

**THE LEGAL PROFESSION
LAWS2012
TOPIC NOTES & SCAFFOLDS**

WEEK 1(a) – Intro to The Legal Profession; Approaches to Legal Ethics & Professional Responsibility

TEXTBOOK

Introduction: Overview

Ethical Decision-Making in Law

- Ethical decision-making is influenced by individual lawyers' approaches (e.g. adversarial advocacy vs responsible lawyering)
- Ethics in law involves more than just professional conduct rules; it includes moral philosophy (general morality)
- Lawyers must not only determine the right ethical course but also have the capacity to act on it.

Four Approaches to Lawyers' Ethics

- **Adversarial advocate**
 - o Lawyer as a **client's agent**, focused on winning the case within the legal bounds
 - o Common in adversarial legal systems
 - o Criticism: Can promote excessive partisanship and non-accountability
- **Responsible lawyering**
 - o Lawyers act as **officers of the court** as well as client advocates
 - o Balances client interests with broader legal and ethical duties
 - o Some professional conduct rules attempt to enforce this balance.
- **Moral activism**
 - o Lawyers have a duty to **advance social justice**
 - o Ethical obligation extends beyond legal rules to broader social ethics
 - o Justice should be the final arbiter of lawyers' ethical decisions
- **Ethics of care**
 - o Focuses on **relational ethics, compassion, and harm minimisation**
 - o Includes a duty to care for the community and environment
 - o Challenges adversarialism and questions the effectiveness of the adversarial system

Adversarialism vs Ethical Alternatives

- Responsible lawyering seeks to moderate adversarial excesses while staying within the system
- Moral activism and ethics of care offer external critiques, advocating for virtue-based ethics over strict client partisanship
- Raises questions about whether adversarialism is the best method of resolving disputes and delivering justice

The Role of Professional Conduct Rules

- **Australian Solicitors' Conduct Rules** govern lawyers' ethical behaviour
- The book critiques whether these rules effectively enforce ethical standards
- Some common law principles may align more closely with ethical values than the formal conduct rules
- While rules are important, compliance alone is insufficient for ethical decision-making
- Ethical practice requires an active commitment to moral principles

The Role of Lawyers

- Lawyers serve as **advocates, advisors, and officers of the court**.
- Their role can conflict with moral, social, and political values, leading to ethical dilemmas

Case Study: The Philanthropic QC & Tobacco Company

- In 2012, a high-profile QC with a strong record of philanthropy was appointed to the Board of a cancer hospital's fundraising arm
- Criticism arose because he had previously represented **British American Tobacco** in:
 - o HC challenge against Australia's plain packaging laws (which aimed to reduce smoking rates)

- A case against lung cancer victim Rolah McCabe, where the company was accused of destroying evidence
- **Ethical issue:** Can a lawyer support public health initiatives while defending the interests of a tobacco company?
 - **Arguments in defence:**
 - Lawyers represent clients based on legal principles, not personal beliefs
 - The HC challenge was about intellectual property and constitutional rights, not smoking itself
 - The ‘cab rank’ rule obliges barristers to represent clients who seek their services
 - **Criticism:**
 - Acting for a tobacco company contradicts a commitment to public health and philanthropy
 - Lawyers have a choice in cases they take; moral responsibility cannot be ignored

Broader ethical questions raised:

- Can lawyers separate their professional role from personal morality?
- Should lawyers take cases that contradict their moral or social beliefs?
- Do lawyers have a duty to consider the broader impact of their advocacy on society?
- Should lawyers be judged for the clients they represent?
- Can legal representation be morally neutral, or does it inherently support a cause?

These questions relate to the foundational ethical dilemma in legal practice:

→ Is it possible to be both a good lawyer and a good person

Ethics & Professional Conduct

Legal ethics v personal morality

- Lawyers must adhere to professional conduct rules, but ethical decisions often go beyond the rules
- Ethics require critical reasoning, not just rule compliance
- Professional rules guide conduct, but lawyers must also engage with broader moral principles

Sources of ethical expectations for lawyers

- **Personal ethics**
 - Derived from upbringing, social circles, religious and political beliefs
- **Professional conduct rules**
 - Codified regulations, such as the **Legal Profession Uniform Law** and the **Australian Solicitors' Conduct Rules (ASCR)**
- **General morality**
 - Broader ethical principles beyond formal regulations

The Legal Profession Uniform Law & ASCR

- Provides certainty, predictability and enforceability in ethical conduct
- However, compliance alone doesn't ensure ethical decision-making
- Lawyers may face gaps or conflicts in rules, requiring them to apply ethical reasoning beyond strict legalism

General Morality & Ethical Theories in Law

- **General morality** refers to broad philosophical and ethical theories that shape our understanding of what is good, right, or a duty
- These theories are relevant to legal ethics, particularly in considering justice, social environmental responsibility, minimising harm, and respecting others.

Key ethical theories:

1. **Deontological Ethics (duty-based ethics – Kantian approach)**
 - Ethical actions are based on absolute moral duties and principles
 - Kant's categorical imperative
 - “Act only according to that maxim whereby you can, at the same time, will that it should become a universal law.”

- **Scenario:** AGL, accused by Greenpeace of misleading environmental claims, seeks legal action to stop Greenpeace's campaign
- **Ethical considerations:**
 - o **Adversarial advocacy:** Protect AGL's interests and pursue litigation aggressively
 - o **Responsible lawyering:** Assess AGL's legal position while considering public perception and corporate social responsibility
 - o **Moral activism:** Encourage AGL to address legitimate environmental concerns rather than suppress criticism
 - o **Ethics of care:** Balance AGL's interests with the broader impact on stakeholders and environmental ethics

CONDUCT RULES

Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW) – s 8 General

A barrister must not engage in conduct which is:

- a. Dishonest or otherwise discreditable to a barrister,
- b. Prejudicial to the administration of justice, or
- c. Likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute

Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (NSW) – Part 1 s 3 Objective

- 3.1 The objective of these Rules is to assist solicitors to act ethically and in accordance with the principles of professional conduct established by the common law and these Rules

Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (NSW) – Part 2 s 3 Paramount duty to the court and the administration of justice

- 3.1 A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.

