

CHAPTER 1

WHAT IS 'LAWYERING'?

INTRODUCTION

It might seem surprising to begin by asking, 'what is lawyering'? Yet this is an important question, not only for providing a basis for many of the ideas we will discuss, but also because 'lawyering' is a term often used but rarely defined.¹ In this chapter, we will start by outlining our view of what lawyering is and how notions of lawyering are currently the subject of many discussions. We will then look at who lawyers are, because the composition of the legal profession has changed significantly in recent years. From this point, we will consider the debate as to whether lawyering is a profession or a business, and the implications of that debate for the standards of lawyering. We will also consider the ways in which the increasing commercialisation of the profession is reshaping legal practice.

1 WHAT DO WE MEAN BY 'LAWYERING'?

When we refer to lawyering, we refer to what it is that lawyers do. However, lawyers do in fact operate in a variety of contexts and in different ways. This variety is reflected in Daniel's lament that, when we talk about lawyering, '[e]veryone seems to know what it means, but finding a published—and meaningful—definition of the word is exasperating'.² The literature identifies what are generally accepted to be the 'fundamental lawyering skills' such as problem solving, legal analysis,

1 Josiah M Daniel, III, 'A Proposed Definition of the Term "Lawyering"' (2009) *Law Library Journal* 207.

2 *Ibid* 207.

legal research, factual investigation, communication, counselling, negotiation and litigation and alternative dispute resolution.³ This list is useful, but does not tell us what it is we actually mean by ‘lawyering’.

So what is it that lawyers do? For many, notions of lawyering are developed through popular culture. Asimow et al.,⁴ for instance, researched law students from a number of different countries, including Australia. This study found that only news coverage is more helpful than popular culture in assisting students to form their opinions of what constitutes lawyering. In fact, the study found that news and popular culture were generally more helpful than other sources of information (such as having lawyers as friends or family members, personal experience with lawyers, conversations with family and friends, or classes in school) in forming an understanding of the role of a lawyer.

This phenomenon of viewing law through the lens of popular culture can be illuminating not only for seeing the ways in which our ideas of lawyering are shaped, but also for revealing our public attitudes to lawyers: one can see a change in the representations of lawyers over time, for instance,⁵ and with this change has come a more overt hostility to lawyers. Post,⁶ picking up on this latter point, makes the interesting observation that, in popular culture:

lawyers are applauded for following their clients’ wishes and bending the rules to satisfy those wishes; and they are at the very same time condemned for using the legal system to satisfy their clients’ desires by bringing lawsuits at their clients’ behest and using the legal system to get what their clients want, rather than to uphold the right and denounce the wrong.⁷

Such a dichotomy reveals a discrepancy between our aspirations and our realities: community and individual autonomy, the need for a stable and authentic self, and the fragmentation and disassociation of the roles we play in modern life.

Representations of lawyers in popular culture often focus on the work of criminal lawyers (both prosecution and defence), barristers and lawyers who work for large, well-resourced firms. The reality, however, is that lawyering is

3 American Bar Association, Section of Legal Education and Admissions to the Bar, ‘Report of The Task Force on Law Schools and the Profession: Narrowing the Gap’ (the ‘McCrate Report’), July 1992, 135. See also Marjorie M Schultz and Sheldon Zedeck, ‘Final Report: Identification, Development and Validation of Predictors for Successful Lawyering’, 2008, 12, 13, 18, www.law.berkeley.edu/files/LSACREPORTfinal-12.pdf. This was a study of 2000 lawyers who identified 26 factors that they considered to be important to effective lawyering.

4 Michael Asimow, Steve Greenfield, Guillermo Jorge, Stefan Machura, Guy Osborn, Peter Robson, Cassandra Sharp and Robert Sockloskie, ‘Perceptions of Lawyers—A Transnational Study of Student Views on the Image of Law and Lawyers’ (2005) 13(3) *International Journal of the Legal Profession* 407.

5 PD Baron, ‘The Emperor’s New Clothes: From Atticus Finch to Denny Crane’ in Francesca Bartlett, Reid Mortenson and Kieran Tranter (eds), *Alternative Perspectives on Lawyers and Legal Ethics: Reimagining the Profession* (Routledge, 2011) 85.

6 Robert C Post, ‘On the Popular Image of the Lawyer: Reflections in a Dark Glass’ (1987) 75(1) *California Law Review* 379.

7 Ibid 380.

much wider than this. In Australia, lawyers may be barristers or solicitors or both; they may work in large firms, or as sole practitioners; they may work as in-house counsel or government lawyers; they may be generalists or specialists; work for the underprivileged or for the elite; work in one of the major cities, in the suburbs, or in regional or rural practice.

Because of the range of roles lawyers play in common law systems, there has always been some measure of diversity in describing what it is that lawyers do. Generally, however, the traditional conception of the lawyer was as an expert in law; advising, if not directing, the client; actively engaging in the litigation process; and upholding the rule of law. This tripartite rule can be seen in the Preamble to the US Model Rules of Professional Conduct (2004), which states:

A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

López argues that the most common assertion that can be made about what it is that lawyers do, irrespective of the context and the organisational structure in which they work, is that lawyers solve problems: 'Lawyering means problem-solving. Problem-solving involves perceiving that the world we would like varies from the world as it is and trying to move the world in the desired direction'.⁸

Recently, a body of literature, of which López's work is part, has identified what might be described as 'new lawyering'.⁹ This does not call into question the notion of lawyer-as-problem-solver so much as challenge the traditional paradigms of problem solving; that is, the lawyer-as-expert directing the client; or the zealous advocate pursuing solutions through the adversarial system. This 'new lawyering' does not have a single definition, but its characteristics can be distilled from the literature. First, 'new lawyering' is client-centred, rather than directive. The autonomy of the client is seen to be of prime importance,

⁸ Gerald P López, 'Lay Lawyering' (1984) 32 *UCLA Law Review* 1, 2 cited in Daniel, above n 1, 214.

⁹ See, for instance, Julie McFarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (UBC Press, 2008).

so the lawyer's role is facilitative,¹⁰ collaborative¹¹ and evaluative,¹² generating legal options for the client.¹³ Second, rather than being focused on adversarial solutions to the problem, the new lawyer will look to a range of problem-solving methods, including alternative dispute resolution options. The new lawyer is a creative problem solver,¹⁴ empathises with the client,¹⁵ is conscious of the client's needs,¹⁶ and displays fidelity to the pursuit of a solution to the client's problem¹⁷ rather than a concern to 'win' at all costs.¹⁸ All this, of course, has led to calls for a rather different form of legal education.¹⁹ For instance, as detailed in Chapter 9, 'Service and Access to Justice', the Australian Learning and Teaching Academic Standards²⁰ suggest that law students are encouraged to recognise that lawyers, acting in their public role, should promote justice and reflect on the fact that their professional decisions have consequences.²¹

2 WHO ARE THE LAWYERS? THE DIVERSITY OF THE PROFESSION

Traditionally, the practice of law was perceived to be elitist and masculine, a domain of power and prestige. Lawyering and the culture of lawyering were dominated by 'white, Anglo-Celtic, heterosexual, able-bodied, middle class' males.²² In consequence, '[w]omen, indigenous people, NESB

10 Richard D Marsico, 'Working for Social Change and Preserving Client Autonomy: Is There a Role for "Facilitative" Lawyering?' (1995) 1 *Clinical Law Review* 639.

