocates' immunity for negligence "relating to work sufficiently connected with 'in court' work in conducting litigation"

#### Professional duties [fiduciary duties in equity + disciplinary action]

- Recall the general duties under **SR 4**; **BR 4** and **5**
  - Demonstrate **care, skill, diligence, competence, honesty, honour, integrity, probity and trustworthiness**
  - **Competence:** the solicitor should decline work that they are not able to do – solicitor should talk to their law firm partners
  - Duty to the client in **BR**: 35-38 and **SR**: Part 2 (7-16) → barrister should not take on work not in their expertise area (an exception to the cab-rank rule)
  - E.g., if it is a litigation law firm for construction, what if a client comes with a commercial matter for litigation – can the firm accept the client → yes, but must communicate (via written documents) to the client that the lawyer is not the best qualified person to take on the matter, and should advise the client that they will get a barrister who has expertise in that area of law
    - Lawyer should advise the client that they are not fully qualified in the matter (must indicate that their expertise is in another area), but that the lawyer must recommend that they will take steps to ensure that the client gets competent services (e.g., to get an expert barrister) → and get the client to agree to that
  - E.g., if a case involves tax case, but a small part of the claim requires an IP issue
    - Can get a barrister, or another solicitor to cover the IP issue
- **SR 3 – paramount duty to court and the administration of justice**
- **SR 4 – other ethical duties**
  - 4.1.3 – deliver legal services competently, diligently and as promptly as reasonably possible
- [see also **BR 4** and **5**]

#### Duty in contract (retainer):

- From the retainer agreement

- A barrister must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the barrister believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation.
- **BR 37**
  - A barrister must seek to assist the client to understand the issues in the case and the client's possible rights and obligations, sufficiently to permit the client to give proper instructions, including instructions in connection with any compromise of the case.
- **BR 38**
  - A barrister must (unless circumstances warrant otherwise in the barrister's considered opinion) advise a client who is charged with a criminal offence about any law, procedure or practice which in substance holds out the prospect of some advantage (including diminution of penalty), if the client pleads guilty or authorises other steps towards reducing the issues, time, cost or distress involved in the proceedings.

**Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015** ('Solicitors Conduct Rules'): **Part 2** (rules 4.1.4, 7-8) ±

- **SR 4 – Other fundamental ethical duties [of solicitors]**
  - 4.1 A solicitor must also—
    - 4.1.1 act in the best interests of a client in any matter in which the solicitor represents the client,
    - 4.1.2 be honest and courteous in all dealings in the course of legal practice,
    - 4.1.3 deliver legal services competently, diligently and as promptly as reasonably possible,
    - **4.1.4 avoid any compromise to their integrity and professional independence**, and
    - 4.1.5 comply with these Rules and the law

**Relations with clients**

- **SR 7 – Communication of advice**
  - 7.1 A solicitor must provide clear and timely advice to assist a client to understand relevant legal issues and to make informed choices about action to be taken during the course of a matter, consistent with the terms of the engagement.
  - 7.2 A solicitor must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the solicitor believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the matter.
- **SR 8 – Client instructions**
  - 8.1 A solicitor must follow a client's lawful, proper and competent instructions.

**Cases**

**Roberts v Cashman [2000] NSWSC 770 ± Lawyers' breach of duty + negligence – failure to interview client and determine the available causes of action**

<b>Facts</b>	<ul style="list-style-type: none"> <li>• Plaintiff (Roberts) brought proceedings against defendant (Cashman); a firm of solicitors</li> <li>• Plaintiff's claim is that the defendant breached a duty of care owed to her and was negligent arising out of the relationship of solicitor and client. She seeks damages.</li> </ul> <p><b><u>Principal proceedings</u></b></p> <ul style="list-style-type: none"> <li>• 1987 – plaintiff injured herself after banana chair she purchased from hardware store collapsed chair – defective ratchet mechanism</li> <li>• 1990 – received two Depo Medrol injections – condition worsened</li> <li>• 1992 – saw episodes of 'the Investigators' on ABC re Depo Medrol contacted defendant's firm (specialised in class actions in field of product liability)</li> <li>• Plaintiff wasn't interviewed face-to-face, but completed questionnaire, including questions:</li> </ul>
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