THE LAW SOCIETY OF NSW, STATEMENT OF ETHICS (OCTOBER 2020)

The true profession of law is based on an ideal and honourable service – Riley, NSW Solicitors Manual

We acknowledge the role of our profession in serving our community in the administration of justice. We recognise that the law should protect the rights and freedoms of members of society. We understand that we are responsible to our community to observe high standards of conduct and behaviour when we perform our duties to the courts, our clients and our fellow practitioners.

Our conduct and behaviour should reflect the character we aspire to have as a profession.

This means that as individuals engaged in the profession and as a profession:

- Our **paramount duty is to the administration of justice**. (aligns with responsible lawyering)
- We **act competently and diligently** in the service of our clients. (supports all ethical approaches)
- We **advance our clients' interests above our own**. (aligns with adversarial advocacy)
- We act **confidentially and in the protection of all client information**. (fundamental to legal practice)
- We **act together for the mutual benefit of our profession**.
- We **avoid any conflicts of interest and duties**. (connects to professional integrity)
- We observe strictly our **duty to the court** of which we are officers to ensure the **proper and efficient administration of justice** (reinforces legal responsibility)
- We seek to maintain the **highest standards of integrity, honesty and fairness** in all our dealings. (supports virtue ethics in lawyering)
- We **charge fairly** for our work. (aligns with ethical billing practices)

Proclaimed by the Law Society's Council, October 2020.

SUPREME COURT PRACTICE NOTE SC GEN 23 – USE OF GENERATIVE AI (28 JAN 2025)

Overview

- **Issued:** 28 January 2025
- **Effective:** 3 February 2025
- **Applies to:** All proceedings from that date
- **Purpose:** Establishes **rules for the use of Generative AI (Gen AI)** in legal practice within the Supreme Court of NSW

Definition & Scope of Gen AI

- **Gen AI:** Artificial intelligence capable of **creating new content** (e.g. text, images, sounds) from patterns in training data
- **Examples of Gen AI programs:**
 - o **General AI:** ChatGPT, Claude, Grok, Llama, Bard, Co-Pilot
 - o **Legal specific AI:** Lexis Advance AI, Westlaw Precision, Luminance, AI Lawyer, CoCounsel Core
- **Exclusions:**
 - o Basic spell-check, transcription, formatting, or translation tools
 - o Search engines (Google, Bing etc.) that only return links, not generated text
 - o Legal research databases that use AI to search case law, legislation, and legal commentary

Risks & Limitations of Gen AI in Legal Practice

Legal practitioners and unrepresented parties must be aware of AI-generated risks, including

1. **Hallucinations** – AI can generate false but plausible legal references
2. **Data quality issues** – AI training data may be outdated, biased, or legally irrelevant
3. **Confidentiality risks** – AI chatbots may store or reuse entered data
4. **Lack of privacy protections** – No guarantee of privilege or confidentiality in public AI models
5. **Copyright infringement risks** – AI-generated outputs may use unlawfully obtained material

Prohibited Uses of Gen AI

Gen AI must **NOT** be used for:

1. **Entering confidential or restricted court materials**
 - o Includes:
 - Suppression orders
 - Subpoenaed documents
 - Material protected by legal privilege
 - o **Exception:** If the platform has confidentiality safeguards and data cannot be publicly accessed
2. **Creating or modifying evidence**
 - o AI cannot generate affidavits, witness statements, or character references (but doesn't prohibit use for preparatory work)
 - o AI cannot alter or rephrase witness testimony
 - o Witnesses must confirm that AI was not used to generate evidence
3. **Expert reports**
 - o Experts cannot use AI to generate their reports without prior court approval
 - o If approved, the expert must:
 - Disclose AI usage in the report
 - Keep records of AI interactions (prompts, variables, outputs)
 - Comply with professional ethics rules on AI

Permitted Uses of Gen AI

Legal practitioners may use Gen AI for:

- Chronologies, indexes and witness lists
- Drafting briefs and Crown Case Statements
- Summarising documents and transcripts
- Drafting written submissions and legal arguments (subject to verification requirements)

Conditions:

- Court clarified that under **s 297(1)(b)**, it is not necessary to establish that a lawyer is in fact unfit to practise, but rather that their conduct would justify such a finding (at [163]).
- However, a finding of unfitness involves more than just an objective assessment of the conduct – it requires consideration of character and surrounding circumstances (at [169]).
- Tribunal erred in applying a higher threshold than required under **s 297(1)(b)** (at [165]), but the Court ultimately agreed with its conclusion that the conduct, while serious, did not justify a finding that EFA was unfit to practise law (at [173]).

3. Penalty

- Court found the words ‘suck my dick’ elevated the seriousness of the conduct and warranted ‘severe condemnation’ (at [181]).
- However, it considered that imposing a fine was unnecessary due to the resp’s substantial financial penalty from increased professional indemnity insurance premiums (at [184]).
- Tribunal’s decision to impose only a reprimand was upheld, as conduct was an isolated instance of poor judgement rather than part of pattern of misconduct (at [195]-[196])

NSW LAW SOCIETY, ‘CHARTER FOR THE ADVANCEMENT OF WOMEN IN THE LEGAL PROFESSION’ (GUIDELINES) (DECEMBER 2020)

These guidelines provide recommended practices for law firms to implement the *Charter for the Advancement of Women in the Legal Profession*, aiming to foster gender equality, inclusion, and career progression for women in the solicitor profession

1. Gender equality in employment and work allocation

- Develop and implement policies ensuring fair employment opportunities
- Address barriers preventing gender equality
- Counteract unconscious bias in work allocation and promotion
- Ensure equitable access to high-fee practice areas, major projects, and client development opportunities
- Monitor work distribution to support professional skill development
- Regularly review remuneration data to ensure gender pay equity

2. Leadership and promotion of women

- Create pathways for recognition and leadership roles for women
- Examine leadership selection criteria for gender fairness
- Aim for gender balance in senior leadership and set targets where applicable
- Support equitable briefing practices for female barristers
- Adopt the *National Model Gender Equitable Briefing Policy*