11 Daniel, above n 1, 214.

12 Marsha M Mansfield and Louise G Trubek, 'New Roles to Solve Old Problems: Lawyering for Ordinary People in Today's Context' (2011–2012) 56 *New York Law School Law Review* 367.

13 Robert F Cochran Jr, 'Enlightenment Liberalism, Lawyers, and the Future of Lawyer-Client Relations' (2011) 33(3) *Campbell Law Review* 685, 686.

14 Carrie J Menkel-Meadow, 'When Winning isn't Everything: The Lawyer as Problem Solver' (1999–2000) 28 *Hofstra Law Review* 905; Lisa A Kloppenberg, '"Lawyer as Problem Solver": Curricular Innovation at Dayton' (2006–2007) 38 *University of Toledo Law Review* 547; Janet Reno, 'Lawyers as Problem-Solvers: Keynote Address to the AALS' (1999) 49 *Journal of Legal Education* 5; James M Cooper, 'Towards a New Architecture: Creative Problem Solving and the Evolution of Law' (1997–1998) 34 *California Western School of Law Review* 297.

15 Ian Gallacher, 'Thinking like Non-Lawyers: Why Empathy is a Core Lawyering Skill and Why Legal Education should Change to Reflect its Importance' (2010) *College of Law Faculty Scholarship*, Paper 6, <http://surface.syr.edu/lawpub/6>.

16 John Lande, 'Developing Better Lawyers and Lawyering Practices: Introduction to the Symposium on Innovative Models of Lawyering' (2008) 1 *Journal of Dispute Resolution* 1.

17 Robin S Golden, 'Collaborative as Client: Lawyering for Effective Change' (2011–2012) 56 *New York Law School Law Review* 393.

18 Menkel-Meadow, above n 14.

19 Paul Brest, 'The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers' (1995) 58(3/4) *Law and Contemporary Problems* 5.

20 Sally Kift, Mark Israel and Rachael Field, 'Learning and Teaching Academic Standards Project: Bachelor of Laws Learning and Teaching Academic Standards Statement' (Australian Learning and Teaching Council, December 2010).

21 *Ibid* 16.

22 Margaret Thornton, 'Gender, Legality and Authority' (Paper presented at the Australian Lawyers and Social Change Conference, ANU, Canberra, 22–24 September 2004), http://law.anu.edu.au/sites/all/files/users/u4081600/Conference_docs/thorntondiversity.pdf.

[non-English-speaking-background] people, working class people, gays and lesbians have been viewed as non-normative within the legal culture'.²³ In recent years, however, there has been a significant growth of diversity in the composition of the practising profession; in the organisational structures in which law is practised; in the specialisations within legal practice; and in the paths open to law graduates.

2.1 The diversity of the membership of the profession

Today, there is considerably more diversity in the legal profession than was the case 40 years ago. For instance, in 1970, women made up some 20 per cent of law students and 6 per cent of practitioners. By 2004, women made up some 50 per cent or more of law students and around 30 per cent of practitioners.²⁴ Multidisciplinary practices, 'mega-firms', transnational firms, small specialised firms,²⁵ and the increase in the number of women and individuals from varying ethnic backgrounds have all contributed to this diversity.

Nevertheless, there are still concerns that the profession tends to maintain its 'exclusivity, uniformity and conservatism'.²⁶ In particular, women still tend to cluster at the lower levels of legal practice, as employed solicitors and support staff. A very small proportion achieves partnership in large firms and a smaller proportion still becomes Senior Counsel.²⁷ Thornton points to the influence of neo-liberalism²⁸ and the corporatisation and quasi-privatisation of universities as barriers to further diversification of the legal profession. Moran points to the way in which judicial debates focus upon gender and ethnic diversity, but remain silent on the issue of sexuality.²⁹ Further, Indigenous membership of the legal profession remains low, although reliable information on the actual number of Indigenous lawyers is difficult to find.³⁰

23 Ibid.

24 Ibid.

25 Ibid.

26 Ibid.

27 Ibid.

28 Ibid. Neo-liberalism has been defined as 'a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets and free trade. The role of the state is to create and preserve an institutional framework appropriate to such practices': David Harvey, *A Brief History of Neoliberalism* (Oxford University Press, 2005) 3.

29 Leslie J Moran, 'Judicial Diversity and the Challenge of Sexuality: Some Preliminary Findings' (2006) 28 *Sydney Law Review* 566.

30 Law Council of Australia, *Challenges for the Legal Profession. 2010: A Discussion Paper*, September 2001, 20, <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN016547.pdf>.

2.2 The diversity of organisational structures

Lawyers today work in a diversity of organisational forms. Traditionally, legal practices operated as either sole practitioners or partnerships. However, as reported by the Australian Bureau of Statistics in 2008,³¹ there were at that time 11,244 businesses employing 84,921 people from the ‘other legal services’ category;³² and, within that figure, 7350 were unincorporated businesses, 2264 were incorporated and the remaining 1630 were trusts. Since that report, the 2014 Law Society National Profile was published,³³ the statistics of which show that as at October 2014 there was a total of 66,211 practising solicitors in Australia: 41.6 per cent in New South Wales; 24.5 per cent in Victoria; and 15.7 per cent in Queensland. Of the total number, 51.5 per cent are males and 48.5 per cent females; and 0.8 per cent identified as being of Aboriginal or Torres Strait Islander status. There are more large firms, the report showing a 300 per cent increase in firms with over 40 partners. There has been a 22 per cent increase in the number of solicitors in the corporate sector and a 19 per cent increase in the government sector.³⁴

While there are still large numbers of legal practices that operate as sole practitioners and partnerships, those that have taken the opportunity to become incorporated are able to take advantage of the benefits of limited liability: easier entry and exit paths for ownership; acceptance of non-lawyer contributions; and an increased ability to raise debt and equity. The legislation governing legal practices also allows the formation of multidisciplinary partnerships, but there are ‘only a handful of multi-disciplinary partnerships’.³⁵ Incorporation is the favoured organisational structure, ‘primarily among sole practitioners and small law firms, and is increasingly becoming their structure of choice for new law practices’.³⁶ There are also four law firms who have registered on the Australian Stock Exchange. These are Shine Corporate Ltd., Slater & Gordon Limited, IPH

31 Australian Bureau of Statistics, *Legal Services, Australia*, No. 8667.0, 13, [www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/ED9EDC3A4FFBF9BDCA2575DE0019F004/\\$File/86670_2007-08.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/ED9EDC3A4FFBF9BDCA2575DE0019F004/$File/86670_2007-08.pdf).