3. Gender pay equity and promotion strategies

- Ensure equal pay for equivalent performance across genders
- Conduct fair and impartial salary reviews, including for part-time and flexible workers
- Train promotion decision-makers on diversity and inclusion policies
- Avoid indirect discrimination in promotion criteria (e.g. linking promotions solely to financial performance)

4. Mentoring and sponsorship

- Establish and support internal and external mentoring, coaching, and sponsorship programs
- Regularly evaluate the effectiveness of mentoring initiatives

5. Flexible work practices

- Develop and implement policies on flexible working arrangements
- Consider individual requests for part-time work, remote work, and job-sharing
- Support employees with family responsibilities, including career breaks
- Provide facilities for parents returning to work (e.g. lactation rooms, flexible hours)
- Encourage leadership to role-model flexible work arrangements

6. Addressing sexual harassment and bullying

- Implement zero-tolerance policies for sexual harassment and bullying
- Regularly review policies to ensure effectiveness
- Conduct exit interviews to identify workplace culture issues

7. Transparent complaint and investigation procedures

- Maintaining social support
 - Lawyers with strong personal and professional support networks report lower indirect trauma symptoms (Carlson et al. 2016)

Conclusion

- Trauma exposure is a serious risk in legal practice, particularly in high-stress fields (criminal, family, refugee)
- Stigma remain a significant barrier to addressing trauma, leading to denial and untreated distress
- Trauma-informed policies and supervision are essential to:
 - Protect lawyers' mental health
 - Improve workplace effectiveness
 - Foster a culture of support and resilience
- Self-care and resilience building strategies should be viewed as professional competencies, not weaknesses
- The legal profession must shift towards trauma-informed practice, integrating research-backed strategies into legal education, firm management, and workplace policies

LEGAL PROFESSION UNIFORM LAW 2014 (NSW)

Section	Key Point	Summary
s 172	Fair & Reasonable Costs	Costs must be fair, reasonable, proportionate, and reflect skill, complexity, and responsibility.
s 173	Avoidance of Increased Costs	Law practices must not act in a way that unnecessarily increases client costs.
s 174	Disclosure Obligations	Law practices must disclose the basis for costs, updates on significant changes, and client rights.
s 179	Client's Right to Costs Agreement	Clients have the right to a negotiated costs agreement.
s 180	Making Costs Agreements	Costs agreements must be in writing and cannot exclude costs assessments.
s 181	Conditional Costs Agreements	Allowed if in writing, signed, and includes clear success criteria. Not allowed in criminal or family law.
s 182	Uplift Fees	Uplift fees (success fees) are capped at 25% of legal costs in litigation matters.
s 183	Contingency Fees Prohibited	Legal costs cannot be based on settlement/award value (except where fixed by law).
s 187	Request for Itemised Bills	Clients can request an itemised bill within 30 days, and law practices must provide it within 21 days.
s 188	Responsible Principal for Bills	A principal must be designated as responsible for each bill.
s 189	Giving Bills	Bills must be provided to clients in accordance with the Uniform Rules.
s 190	Progress Reports	Clients can request (free) reports on legal costs incurred.
s 207	Unreasonable Legal Costs	Charging unreasonable costs may constitute professional misconduct or unsatisfactory

172 Legal costs must be fair and reasonable

1. A law practice must, in charging legal costs, charge costs that are no more than fair and reasonable in all the circumstances and that in particular are—
 - a. proportionately and reasonably incurred; and
 - b. proportionate and reasonable in amount.
2. In considering whether legal costs satisfy subsection (1), regard must be had to whether the legal costs reasonably reflect—
 - a. the level of skill, experience, specialisation and seniority of the lawyers concerned; and
 - b. the level of complexity, novelty or difficulty of the issues involved, and the extent to which the matter involved a matter of public interest; and
 - c. the labour and responsibility involved; and
 - d. the circumstances in acting on the matter, including (for example) any or all of the following—
 - i. the urgency of the matter;

- ii. the time spent on the matter;
- iii. the time when business was transacted in the matter;
- iv. the place where business was transacted in the matter;
- v. the number and importance of any documents involved; and
- e. the quality of the work done; and
- f. the retainer and the instructions (express or implied) given in the matter.

3. In considering whether legal costs are fair and reasonable, regard must also be had to whether the legal costs conform to any applicable requirements of this Part, the Uniform Rules and any fixed costs legislative provisions.
4. A costs agreement is *prima facie* evidence that legal costs disclosed in the agreement are fair and reasonable if—
 - a. the provisions of Division 3 relating to costs disclosure have been complied with; and
 - b. the costs agreement does not contravene, and was not entered into in contravention of, any provision of Division 4.

173 Avoidance of increased legal costs

A law practice must not act in a way that unnecessarily results in increased legal costs payable by a client, and in particular must act reasonably to avoid unnecessary delay resulting in increased legal costs.

174 Disclosure obligations of law practice regarding clients

174 Disclosure obligations of law practice regarding clients

1. **Main disclosure requirement** A law practice—
 - a. must, when or as soon as practicable after instructions are initially given in a matter, provide the client with information disclosing the basis on which legal costs will be calculated in the matter and an estimate of the total legal costs; and
 - b. must, when or as soon as practicable after there is any significant change to anything previously disclosed under this subsection, provide the client with information disclosing the change, including information about any significant change to the legal costs that will be payable by the client—
 - together with the information referred to in subsection (2).
2. **Additional information to be provided** Information provided under—
 - a. subsection (1)(a) must include information about the client's rights—
 - i. to negotiate a costs agreement with the law practice; and
 - ii. to negotiate the billing method (for example, by reference to timing or task); and
 - iii. to receive a bill from the law practice and to request an itemised bill after receiving a bill that is not itemised or is only partially itemised; and
 - iv. to seek the assistance of the designated local regulatory authority in the event of a dispute about legal costs; or
 - b. subsection (1)(b) must include a sufficient and reasonable amount of information about the impact of the change on the legal costs that will be payable to allow the client to make informed decisions about the future conduct of the matter.
3. **Client's consent and understanding** If a disclosure is made under subsection (1), the law practice must take all reasonable steps to satisfy itself that the client has understood and given consent to the proposed course of action for the conduct of the matter and the proposed costs.
4. **Exception for legal costs below lower threshold** A disclosure is not required to be made under subsection (1) if the total legal costs in the matter (excluding GST and disbursements) are not likely to exceed the amount specified in the Uniform Rules for the purposes of this subsection (***the lower threshold***), but the law practice may nevertheless choose to provide the client with the uniform standard disclosure form referred to in subsection (5).
5. **Alternative disclosure for legal costs below higher threshold** If the total legal costs in a matter (excluding GST and disbursements) are not likely to exceed the amount specified in the Uniform Rules for the purposes of this subsection (***the higher threshold***), the law practice may, instead of making a disclosure under subsection (1), make a disclosure under this subsection by providing the client with the uniform standard disclosure form prescribed by the Uniform Rules for the purposes of this subsection.

WEEK 3(a) – Legal Education – Pre and Post Admission to the Prof. 1

TEXTBOOK CH 3 pp 78-85

Continuing Self-Regulation – Admission and Certification

Admission & Certification: Historical Context and Current Regulation

- **Self-regulation** historically set strict admission standards to ensure only well-qualified, trustworthy individuals entered the legal profession
- **Admission remains rooted in this idea**, requiring
 - o **Academic qualifications** (law degree)
 - o **Practical legal training**
 - o **Good fame and character** (now framed as being a *fit and proper person*)
- Supreme courts control admission and retain inherent jurisdiction to *strike off* practitioners who fail to meet professional standards
- National consensus exists on admission requirements, though processes vary slightly across jurisdiction

Certification

- After admission, certification is required to practise law:
 - o For **solicitors**, certification is mostly a formality
 - o For **barristers**, additional requirements exist, such as a bar exam and further advocacy training
- Law societies control the licensing process in most jurisdictions, except in Victoria, where it is delegated back to the profession by the Legal Services Board

Power of Certification & Regulatory Control

- Linda Haller argues that certification powers may be important than disciplinary control, as:
 - o Administrative withdrawal of practising rights is immediate and cost-effective for regulators
 - o Contested disciplinary proceedings are lengthy and expensive
- Law societies have significant discretion to remove a lawyer's practising certificate, ensuring public confidence and protecting clients

Admission requirements: 'Fit and proper' standard

- To be admitted, **an applicant must be**:
 - o **Legally knowledgeable** (law degree)
 - o **Practically trained** (PLT or supervised practice)
 - o **Proficient in English**
 - o **A 'fit and proper' person** (most contentious requirement)
- 'Fit and proper' is undefined in legislation, leaving broad discretion to courts and admission bodies
- **Key considerations**:
 - o Honesty and respect for the law are paramount
 - o Criminal history, academic dishonesty, and professional misconduct can raise concerns
 - o Mental health conditions are assessed under *capacity to practise*, not as a character flaw

Legal Profession Uniform Admission Rules 2015 – Fitness Considerations

- Rule **10(1)** lists key factors for assessing fitness:
 - o Statutory declarations of character
 - o Disclosure statements
 - o Police reports and student conduct reports
 - o Certifications of good standing
 - o Bankruptcy or corporate insolvency involvement
 - o Prior criminal convictions (nature, recency, and age of offender)
 - o Previous professional disciplinary actions
 - o Mental health conditions impacting legal practice
- In practice, applicants must self-disclose issues. The onus is on the applicant to prove fitness
- Failure to disclose relevant matter is the most common reason for admission refusal, as it reflects poor ethical awareness

- The Court found that these concerns were valid, as insight and remorse are crucial indicators of whether past misconduct is likely to be repeated.

5. Attempted Internet Publication

- The Board investigated an anonymous internet article sympathetic to the appellant, which contained misrepresentations about his past legal proceedings and vilified Ms. Sagers.
- The Board concluded that it was highly probable that the appellant had been the original source of much of the article's content.
- The Court agreed that this finding was open to the Board but noted that the Board ultimately excluded this issue from its final decision, meaning it did not influence the overall outcome.

6. Allegations of Bias by Board Members

- The appellant alleged apprehended bias on the part of three Board members who were associated with the Women Lawyers Association of WA, which had circulated a letter informing members of his application.
- The Court rejected this claim, stating that mere membership in an organisation is insufficient to establish bias unless active involvement in prejudging the issue was proven.
- Additionally, an offhand remark by a Board member ("not long enough") about his punishment for stalking did not constitute bias, as it was made during closing submissions after all evidence had been heard.

LEGAL PROFESSION UNIFORM LAW 2014 (NSW)

Section	Title	Summary
15	Objective	Ensures only individuals with appropriate qualifications and fitness are admitted to the legal profession.
16	Admission	The Supreme Court may admit individuals 18+ if they meet regulatory requirements, are not already admitted, and take an oath.
17	Prerequisites for compliance certificates	Compliance certificate prerequisites include academic qualifications, practical training, and being fit and proper.
18	Exemption from certain prerequisites	Exemptions from academic or practical training can be granted for sufficient legal skills or experience, whether in Australia or overseas.
19	Compliance certificates	Compliance certificates are issued by the regulatory authority after application, review of objections, and ensuring all criteria are met.
20	Conditional admission of foreign lawyers	Foreign lawyers may be admitted with conditions such as time limits, additional training, supervised practice, or restricted practice areas.
21	Declaration of early assessment of suitability	Applicants may seek a declaration that disclosed matters will not affect their fitness assessment unless disclosure was incomplete or misleading.
22	Supreme Court roll	The Supreme Court maintains a roll of Australian lawyers, and admission is effective once the individual signs the roll.
23	Removal from Supreme Court roll	The Supreme Court may remove names from the roll upon its own motion or recommendations from regulatory authorities or tribunals.
24	Notice to be given of interjurisdictional action	Lawyers must notify the regulatory authority if their name is removed from another jurisdiction's roll or if removal is recommended.
25	Australian lawyer is officer of Supreme Court	An Australian lawyer remains an officer of the Supreme Court as long as their name is on any jurisdiction's Supreme Court roll.

15 Objective

The objective of this Part is to protect the administration of justice and the clients of law practices by providing a system under which persons are eligible for admission to the Australian legal profession only if—

- they have appropriate academic qualifications and practical legal training, whether obtained in Australia or elsewhere; and
- they are fit and proper persons to be admitted.