32 The Australian Bureau of Statistics categorises legal services into a number of sub-industries; that is, barristers, legal aid commissions, community legal centres, Aboriginal legal services, government solicitors, public prosecutors and other legal services: *ibid* 4. This latter category of ‘other legal services’ is further defined as ‘solicitor firms, patent attorney businesses, service/payroll entities and businesses providing various legal support services’: *ibid* 13.

33 Law Society of New South Wales, ‘2014 Law Society National Profile: Final Report’, April 2015, www.lawsociety.com.au/cs/groups/public/documents/internetcontent/1005660.pdf.

34 *Ibid* i.

35 *Ibid* 4.

36 *Ibid*. See also Uniform Law Chapter 3, Part 3.2; and Chapter 3, Part 3.7 Division 2.

Holdings and Xenith IP.³⁷ However, a report in January 2016 suggested that the two 'pioneer' firms of Slater & Gordon Limited and Shine Corporate Ltd are now experiencing some financial issues.³⁸

The Law Council of Australia reports positively on the introduction of these alternative business structures. More specifically it notes that Legal Services Commissioners have found incorporated bodies to have 'higher standards than traditional law practices'; and that no conflicts of duty issues by legal practitioner directors have been reported between 'their professional obligations as lawyers and their corporations law obligations as company directors and officers'.³⁹ This latter finding is particularly relevant, as it addresses the profession's initial concerns about the adoption of these alternative organisational structures. These concerns led the Law Council of Australia to create a policy which stated: 'lawyers' business structures should focus on the compliance of individual lawyers with ethical standards and professional duties rather than on the regulation of the business entity'.⁴⁰ More specifically, it was thought that if there were non-legal owners of these alternative business structures, this might create a threat to professionalism and the 'integrity of the role lawyers played in the administration of justice'.⁴¹ This debate is examined below, in Section 3.1.

2.3 The growth of specialisation

One of the characteristics of lawyering in Australia has been the growth of specialisation, whereby practitioners confine their practice wholly or largely in certain practice areas, such as intellectual property or family law.⁴² Specialisation is seen to be a consequence of the growing complexity of the law, and one effect of globalisation.⁴³

37 Stefanie Garber, 'Second IP Firm Debuts on ASX at \$89m', *Lawyers Weekly*, 20 November 2015, www.lawyersweekly.com.au/news/17544-second-ip-firm-debuts-on-asx-at-89m.

38 Jonathan Shapiro, 'Shine and Slater & Gordon put the listed law firm model in the dock', *Financial Review*, 31 January 2016, www.afr.com/business/legal/shine-and-slater-gordon-put-the-listed-law-firm-model-in-the-dock-20160131-gmhwyt.

39 Ibid. Interestingly, Christine Parker predicted this result. See Christine Parker, 'Law Firms Incorporated: How Incorporation Could and Should Make Firms More Ethically Responsible' (2004) 23 *University of Queensland Law Journal* 347.

40 Murray Hawkins, Director, National Legal Profession Project, Law Council of Australia, 'Emerging Trends in the Provision of Legal Services: Some Australian Experiences' (Paper presented at the Commonwealth Law Association Conference, Nairobi, 7 September 2007, 8.

41 Andrew Grech, 'New Legal Practices Embracing Incorporation', *The Australian*, 9 July 2010, www.theaustralian.com.au/business/legal-affairs/new-legal-practices-embracingincorporation/story-e6frg97x-1225889567789.

42 This trend has been evident for some years. In 1993, for example, Clarke noted the increase in specialisation in legal practice and the greater advertising of such expertise as emerging trends in lawyering: E Eugene Clarke, 'Note: Legal Education and Professional Development—An Educational Continuum' (1993) 4(1) *Legal Education Review* 201.

43 A discussion paper authored by the Law Council of Australia states: 'Global markets facilitate global specialisation: a lawyer's field of expertise can be quite narrow if the potential market is the world'. Law Council of Australia, above n 30, 44.

Such specialisation is endorsed by the professional bodies in each of the Australian states and territories through their specialist accreditation schemes. Specialisation is seen to have a range of benefits in terms of improved access to legal services and reduced costs for the legal consumer. Lawyers are also seen to benefit from the ability to charge higher fees; law firms from the ability to compete more effectively in the marketplace;⁴⁴ and the legal system from the growth of specialist expertise.

The trend to specialisation has been subject to some critical comment, however, by Justice French,⁴⁵ who, in the context of the National Reforms,⁴⁶ calls for a ‘careful and rigorous consideration’⁴⁷ of the issue. Such consideration, he claims, should aspire to ‘a better generic understanding of the concept than presently exists, the criteria for defining particular specialties and the interests served and objectives advanced by their recognition and regulation’.⁴⁸ The Justice is particularly careful to separate out the two meanings of specialisation: concentration, meaning ‘a limitation of activity to a particular area of practice’; and expertise, meaning ‘the acquisition of knowledge and skills’.⁴⁹ His Honour observes that these two meanings of specialisation are distinct, though they may at times overlap.

While His Honour acknowledges the potential advantage of specialist practice in terms of efficiency and marketability of legal services, he is concerned as to the complexity and inconsistency of the regulation of specialisations across Australian jurisdictions. His Honour maintains that if there is to be national regulation of specialisation to overcome such complexity and inconsistency, that regulation should be devised thoughtfully, with greater attention to the meanings both of specialisation and the criteria that define the subject areas for specialisation.

Over and above these concerns, however, Justice French points out that the complexity of the contemporary legal environment is such that the law is not as easily segmented as specialisation would suggest: ‘Any apparently discrete section of legal practice cannot avoid the pervasive influence of other areas which are of

44 ‘Boutique appears to be the way of the future for medium firms ... While medium sized firms will generally not be able to compete head to head with large firms in all practice areas, there is room for medium sized specialists to capture significant niche markets and quality clients in selected practice areas’: Law Council, *ibid* 114.

45 Justice Robert French, “In Praise of Breadth”—A Reflection on the Virtues of Generalist Lawyering’ (Paper presented at University of Western Australia Law Summer School, Perth, 20 February 2009), www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj20feb09.pdf.

46 The Uniform Framework has now been adopted by Victoria and New South Wales. See the Legal Service Council, <http://www.legalservicescouncil.org.au/Pages/uniform-framework/guidelines-directions.aspx>.

47 French, *above n* 45, 2.

48 *Ibid*.

49 *Ibid* 6–7.

general application'.⁵⁰ For this reason, in His Honour's view, specialist lawyers must maintain currency in their knowledge of the general law. He argues:

given the extent of overlap between different areas of the law and the inability to quarantine specialist areas from that overlap, how are the specialist practitioner and his or her clients to be protected from a dangerous narrowing of competencies? And how is the profession to be protected from fragmentation? If specialisation is to be supported and protected by accreditation, the objective of accreditation must ultimately be directed to serving the public interest and not just the commercial interests of the subset of lawyers who hold themselves out as specialists. Whatever system is devised ultimately it must recognise the disadvantages of specialisation and seek to mitigate them in particular deskilling in the areas of law outside the specialist's practice area.⁵¹

The former Chief Justice's concerns about specialisation are not confined to legal practice. He also urges some caution in relation to the creation of specialist courts and specialist divisions within courts. Along similar lines, some commentators have questioned the desirability of increasing specialisation among legal academics.⁵² We discuss the issue of specialisation in relation to competence in more detail in Chapter 7, 'Competence'.