Notes

1 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.

2 The admission of New Zealand lawyers is effected by the operation of the [Trans-Tasman Mutual Recognition Act 1997](#) of the Commonwealth.

16 Admission

1. The Supreme Court of this jurisdiction may admit an individual aged 18 years or over to the Australian legal profession as an Australian lawyer, but only if—
 - a. the designated local regulatory authority has provided the Supreme Court with a compliance certificate in respect of the person and the certificate is still in force; and
 - b. the person is not already admitted to the Australian legal profession; and
 - c. the person takes an oath of office, or makes an affirmation of office, in the form required by the Supreme Court.
2. Residence in, or any other connection with, this jurisdiction is not a requirement for admission by the Supreme Court.

Note A person may seek admission by the Supreme Court of any participating jurisdiction, subject to compliance with this Law and applicable jurisdictional legislation.

3. Any person may, in accordance with any applicable rules of court, object to the Supreme Court to the admission of a particular person.
4. Nothing in this section is intended to interfere with the inherent jurisdiction of the Supreme Court to refuse admission.

17 Prerequisites for compliance certificates

1. The prerequisites for the issue of a compliance certificate in respect of a person are that he or she—
 - a. has attained the academic qualifications specified under the Admission Rules for the purposes of this section (**the specified academic qualifications prerequisite**); and
 - b. has satisfactorily completed the practical legal training requirements specified in the Admission Rules for the purposes of this section (**the specified practical legal training prerequisite**); and
 - c. is a fit and proper person to be admitted to the Australian legal profession.
2. In considering whether a person is a fit and proper person to be admitted to the Australian legal profession—
 - a. the designated local regulatory authority may have regard to any matter relevant to the person's eligibility or suitability for admission, however the matter comes to its attention; and
 - b. the designated local regulatory authority must have regard to the matters specified in the Admission Rules for the purposes of this section.

18 Exemption from certain prerequisites

1. The designated local regulatory authority may exempt a person from satisfying the specified academic qualifications prerequisite or the specified practical legal training prerequisite or both, if the designated local regulatory authority is satisfied that the person has sufficient legal skills or relevant experience so as to render the person eligible for admission.
2. The legal skills or relevant experience or both can be obtained in legal practice, in service with a government authority or in another way considered appropriate by the designated local regulatory authority. They can be obtained wholly in Australia or overseas or obtained partly in Australia and partly overseas.

19 Compliance certificates

1. A person may apply, in accordance with the Admission Rules, to the designated local regulatory authority for a compliance certificate if the person proposes to be admitted in this jurisdiction.

Note Section 474(2) contemplates that jurisdictional legislation may fix fees for payment in relation to any function of the Supreme Court, the designated tribunal or a local regulatory authority under this Law or the Uniform Rules. This could, for example, extend to processing an application for a compliance certificate.

2. The designated local regulatory authority may require an applicant for a compliance certificate to provide further information to it within a specified time.
3. The designated local regulatory authority may issue and provide to the Supreme Court a compliance certificate stating that the applicant has satisfied it that he or she—
 - a. has satisfied the specified academic qualifications prerequisite and the specified practical legal training prerequisite (or is exempted under section 18); and

WEEK 7(a) – Client Legal Privilege

TEXTBOOK CH 4 pp 109-117

Overview and Purpose

- CLP (also known as legal professional privilege) is a substantive **common law right** that protects confidential communications between a lawyer and client **from compulsory disclosure**, including in court.
- Its purpose is to encourage full and frank disclosure between clients and their advisers.
- Privilege **belongs to the client** and thus **only the client can waive it**

Two Core Categories

1. **Advice Privilege** – where the dominant purpose of the communication is to obtain or give legal advice
2. **Litigation Privilege** – where the dominant purpose is for use in actual, pending or contemplated legal proceedings

Dominant Purpose Test

- Communication must have a **bona fide dominant purpose** of legal advice or litigation. Ancillary purposes (e.g. commercial assistance) are permissible if a dominant legal purpose remains (*Esso v FCT (1999)*)
- Question of **fact**, to be determined **objectively**. The maker's stated intention is **not conclusive**; courts may examine the purpose of others involved in the communication's creation.

Key Common Law Principles (from *Young J, AWB case*)

- The **onus** of proving CLP is on the party asserting it
- CLP is not established by mere assertion that legal advice was sought or given
- There may be a **presumption** of privilege in communications with external or in-house legal advisers unless contrary evidence exists
- CLP protects documents created by lawyers (e.g. research memos, summaries, chronologies), even if not shared with the client.
- It extends to internal client documents (e.g. draft, notes) made for the purpose of being communicated to a lawyer
- CLP applies to salaried legal advisers where advice is sought in a professional capacity
- CLP protects **communications**, not documents per se – a copy of non-privileged document may still be privileged if made for a privileged purpose.

Limits and Misuse of CLP

- Concerns persist about overuse: legal advice must be the **dominant** purpose, not secondary to financial, accounting or strategic business advice
- Example: Lawyer advising on best capital market for IPO may incidentally give legal advice – if the main purpose was commercial, that legal advice may not be privileged.

Exceptions to CLP

Privilege does **not apply** where:

- The client **waives** privilege (expressly, impliedly, or by inconsistent conduct).
- The communication is directed against the **public interest** (e.g. criminal/fraud exception)
- Privilege is **removed by statute** (e.g. anti-tax evasion laws)
- Disclosure occurs **knowingly and voluntarily**
- The claim would be **unfair** or inconsistent in the context of litigation

NOTE: CLP is a **shield not a sword** – it prevents compelled disclosure but is **not enforceable as a cause of action**

- See: *Glencore International AG v Commissioner of Taxation (Cth)* – where advice leaked in the Paradise Papers was in the public domain, CLP could not be used to enjoin the ATO from accessing it.
- **Clarifies that** while the **communication** is protected, the **information contained within** is not. If the same facts exist elsewhere, CLP is irrelevant.

ASCR Rule 31 (Accidental Disclosure)

Where privileged documents are mistakenly disclosed, the opposing lawyer must:

- Return, destroy or delete the material (as appropriate)
- Notify the disclosing party of the error and the steps taken.