2.4 The diverse paths open to law graduates

Law graduates have a variety of paths open to them. They can obviously work in the legal services sector, but they can also choose to work in government departments, or accounting or corporate organisations. With respect to those who work in the legal services sector, the most recent data collected by the Australian Bureau of Statistics in June 2008⁵³ reported that there were 99,696 people employed and 15,326 businesses and organisations providing either legal services or legal support. More specifically, there were 3869 barristers who employed 1285 people;⁵⁴ 5108 people employed in community legal services (legal commissions, Aboriginal legal services and community legal centres);⁵⁵

50 Ibid 11. Justice Michael Kirby also referred to the 'increasingly narrowing effect of specialisation' in 1996: Justice Michael Kirby, 'Legal Professional Ethics in Times of Change' (Paper delivered at the St James Ethics Centre Forum on Ethical Issues, Sydney, 23 July 1996), http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_stjames2.htm.

51 French, above n 45, 16.

52 Bryan T Horrigan, 'Reforming Law Reform's Engagement with the Academic Arm of the Legal Profession' (Paper presented at the Australasian Law Reform Agencies Conference, Port Vila, Vanuatu, 10–12 September 2008) 3, <http://ssrn.com/abstract=1448490>.

53 Australian Bureau of Statistics, above n 31.

54 Ibid 7.

55 Ibid 19.

4514 people working in offices of government solicitors or public prosecutors;⁵⁶ and 84,921 people working in more traditionally understood legal settings, referred to as ‘other’ legal services.⁵⁷

It is this latter category that is the subject of most of the literature on lawyers, but it should not be assumed that the lawyers in this group are homogeneous. For example, as already noted, many lawyers specialise in particular areas of law such as litigation, employment and labour law, tax law, corporate law or international law; and lawyers work in a variety of settings. The majority of lawyers work in private practice; some work in large commercial firms, but most are employed in small and mid-sized firms.

3 THE PROFESSION VERSUS BUSINESS DEBATE

In addition to the changes outlined above, there has been increased commercialisation of legal practice in recent years, bringing with it questions of whether law is still a ‘profession’ or whether it has become a business. Such questions go to the purpose of the practice of law.⁵⁸ However, before discussing the profession versus business debate, it is important to recognise that the Uniform Law dictates that only qualified lawyers or entities may engage in legal practice.⁵⁹ Section 6 of the Uniform Law defines ‘engage in legal practice’, ‘entity’ and ‘qualified entity’ as follows:

engage in legal practice includes practise law or provide legal services, but does not include engage in policy work (which, without limitation, includes developing and commenting on legal policy).

entity includes:

- (a) an individual, an incorporated body and an unincorporated body or other organisation; and
- (b) in the case of a partnership:
 - (i) the partnership as currently constituted from time to time; or
 - (ii) the assignee or receiver of the partnership.

...

⁵⁶ Ibid 24.

⁵⁷ Ibid 13; and the Law Council of Australia, above n 30.

⁵⁸ Joshua JA Henderson, ‘The Ethical Development of Law Students: An Empirical Study’ (2009) 72 *Saskatchewan Law Review* 75, 84.

⁵⁹ Uniform Law s 10.

qualified entity means:

- (a) an Australian legal practitioner; or
- (b) a law practice; ...

While these definitions are useful, a clear understanding of what it means to engage in legal practice and, in particular, to provide legal advice is still a focus of judicial comment, especially now that consumers can access legal information and documents on the web. For instance, in the case of *ACCC v Murray*,⁶⁰ the court held that if a provider, who does not hold a practising certificate, simply makes forms available for a consumer, then that would not be the provision of legal advice. However, if the provider helps the consumer select the appropriate form and assists by explaining terminology or in completing the form, then the provider would be considered to be breaching what is now s 10 of the Uniform Law.

Section 9 of the Uniform Law provides that the reservation of legal work for lawyers is required for the administration of justice and to ensure client protection, but protection of the public is not a universal rationale for such provisions. In the UK 'legal advice' does not feature in the list of reservations set out in s 12 of the *Legal Services Act 2007*. In the USA there are some very strong views expressed in relation to services offered on the internet. These views suggest that regulators should be focusing on how to best regulate online providers rather than shutting them down for unqualified legal practice, as their services are best viewed as innovative ways of providing access to justice.⁶¹

In Australia, however, the theme of 'protection of the public' runs throughout all of the legislation that regulates lawyers and extends to other restrictions: '[a]n entity must not advertise or represent, or do anything that states or implies, that it is entitled to engage in legal practice unless it is a qualified entity'.⁶² In addition, firms who intend employing disqualified or convicted people as lay associates must get approval from the Law Society or the Bar Association.⁶³ Criminal penalties apply in each case.

It could be argued that such legislation reinforces the view that law is a profession; this implies a recognition that the purpose of lawyering is to protect the public interest for the purpose of improving society and 'to help citizens maximise their legal rights (regardless of their economic power or commercial

60 (2002) 121 FCR 428, 448

61 Robert Ambrogi, 'Latest Legal Victory has LegalZoom Poised for Growth' (2014) *ABA Journal*, www.abajournal.com/magazine/article/latest_legal_victory_has_LegalZoom_Poised_for_growth.

62 *Ibid* s 11.

63 Uniform Law s 121. See definition of 'lay associate' in s 6 of the Uniform Law, and the definition of 'designated authority' in the *Legal Profession Uniform Law Application Act 2014* of NSW in s 11 and the *Legal Profession Uniform Law Application Act 2014* of Vic in s 10.

considerations)'.⁶⁴ These are rather different aims to those of a business, where the purpose of lawyering is considered 'in terms of its commercial opportunities (as a vehicle for maximizing client interests with a view to making money for both the client and the lawyer)'.⁶⁵

Whether the practice of law is rightly thought of as a profession or a business has ignited some considerable debate. By referring to a set of 'professional' attributes identified by Justice Gleeson, the Law Council of Australia argues that the practice of law is a profession, by which it means:

- [it involves] the exercise of some special skill not held by the general public, based on an organised body of learning, imparted systematically by an institution;
- members usually enjoy some form of exclusive right to provide their services to the public for reward;
- the profession avows obligations of service to the community, and the community accepts that such obligations constrain their pursuit of self interest;
- [members] are permitted, and actively pursue, a substantial degree of self regulation.⁶⁶

Similarly, Queensland's Chief Justice de Jersey, at an admissions ceremony for new practitioners, appealed to them to avoid being caught up in the:

busy-ness of modern practice, an unfortunate preoccupation with so-called 'billable hours', and the intensely competitive nature of the contemporary profession, [which] can shift the focus from measured professionalism to out and out commercialism.⁶⁷

Along similar lines, Justice Kirby asserts that '[t]he bottom line is that law is not just a business. Never was. Never can be so. It is a special profession. Its only claim to public respect is the commitment of each and every one of us to equal justice under law'.⁶⁸

Others take the midway view that law is a profession with commercial aspects to its practice. For instance, Justice Hayne has stated:

Both elements have always been present in the practice of the law—the self-abnegating pursuit of some higher ideal and the pursuit of commercial

⁶⁴ Henderson, above n 58, 84.

⁶⁵ Ibid.

⁶⁶ Justice Murray Gleeson, 'Are the Professions worth Keeping?' (Paper presented at the Greek Australian International Legal and Medical Conference, 31 May 1999), www.hcourt.gov.au/assets/publications/speeches/former-justices/gleeson/cj_areprofe.htm, cited in Law Council of Australia, above n 30, 120.

⁶⁷ Chief Justice Paul de Jersey, *Admissions Ceremony* (10 November 2003), <http://archive.sclqld.org.au/judgepub/2003/dj101103.pdf>.

⁶⁸ Justice Michael Kirby, 'Law Firms and Justice in Australia' (Paper presented at the Australian Law Awards, Sydney, 7 March 2002), www.hcourt.gov.au/assets/publications/speeches/former-justices/kirby/kirbyj_award.htm.

success. We cannot for a moment delude ourselves into thinking that the commercial element of practising law has emerged only recently. It has always been there. But the balance appears to have changed.⁶⁹

In a similar vein, Chief Justice Bathurst, recounting his discovery of early English textbooks on the recovery of costs, claims '[i]t was a stark reminder ... that legal practice has been a commercial enterprise from the time the first legal enthusiast charged money for what had previously been a gentleman's hobby'.⁷⁰ This latter view—that the practice of law is in reality a profession with commercial aspects—is an opinion widely supported by many leaders of the profession.⁷¹

For others, however, lawyering is seen to be primarily a commercial enterprise. For instance, an empirical study of legal practitioners in New South Wales found that participants considered themselves as primarily conducting a business:

regardless of the rhetorical flourishes from legal societies, lawyers are more interested in business orientation and not service orientation ... Social justice and public service are the least of their worries. They see these social values as unrealistic goals.⁷²

This finding is supported by an empirical study of Queensland legal practitioners. When asked whether they considered the practice of law a business or a profession, 75 per cent answered without hesitation that the practice of law is a business and that its focus is the generation of profit.⁷³ Interestingly, they did acknowledge that 'the public considers their firms as professions' and reasoned that 'they are justified in claiming to be a profession because they possess technical or expert knowledge'.⁷⁴

A Law Council report notes that there can be different views within the profession depending on context: it suggests that suburban practitioners cater to the personal needs of their clients, whereas larger firms mainly focus on commercial issues.⁷⁵ Empirical studies conducted in the UK and USA have found

69 Justice KM Hayne, 'Lessons from the Rear-View Mirror' (2002) 22 *Australian Bar Review* 1.

70 Chief Justice TF Bathurst, 'Commercialisation of Legal Practice: Conflict *Ab Initio*; Conflict *In Futuro*' (Paper presented at the Commonwealth Law Association Regional Conference, Sydney, 21 April 2012), http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Bathurst/bathurst_2012.04.21.pdf.

71 See, for instance, the Legal Services Commissioner for New South Wales, Steven Mark, 'Harmonization or Homogenization? The Globalization of Law and Legal Ethics—An Australian Viewpoint' (2001) 34 *Vanderbilt Journal of Transnational Law* 1173, 1174.

72 Roman Tomasic (ed), *Understanding Lawyers: Perspectives on the Legal Profession in Australia* (Law Foundation of New South Wales and George Allen & Unwin, 1978) 45, 48.

73 Lillian Corbin, *Redefining Professionalism in the Legal and Accounting Marketplace: An Empirical Study of Students, Graduates and Experienced Legal and Accounting Participants in South-east Queensland, Australia* (Lambert Publishing, 2010) 139.

74 *Ibid.*

75 Law Council of Australia, above n 30, 354–357.

a similar pattern. They have found that large firms dealing with corporations take a different approach to lawyering to lawyers servicing individual clients.⁷⁶ Wallace and Kay's study—which examined two work contexts, solo practitioners and law firm settings—proposes that the version of professionalism adopted by lawyers depends on the nature of the legal work undertaken, particularly with respect to dealing with corporate clients, and the importance the lawyer (or the lawyer's workplace) places on achieving a profit.⁷⁷ Hanlon suggests that this pattern exists because practitioners in large firms rely on entrepreneurial and managerial skills, and identify with the commercial interests of their clients. He suggests that '[t]hese are the values of business rather than the professions', whereas small firm lawyers 'appear to want to retain at least elements of the older form of professionalism'.⁷⁸

More recent empirical work supports the fact that corporate law firms, at least, are very business oriented. For instance, an Australian qualitative study, conducted by Bagust, of 50 lawyers who were employed by major commercial law firms in Melbourne found that corporate law firms are '(re) forming themselves into the image of the ever-merging, "big business" clients they serve; they operate on the basis that 'the client is always right', thereby diminishing lawyer autonomy,⁷⁹ and that 'lawyers are likely to find it more difficult to be able to adhere to professional and ethical principles that do not cohere with their client's objectives'.⁸⁰ Recognising that her study was conducted prior to the global financial crisis in 2007, Bagust referred to the 2010 study conducted by Eversheds, a London law firm, entitled 'Law Firm of the 21st Century: The Client's Revolution', where 130 general counsel and 80 partners of law firms were interviewed.⁸¹ She notes:

Inhouse lawyers are becoming far more powerful than they were before the downturn ... major law firms are placed under increasing pressure to redefine their role and their worth to their corporate clients ... [who are] now at the centre of the legal services solar system, and the major law firms in obedient orbit ...⁸²

76 See John P Heinz and Edward O Laumann (eds), *Chicago Lawyers: The Social Structure of the Bar* (Northwestern University Press, 1982); Gerald Hanlon, 'A Profession in Transition?—Lawyers, The Market and Significant Others' (1997) 60 *Modern Law Review* 798, 799.

77 Jean E Wallace and Fiona M Kay, 'The Professionalism of Practicing Law: A Comparison Across Two Work Contexts' (2008) 29 *Journal of Organizational Behaviour* 1021, 1043.

78 Hanlon, above n 76, 820–821.

79 Joanne Bagust, 'The Legal Profession and the Business of Law' (2013) 35(27) *Sydney Law Review* 27, 29.

80 *Ibid* 46.

81 *Ibid* 51.

82 *Ibid*.