Case Study: Big Tobacco Privilege (Australia and US)

- Tobacco companies, with legal assistance, systematically hid or destroyed documents on the health harms and addictiveness of smoking
- Lawyers structured scientific research to be controlled by legal teams to claim CLP over damaging reports while promoting favourable ones.
- Privilege claims were later struck down as *abuses of privilege* following whistleblower revelations

Australian Example – BATAS

- BATAS and Clayton Utz engaged in a “contrivance” to shield documents under CLP: harmful documents were passed to the law firm for “advice,” originals destroyed, and privilege claimed over retained copies.
- The NSW Dust Diseases Tribunal found evidence of dishonest concealment and ordered disclosure

Principles

- Abuse of CLP can severely damage public trust, delay justice, and implicate lawyers in unethical conduct.
- Courts will pierce claims of privilege if used as a strategic shield to suppress material evidence.
- Lawyers must distinguish between adversarial zeal and ethical obligations—privilege should not be used to frustrate justice or regulatory processes.

Case Study: AWB (Col Royal Commission)

- Following corruption allegations (post-Saddam Hussein), AWB initiated “Project Rose,” a legal-led internal investigation involving three firms and two barristers.
- AWB asserted CLP over all legal advice and internal communications, including opinions by in-house counsel based on external advice.
- Refused to answer questions on grounds of privilege; attempted to claim privilege over a mistakenly disclosed draft apology prepared with external lawyers and a PR consultant.

Judicial Criticism (Cole RC):

- Commissioner Terence Cole warned AWB should have considered the “wisdom” of asserting privilege from a *corporate governance* perspective, despite legality.
- He observed that earlier disclosure would have materially shortened and reduced the cost of the inquiry.
- “Had there been frankness or real cooperation... most material documents could have been produced in November 2005.” – Cole RC

Principles / Takeaways:

- CLP must be asserted judiciously and with ethical foresight—not merely because it is legally available.
- Courts may distinguish between *legal entitlement* and *ethical prudence* when reviewing privilege claims.
- Delay and non-cooperation under the guise of CLP can lead to reputational damage and increased scrutiny.
- Lawyers should consider their duties to the court and justice system under **ASCR r 17.1**—not simply follow client instructions if privilege claims are spurious or strategic.

Glencore International AG v Commissioner of Taxation [2019] HCA 26

FACTS: G sought injunctive relief to restrain COT from using certain documents (“the Glencore documents”) that were stolen from the electronic systems of their law firm, Appleby (Bermuda), and leaked to the public as part of the “Paradise Papers”. The documents had been created for the sole or dominant purpose of providing legal advice on the restructuring of G’s Australian entities. G claimed the documents were protected by LPP and sought orders for their return and to prevent their use, relying solely on the existence of LPP – not on confidentiality or other grounds.

ISSUE: Can LPP form the sole juridical basis for injunctive relief to restrain use of documents already in the possession of a third party and in the public domain?

- In *Temby v Chambers Investment Planners* [2010] FMCA 783, the son (a solicitor) was restrained from acting for his parents due to the likely conflict.
- Dal Pont warns that lawyers acting for relatives may “cut corners” or be less rigorous in disclosures (*Lawyers’ Professional Responsibility*, 7th ed, [6.50]; *Woolley v Ritchie* [1999] ANZ Conv R 385).

Barristers’ Rule 105(k) also permits refusal or return of a brief where a personal or business relationship exists with a party or witness.

Concurrent Businesses and Non-Legal Services

Solicitors must ensure:

- Clients can distinguish between legal and non-legal services.
- Legal protections do not automatically apply to non-legal advice.
- No conflict arises where the solicitor operates a second business (e.g. finance broking).

Referral Fees (Rules 12.4.3 and 12.4.4)

A solicitor may:

- Receive a benefit from a third party for a referral **only if** full disclosure is made and the client gives informed consent.
- Must disclose: the nature of the benefit, associated risks, and the option of using a different solicitor.

Solicitors are strongly encouraged to:

- Advise the client to obtain independent advice.
- Obtain written consent, especially where not acting for the referred client.

In jurisdictions such as Queensland, NT, WA, and SA, **statutes** impose additional restrictions or prohibitions on referral fees in areas such as personal injury and conveyancing:

- *Personal Injuries Proceedings Act 2002* (Qld)
- *Civil Liability Act 2002* (WA) s 20(1)
- *Legal Profession Act 2006* (NT) s 293(1)
- *Land and Business (Sale and Conveyancing) Act 1994* (SA) s 29(1)

In such cases, apply the **higher standard** under Rule 2.2 where statute and rules differ.

Amendments to Rule 12 (2022–2024)

- Rule 12.2 now expressly prohibits acting in a way calculated to dispose a client or third party to confer improper benefits.
- “Member of the immediate family of the solicitor’s spouse” was added to the excluded categories under Rule 12.4.2.

Law Society of NSW v Harvey [1976]

FACTS: Harvey, a solicitor of 20 years’ standing, was found to have engaged in sustained professional misconduct by misusing his fiduciary position to channel his clients’ funds into companies in which he had a personal interest—Whitehall Park Pty Ltd (W.P.), Westwood Lodge Pty Ltd (W.L.), and Janprard Pty Ltd (J.). These investments were often unsecured, high-risk, under-informed, and contrary to the interests of clients, many of whom were elderly or vulnerable. Harvey failed to advise his clients to seek independent legal advice, provided incomplete or misleading disclosures of his interests, and in some cases failed to disclose them at all. He acted as a loan broker under the guise of a solicitor, using client funds to prop up his personal ventures.

ISSUE: Whether Harvey’s conduct constituted professional misconduct warranting removal from the roll.

HELD: Harvey was struck off. The Court found sustained, serious misconduct motivated by self-interest and dishonest, rendering him unfit to practise (at 172).

REASONING:

- **Breach of fiduciary duty and conflict of interest:** Harvey stood in a fiduciary relationship to clients and was bound to “act in perfect good faith and to make full disclosure of his interest” (at 170). Instead, he repeatedly promoted his own ventures, failing to disclose risks or offer independent legal advice.