3.1 The implications of the profession versus business debate for conduct

At the core of the debate as to whether lawyering is a business or a profession is the question of 'whether profit motivations compromise the core values and obligations of professional conduct'.⁸³ Definitions of professionalism focus primarily on the conduct that professionals should exhibit when dealing with their clients. Notions of traditional professionalism found in the Anglo-American model⁸⁴ are based in the view that professionals have special expertise, autonomy⁸⁵ and provide a service to the public. The model thus maintains that legal professionals will altruistically use their specialised knowledge and skills to advance the good of the community in preference to their own self-interest. In exchange for this altruism, they are given the privilege of self-regulation (autonomy).⁸⁶ A number of commentators have referred to this arrangement as a contract between the profession and society:⁸⁷

Perceiving a social need, and the profession's competence to handle it, the society negotiates a deal with the profession: the society will confer the benefits and privileges of a legal monopoly upon the group in return for a promise of public service, i.e., a promise to carry on professional practice in accordance with high standards of performance, for the public good.⁸⁸

In accordance with the contractual concept, Paterson suggests that both parties have their expectations and obligations. For instance, the profession (the lawyers' side) expects to be given high status, reasonable rewards, restraints on competition, and autonomy.⁸⁹ The monopolistic situation that results is granted 'as a sort of *quid pro quo*', with the profession providing competence, access to the legal system, a service ethic and public protection (the clients' side).⁹⁰ While describing the relationship between lawyers and society as contractual,

83 Bathurst, above n 70.

84 More specifically, Weisbrot, in 1990, suggests that professions in Australia are more closely aligned to those in the UK. For instance, he says that American jurisprudence, having its foundation in the writings of Roscoe Pound, sees law as more open and affected by its social environment—that is, as having its judgments influenced by moral, economic and other considerations—whereas the British are more prone to seeing law as a closed system in the positivist tradition: David Weisbrot, *Australian Lawyers* (Longman Cheshire, 1990) 9.

85 Rayman L Solomon, 'Five Crises or One: The Concept of Legal Professionalism, 1925–1960' in Robert L Nelson, David M Trubek and Rayman L Solomon (eds), *Lawyers' Ideals/Lawyers' Practices: Transformations in the American Legal Profession* (Cornell University Press, 1992) 146.

86 Russell G Pearce, 'The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar' (1995) 70 *New York University Law Review* 1229.

87 One academic calls the relationship a 'compact', a bargain with society. See Simon Longstaff, St James Ethics Centre, *The Lawyer's Duty to the Community*, <http://www.ethics.org.au/on-ethics/blog/march-1995/the-lawyers-duty-to-the-community>.

88 L Newton, 'Professionalization: The Intractable Plurality of Values' in W Robinson, M Pritchard and J Ellin (eds), *Profits and Professions* (Humana Press, 1983) 34.

89 Alan A Paterson, 'Professionalism and the Legal Services Market' (1996) 3(1–2) *International Journal of the Legal Profession* 137, 140.

90 Ibid.

Paterson asserts that there is ‘no assumption in this analysis that the balance between the two sides was a fair one, or that the parties to the “contract” were equally matched, or that the profession gave good measure for what it received in terms of the “bargain”’.⁹¹ However, the claim that legal professionals really strive to attain this ‘service ideal’—a ‘public interest’ goal—is now met with a certain amount of scepticism.⁹² Kritzer suggests that whatever the professional rhetoric:

few professionals are selfless actors seeking solely to advance their professional horizons or the well-being of humankind; professionals are workers who are engaged in an activity to earn a living. Professionals, like other workers, are concerned about both the size and the security of their livelihoods.⁹³

This view pervades the legal community according to Holmes et al.,⁹⁴ and Moorhead, Paterson and Sherr report that lawyers exhibit a significant decline in altruism over time.⁹⁵

Increasingly, firms face greater competition, and the trends towards incorporated legal practices (ILPs) and so-called ‘mega-firms’ (such as those created by the merger of Mallesons Stephen Jacques with Chinese firm King and Wood, and Blake Dawson’s merger with the international firm Ashurst LLP)⁹⁶ have brought with them further concerns about the pursuit of profit in the legal practice context. Yet, as Chief Justice Bathurst observes, ‘commercialisation is not inherently bad or evil; it is a different set of means and ends, which both complement and conflict with the means and ends of professional legal practice’.⁹⁷ There is broad acceptance that increased competition and informed consumers are driving professionals to offer services that are efficient, commercially aware, and economically profitable to clients.⁹⁸ This signifies a shift in the professions’ goal from ‘performing a task for the “public good” towards the concept of somebody doing their job “well or expertly”’⁹⁹ for the paying client.¹⁰⁰

91 Ibid.

92 William M Sullivan, ‘Markets vs Professions: Value Added?’ (2005) 134 *Daedalus* 19.

93 Herbert M Kritzer, ‘The Dimensions of Lawyer–Client Relations: Notes Toward a Theory and a Field Study’ (1984) 2 *American Bar Foundation Research Journal* 409, 413.

94 Vivien Holmes, Tony Foley, Stephen Tang and Margie Rowe, ‘Practising Professionalism: Observations from an Empirical Study of New Australian Lawyers’ (2010) 15(1) *Legal Ethics* 29, 33.

95 Richard Moorhead, Alan Paterson and Avrom Sherr, ‘Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales’ (2003) 37 *Law and Society Review* 765.

96 Bathurst, above n 70.

97 Ibid.

98 Gerard Hanlon, ‘“Casino Capitalism” and the Rise of the “Commercialised” Service Class—An Examination of the Accountant’ (1996) 7 *Critical Perspectives on Accounting* 339, 345.

99 Ibid 346.

100 Ibid 348.

Some writers, such as Hanlon, advocate that professionals should acknowledge that they¹⁰¹ now practise within this 'commercialised professionalism' paradigm.¹⁰² Hanlon observes that the skills for success within this paradigm are (a) technical ability; (b) managerial skill (the ability to balance budgets, manage the firm and satisfy clients); and (c) entrepreneurial skills (the ability to bring in business).¹⁰³ He suggests that a person's ability to bring in new business is the most prized skill as it has the most potential to create a profit and 'personal professional success is related to profitability, not to serving clients in need'.¹⁰⁴ Hanlon also suggests that new entrants to firms are, through the socialisation process, introduced to these attributes of professionalism and are particularly advised that those who are 'commercially aware' may one day 'make it to partner'.¹⁰⁵

Commercialised professionalism positions the provision of legal services in the market with other providers. Justice Spigelman critiques this view by comparing the traditional understanding of professionalism to the activities of the market. He suggests that a profession values historical traditions, whereas:

a market wakes up every morning with a completely blank mind ... a profession has an ethical dimension and values justice, truth and fairness. The market recognises self-interest and self-interest alone. ... the operation of a market gives absolute priority to a client's interest. A profession gives those interests substantial weight, but it is not an absolute weight.¹⁰⁶

Chief Justice Bathurst, in assessing the challenges to ethical practice brought by commercialism, recommends a two-step process. The first is to identify what remains constant: he identifies that professional duties (fidelity, candour, good faith, and public trust in the profession) 'remain steadfast', though their application may change in the contemporary environment. The second step is to engage in debate about how traditional ethical standards should be upheld and reinforced in the modern world.¹⁰⁷ His Honour observes a number of trends: that

101 This is particularly so in the corporate firms. Although Hanlon argues for a redefinition of professionalism towards a commercial-entrepreneurial approach, he still acknowledges that firms 'serving individual, non-influential clients and markets' are trying to adhere to the traditional understanding of professionalism; that is, one that is more social service minded: Hanlon, above n 76.