- The infamous “I’m not a cat” Zoom hearing clip is cited as a cautionary example of technological unpreparedness.
- Technological incompetence can result in **delays, costs orders**, and negative impacts on clients’ cases.

Note: Unlike the US **Model Rules**, the ASCR does not yet provide **prescriptive guidance** on tech competence, though some argue it should.

Professionalism and Courtroom Conduct (incl. Online)

- Courts warn against **over-informality** in remote appearances (e.g. suit jacket + pyjama pants), as it may indicate **disrespect** for the process or **lack of care** for the client’s case.
- There is a risk of breaching **ASCR r 18** if conduct creates the appearance of **personal familiarity or special favour with the court**, potentially leading to **apprehended bias** arguments and undermining public trust.

Respect, Courtesy, and Anti-Bullying Conduct

- **ASCR r 4.1.2** requires that lawyers be **honest and courteous**, which includes avoiding **bullying, rudeness, or harassment**, especially in civil courts and tribunals.
- Reports have shown that **junior and female lawyers** often experience sexual harassment and inappropriate behaviour by peers and judicial officers, breaching both **anti-discrimination laws, judicial ethics**, and **professional conduct rules**.

Client Care and Informed Choice

- Civil proceedings are often **overwhelming** for clients. Lawyers must provide sufficient information to allow clients to make **informed decisions**.
- This reflects the lawyer’s role not only as advocate but also as guide and communicator in an unfamiliar system.

Civil Liability Act 2002 (NSW)

50 – Standard of care for professionals

1. A person who is **practising a profession** (a professional) is **not liable in negligence** for providing a professional service if it is established that the professional:
 - **acted in a way that was, at the time,**
 - **widely accepted in Australia by peer professional opinion as competent professional practice.**
2. However, a **peer professional opinion cannot be relied on** under this section if the court considers the **opinion to be irrational**.
3. If there are **differing peer professional opinions** that are **widely accepted in Australia**, this does **not prevent any one or more** of them from being relied on under this section.
4. An opinion **does not need to be universally accepted** to qualify as **widely accepted**.

Roberts v Cashman [2000] NSWSC 770

FACTS: Grace Ellen Roberts, the plaintiff, was injured in 1987 after a banana chair purchased from BBC Hardware collapsed beneath her, causing serious back injuries. After years of treatment including surgery, she received epidural injections of Depo Medrol in 1990, which she claimed worsened her condition.

In 1992, she saw a TV program referencing Depo Medrol and subsequently contacted the defendant solicitor, Mr Cashman of Cashman & Partners, a firm well known for class actions in product liability. She spoke only by phone with a solicitor at the firm, completed a questionnaire, and signed a retainer agreement. The defendant then commenced proceedings against Upjohn (the drug company) and others in 1993 regarding the Depo Medrol injections.

However, the plaintiff later discovered that she had lost a potential claim against BBC Hardware regarding the 1987 chair collapse, which became statute-barred in November 1993. She brought a professional negligence claim against the defendant for failing to advise her of this viable cause of action in time.

ISSUE: Whether the solicitor breached his duty of care or retainer by failing to properly investigate or advise on the plaintiff’s potential claim relating to the 1987 banana chair accident, resulting in a lost opportunity to pursue that claim.

HELD: Yes — the solicitor breached his duty of care and was negligent. Verdict for the plaintiff. The plaintiff was awarded **\$318,267.00** in damages (inclusive of interest), and the defendant was ordered to pay costs.

REASONING

- **Scope of Retainer:** It was conceded by the defendant that the retainer extended to considering the circumstances of the original injury that led to the Depo Medrol injections. Thus, there was an obligation to investigate the cause of the plaintiff's injury more thoroughly.
- **Failure to Investigate:** The solicitor never met or interviewed the plaintiff, relying instead on her completed questionnaire. Whealy J held that a competent practitioner, especially when commencing individual proceedings (as opposed to a general class action), should have conducted at least a telephone conference. Had they done so, the viable claim against BBC Hardware would have been discovered.
- **Questionnaire Not Sufficient:** While the plaintiff's questionnaire mentioned a fall from a chair, it did not explain the defect or the potential liability of the retailer. However, Whealy J held that the overall information in the questionnaire (including persistent medical problems, surgery, etc.) should have put the solicitor on notice to ask further questions.
- **Failure to Obtain Records:** The solicitor also failed to obtain hospital records or a report from Dr Sheehy, which would have revealed the fall's circumstances. These omissions breached the solicitor's duty of reasonable care.
- **Rejecting the Mass Tort Defence:** The defendant argued that in class actions, clients are not generally interviewed due to impracticality. Whealy J rejected this — if separate proceedings are filed, the solicitor must meet the standards of ordinary litigation. The obligation to meet or meaningfully interview a client remains.
- **No Justification for Not Investigating:** There was no evidence it was impractical or uneconomical to interview the plaintiff, especially given that she lived in the same city.
- **Credibility and Damages:** The court rejected several attacks on the plaintiff's credibility, including claims she had exaggerated or misled her doctors. Whealy J found her honest and consistent overall, supported by her family and medical history.
- **Lost Cause of Action:** The plaintiff had strong prospects of succeeding in an action against BBC Hardware for breach of statutory warranty under the Sale of Goods Act 1923. Whealy J assessed the damages that would have been awarded in such a claim, applying a 25% discount to reflect litigation uncertainties and the impact of a subsequent 1994 motor vehicle accident.

PRINCIPLES

- A solicitor owes a duty to investigate and advise on all reasonably apparent causes of action, not just those explicitly raised by the client.
- A written questionnaire is not a substitute for a proper client interview where complex personal injury issues are involved.
- Class action procedures do not displace a solicitor's core obligations in individual claims.
- Failure to detect and act on a clear cause of action, resulting in a claim becoming statute-barred, can give rise to liability in professional negligence.
- Damages for lost opportunity are assessed using a "broad brush" approach (cf *Johnson v Perez (1988) 166 CLR 351; Sellars v Adelaide Petroleum NL (1994) 179 CLR 332*).

Solicitors' Rules

ASCR 4 – Other fundamental ethical duties

4.1 A solicitor must also:

- 4.1.1** act in the **best interests of the client** in any matter where the solicitor represents the client,
- 4.1.2** be **honest and courteous** in all dealings made in the course of legal practice,
- 4.1.3** provide legal services that are **competent, diligent**, and performed as **promptly as reasonably possible**,
- 4.1.4** avoid any situation that would **compromise their integrity or professional independence**, and
- 4.1.5** comply with these **Rules and the law**.

ASCR 7 – Communication of advice

7.1 A solicitor must give **clear and timely advice** to help the client:

WEEK 12(a) – Technology & The Future of Legal Services & Profession

A SOLICITOR'S GUIDE TO RESPONSIBLE USE OF AI (NSW LAW SOCIETY, 2023)

Core Principles

General Guideline:

- “Understand the tool you are using and know how it can assist your legal practice.”
- “Know what your professional and ethical obligations are and how they are to be applied when using any given tool.”

What Is Generative AI?

- A form of AI that produces content (text, images, sound) based on prompts and probabilistic modelling of vast underlying data sets.
- Learns syntactic and structural relationships in data to generate plausible outputs.
- Distinct from search engines: *search engines retrieve; generative AI generates.*

Benefits in Legal Practice

- Streamlines intake, research, contract drafting, and summarising cases.
- Can analyse case law to predict potential outcomes.
- May reduce costs for clients through efficiency in repetitive tasks.
- Assists in personalising client engagement and explaining legal processes.

Used properly, “generative AI can improve client engagement, lower cost barriers, and unbundle legal services.”

Risks and Ethical Issues

1. Accuracy and Reliability

- Generative AI is **not a legal research tool**—outputs may include:
 - Fabricated case law;
 - Inaccurate or outdated legal principles;
 - “Hallucinations” (entirely false outputs).
- AI lacks context, reasoning, critical thinking, and relevance determination.
- Solicitors are **personally responsible** for verifying all AI-generated content.
- “Humans are accountable, but generative AI is not.”

2. Bias

- “AI bias” occurs due to skewed or incomplete training data, leading to **prejudiced or discriminatory outputs**.
- May cause ethical risks in advising or engaging with diverse clients.

3. Intellectual Property

- AI-generated content may infringe copyright, as it often reproduces existing material.
- Users must consider **ownership and licensing rights** before relying on outputs.

4. Privacy and Data Security

- Generative AI may:
 - Share user data with third parties;
 - Lack sufficient anonymisation;
 - Risk data breaches;
 - Breach confidentiality and privilege if client information is inputted.

“Placing confidential client information into a generative AI system is akin to putting it in the public domain.”

Relevant Ethical Duties (Legal Profession Uniform Law ASCR 2015)

- **Rule 4 – Competence, integrity, honesty:**
 - Solicitors are responsible for the **accuracy** of legal advice, regardless of whether AI was used in preparing it.
 - Disclose use of AI where appropriate to ensure transparency.
- **Rule 9 – Confidentiality:**

- Example: if a lawyer cannot evaluate the function of the AI tool, **supervising its outputs becomes meaningless**. Medianik's suggestion to "treat AI like a junior associate" (93) is problematic, since unlike a junior, AI's reasoning is often inaccessible and unverifiable (93–94).
- The article also discusses **limited-scope retainers and unbundling**, noting that a lawyer may attempt to avoid responsibility for tasks completed by AI. But this is ethically dubious. In *Robert Bax & Associates v Cavenham Pty Ltd*, the court held that the solicitor's retainer extended beyond mechanical tasks, requiring evaluation of "the extent of the risks involved" in the transaction and advice on that basis ([2013] 1 Qd R 476, 490 [54]) (94).
- Lawyers still bear **ultimate responsibility for legal work**, including when AI is used. However, **regulatory regimes have yet to clarify how this responsibility should be discharged** (95).

Professional Conduct and Supervision

- Under ABA Model Rules r 1.1 and 5.3, lawyers remain responsible for outsourced or tech-assisted work and must supervise it appropriately (93).
- There is **no equivalent clear guidance under Australian rules** on the ethical limits of AI use.
- The authors urge that **use of AI in law must be governed by the same standards of competence, disclosure, and supervision** as other legal services (93).

Regulatory Gaps and Risks

- Regulation is currently **fragmented, circular, or absent**. E.g. the definition of "legal practice" under the **Legal Profession Uniform Law s 10** is circular: 'engaging in legal practice' means to 'practise law or provide legal services', and 'legal services' are defined as 'work done in the ordinary course of legal practice' (91–92).
- This definitional vacuum makes it difficult to determine when **non-lawyer providers or AI platforms are crossing into regulated legal practice**.
- Regulatory bodies may also **lack technical expertise** to enforce meaningful AI governance (95).

Rest's Four Component Model (FCM) as Regulatory Framework

- Rogers and Bell propose that regulators use the FCM to assess whether lawyers can uphold ethical standards when using AI.
- FCM "clarifies [regulators'] moral ambitions and their images of the 'successful' professional" (96).
- For regulation to be **legitimate and effective**, it must support both the **motivation and the capacity** of lawyers to meet their ethical obligations (95).
- They caution against placing the entire burden on individual lawyers without providing **education, guidance, or supportive infrastructure** (96).

Conclusion: The Need for Reform and Reorientation

- The article closes with a warning: the **professional identity of lawyers is at risk**, particularly as large firms and corporate clients drive AI adoption without due ethical reflection (96).
- The authors call for regulators, educators, and the profession itself to **respond proactively**, not passively, to the challenges of AI.
- Unless lawyers develop the skills, insight, and ethical infrastructure to work alongside AI responsibly, "**this responsibility is neither straightforward, nor does it encourage high standards**" (96).
- As AI cannot engage in moral reasoning, the **lawyer's human ethical judgment remains essential**: "The influx of AI... heightens the need for human skills" (96).

ABC NEWS, "US LAWYER FINED FOR USING GHATGPT TO SUBMIT FAKE CITATIONS IN COURT' (2023)

Overview

This article recounts the disciplinary fallout from **Steven A. Schwartz**, a New York-based lawyer, who was fined **US\$5,000** (approx. AU\$7,485) after submitting **fabricated case citations** generated by **ChatGPT** in a personal injury