102 Gerard Hanlon, 'Professionalism as Enterprise: Service Class Politics and the Redefinition of Professionalism' (1998) 32 *Sociology* 43, 50.

103 *Ibid.*

104 *Ibid.*

105 Hanlon, above n 98, 349. It has been suggested that it is now naïve to consider technical skills as the determinant that defines merit for promotional purposes. See Donald C Langevoort, 'Overcoming Resistance to Diversity in the Executive Suite: Grease, Grit, and the Corporate Promotion Tournament' (2004) 61 *Washington & Lee Law Review* 1615, 1625. This author suggests that there are other factors that can be more highly valued, but ultimately the person who is promoted is one who recognises what is valued and accommodates those characteristics into his or her work practices.

106 Justice James Spigelman, 'The Value of an Independent Bench and Bar' (1998) 17 *Australian Bar Review* 105, 106.

107 Bathurst, above n 70, 4–5.

young lawyers in the new mega-firms may, in the pursuit of career advancement, be motivated to bill as much as possible, a practice that may conflict with duties to act in good faith, with honesty and in the best interests of the client; that the development of multidisciplinary ‘one-stop shops’ for services may generate a tendency to sacrifice ethical obligations in the pursuit of profit; and that some of the projects undertaken may be so large that lawyers, focusing only on a small aspect of the whole project, may fail to perceive ethical problems.¹⁰⁸ He also points to the rise of the litigation-funding industry—now worth \$50 million dollars a year and growing rapidly—and notes that litigation funders are motivated by profit but are not, as lawyers are, bound by notions of a duty to the court.¹⁰⁹ Nevertheless, the Chief Justice argues that ethics and professional conduct are dynamic, and that issues such as these need to be discussed and debated in open forums.¹¹⁰

3.2 The change environment

Whether one holds the view that commercialisation has always been part of the legal profession but is on the increase, or whether one holds the view that the rise of commercialisation is a new phenomenon, there can be no denying that the pressures of commercialisation are changing the ways in which lawyers relate to each other, to other professions and to clients. In Australia, the Federal Government’s adoption of a National Competition Policy in the 1970s resulted in changes to the regulation of lawyers which effectively labelled and treated the legal profession as just another group of businesses.¹¹¹ Economic benchmarks such as market efficiency and transparency now apply to the professions in an effort to erase any anti-competitive practices.¹¹² A study conducted in New South Wales in 1998 confirmed that this goal had been met, as it found that the legal profession is experiencing increased competition from ‘within the profession, from other professions, and potentially, global competitors’.¹¹³ This change in regulation and other factors—such as the introduction of new technologies and marketing practices—have caused legal practices to prioritise managerial, budgetary and entrepreneurial skills.¹¹⁴

108 Ibid 7–8.

109 Ibid 11.

110 Ibid 5.

111 Some of these investigations have resulted in reports. See Law Society of Western Australia, *Flexible Practice Structures for Lawyers: Position Paper* (Law Society of Western Australia, Perth, 1999); New South Wales Attorney General’s Department, ‘National Competition Policy Review of the Legal Profession Act 1987: Final Report’ 1998, www.lawlink.nsw.gov.au/report%5Clpd_reports.nsf/pages/ncpf_toc.

112 Anonymous, ‘Task Force Examines the Future Regulation of the Profession: Hilmer, TPC Reports Recommend More Competition’ (1993) 31(10) *Law Society Journal* 72.

113 John Gray, Philip King and Robin Woellner, ‘Facing Up to Change’ (1998) 36 *Law Society Journal* 44, 47.

114 Hanlon, above n 98, 50.

3.2.1 Technological Advance

The New South Wales Legal Profession's report 'The Future of Law and Innovation in the Profession' released in early March 2017 acknowledges the importance of technology.¹¹⁵

McGinnis and Pearce¹¹⁶ analysed the ways in which the practice of law will be changed by the rise in machine intelligence. Arguing that law itself is an information technology—a code that regulates social life—they assert that legal practice will soon face a great disruption:

Information technology has already had a huge impact on traditional journalism, causing revenues to fall by about a third and employment to decrease by about 17,000 people in the last eight years and very substantially decreasing the market value of newspapers. Because law consists of more specialized and personalized information, the disruption is beginning in law after journalism. But, its effects will be as wide ranging. Indeed they may ultimately be greater, because legal information is generally of higher value, being central to the protection of individuals' lives and property.¹¹⁷

As they observe, intelligent machines are better than humans in terms of performance and cost. Their increasing sophistication has 'enormous implications for every aspect of law—legal practice, jurisprudence, and legal education' and will ultimately serve to weaken lawyers' market power over the provision of legal services.

On the one hand, this means lawyers can increasingly 'deliver quality services at lower cost'.¹¹⁸ This possibility is explored by Hausman,¹¹⁹ who discusses the rise of virtual legal offices (VLOs). She argues that VLOs provide an additional mode of delivering legal services that can assist access to justice, and provide legal practitioners with a more flexible and less expensive mode of practice. In addition, the increased availability of information through the internet, and the introduction of related technology, enables clients, who are now quite educated consumers, to demand a different relationship with their lawyers. Some lawyers report that clients already demand 24-hour accessibility.¹²⁰ More generally, clients

115 Future Committee, The Law Society of New South Wales Commission of Inquiry, 'The Future of Law and Innovation in the Profession', (FLIP Report 2017), <http://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/1272952.pdf>.

116 John O McGinnis and Russell G Pearce, 'The Great Disruption: How Machine Intelligence will Transform the Role of Lawyers in the Delivery of Legal Services' (2014) 82(6) *Fordham Law Review* 3041.

117 *Ibid* 3041.

118 HM Kritzer, 'The Professions are Dead, Long Live the Professions: Legal Practice in a Post-professional World' (1999) 33 *Law & Society Review* 729.

119 Jordana Hausman, 'Who's Afraid of the Virtual Lawyers? The Role of Legal Ethics in the Growth and Regulation of Virtual Law Offices' (2012) 25 *Georgetown Journal of Legal Ethics* 575.

120 Law Council of Australia, above n 30, 33.

now expect to be treated in a more consultative and collaborative manner and, in particular, are demanding alternative pricing strategies, based on technology that can ‘capture time spent on making calls or emails on your handheld device straight into WIP [work in progress]’.¹²¹

The major law firms are embracing technology for its ability to reduce their costs, but new technologies bring new challenges, particularly in the areas of protection of confidential information, competency¹²² and courtesy. For instance, cloud computing is an increasingly popular means of file storage, although there are warnings about privacy issues,¹²³ and concern has been expressed about the use of email communication, both in terms of confidentiality and in terms of lawyer civility (discussed in Chapter 8, ‘Civility and Courtesy’).

Technological advance also has significant implications for legal education. Otey¹²⁴ argues that ‘a 21st-century legal education must prepare Millennial students to think critically about the ethical and interpersonal consequences related to their pervasive use of technology’. She notes that fewer ‘big law’ jobs are available to law graduates, so that more graduates will work in small firms, work for solo practitioners or work for themselves. They will increasingly rely on technology to organise and maintain their law practices, but currently legal education does not provide adequate training in this regard.

3.2.2 Corporate clients

All clients—individuals and corporations—are now more educated than in the past regarding their legal rights, although they have different demands.¹²⁵ Individual clients and small organisations may want a relationship with their lawyer, whereas larger corporations tend to see their lawyers as service providers¹²⁶ or supplying a commodity.¹²⁷ It has been suggested that these corporations, by virtue of their size, can pressure (and even bully) their lawyers into giving prominence

121 Brian Armstrong, ‘Adding Some Science to the Billing Debate’, *Australasian Law Management Journal*, January 2011, 15.

122 Erik Mazzone and David Ries, ‘A Techno-ethics Checklist: Basics for Being Safe, not Sorry’ (2009) 35 *Law Practice* 35, 35.

123 See James M McCauley, ‘Cloud Computing — A Silver Lining or Ethical Thunderstorm for Lawyers?’ (2011) 59 *Virginia Lawyer* 49; Thomas Margoni, Mark Perry and Karthick Ramachandran, ‘Clarifying Privacy in the Clouds’ (2011) 4 February, <http://ssrn.com/abstract=1755225> or <http://dx.doi.org/10.2139/ssrn.1755225>.

124 Brittany Stringfellow Otey, ‘Millennials, Technology, and Professional Responsibility: Training a New Generation in Technological Professionalism’ (2013) 37 *Journal of the Legal Profession* 199.

125 Hanlon, above n 76, 799. This author suggests that firms servicing large corporations are driven by the commercial-entrepreneurial understanding of professionalism, whereas those who act for individuals act in accordance with the social service version of professionalism. See also Heinz and Laumann, above n 76.

126 Kritzer, above n 118.

127 Hanlon, above n 76.

to commercial factors rather than legal concerns.¹²⁸ Hanlon suggests that these corporate clients 'shop around' and appoint different lawyers to handle different types of matters. He also quotes a company secretary of a large insurance firm who states that lawyers are evaluated in terms of whether the quality of their advice matches the price they are charging.¹²⁹ Most corporate clients are looking for efficient outcomes, rather than long-term relationships.¹³⁰ Whelan and Ziv¹³¹ are of the view that the rise of the corporate client needs to be addressed in future theories of lawyer professionalism. Noting the calls for lawyers to be guardians of corporate ethical responsibility, they observe that corporations are increasingly guardians of lawyers' ethical responsibility. Privatising professionalism appears to be the reality for large corporate clients.

3.2.3 Human resources

A firm's business strategies obviously have the potential to affect its human resources; for instance, in relation to the demands of competition generally and the firm's insistence on its members' achieving a particular level of billable hours.¹³² In fact, it is now the case that market mentality extends to assessing potential partners¹³³ and even existing partners with respect to their entrepreneurial abilities. Hanlon concludes that 'partnership is no longer for life',¹³⁴ and he identifies four functions that influence firm appointments:

- 1 Fee earning—has the candidate for partnership met their billing targets, do they consistently bill more than three times their salary, do they meet and exceed their chargeable hours target, and do they regularly keep on top of their unpaid bills?
- 2 Practice development—has the candidate brought in valuable new clients, do they take part in marketing activities (writing articles, presenting seminars, etc), do they display a positive attitude to client entertainment?

128 John Flood, 'During Business—The Management of Uncertainty in Lawyers' Work' (1991) 25 *Law and Society Review* 1, 41.

129 Ibid.

130 Deborah L Rhode, 'The Professionalism Problem' (1998) 39 *William & Mary Law Review* 298.

131 Christopher J Whelan and Neta Ziv, 'Privatizing Professionalism: Client Control of Lawyers' Ethics' (2012) 80(6) *Fordham Law Review* 2577.

132 See William Reece Smith Jnr, 'Professionalism and Commercialism in the Practice of Law' (Paper presented at the 9th Commonwealth Law Conference, Auckland NZ, 1990) 53. For an empirical analysis of the effect of billable hours, see Susan Saab Fortney, 'The Billable Hours Derby: Empirical Data on the Problem and Pressure Points' (2005–2006) 33 *Fordham Urban Law Journal* 171.

133 Lee refers to this as the 'tournament for partnership'. See R Lee, 'From Profession to Business: The Rise and Rise of the City Law Firm' (1992) 19 *Journal of Law and Society* 1.

134 Hanlon, above n 76, 811.

- 3 Management and development of staff—does the applicant get on with and motivate colleagues and staff, do they delegate work, and do they take part in training and evaluating staff?
- 4 Management—does the applicant demonstrate a willingness to participate in management, have they served in any managerial role, do they have any suggestions for improving the firm, do they follow firm procedures or do they act alone?¹³⁵

These business-oriented goals have been blamed for the fact that lawyers are feeling pressured and insecure.¹³⁶ It is now common to see practitioners defecting from one firm to another, and in some cases even ‘the defection ... of whole departments or groups ...’.¹³⁷

Of particular concern is the claim that, in many cases, lawyer stress and dissatisfaction result in high rates of mental illness, particularly anxiety disorders, depression, addiction and substance abuse among lawyers.¹³⁸ There is now an increasing volume of empirical research conducted on student and lawyer well-being that shows that law students and lawyers have much lower rates of well-being than other disciplines and professions.¹³⁹ Much has been done to raise awareness of this issue and a number of initiatives have been introduced to try to address the problem.¹⁴⁰

It seems, however, that the issue is complex and not susceptible to any single remedy. It does seem clear that the issue of lawyer well-being is related to legal professionalism and ethics in at least two ways.

First, direct links have been made between lawyer well-being and both workplace¹⁴¹ and professional behaviours. Krieger asserts that satisfaction and professional behaviour are manifestations of a well-integrated and well-motivated person; and that depression and unprofessional behaviour among law students and lawyers typically proceed from a loss of integrity—a disconnection from

135 Ibid 810–811.

136 Smith Jnr, above n 132, 53.

137 Ibid. The empirical work carried out by Frenkel, Nelson and Sarat reported on this phenomenon. See Douglas N Frenkel, Robert L Nelson and Austin Sarat, ‘Introduction: Bringing Legal Realism to the Study of Ethics and Professionalism’ (1998) 67 *Fordham Law Review* 704.

138 Norm Kelk, Georgina Luscombe, Sharon Medlow and Ian Hickie, *Courting the Blues: Attitudes Towards Depression in Australian Law Students and Legal Practitioners* (Brain & Mind Research Institute, University of Sydney, 2009).

139 James Duffy, Rachael Field, Kylie Pappalarado, Anna Huggins and Will James, ‘The ‘I Belong in the LLB’ Program: Animation and Promoting Law Student Well-being’ (2016) 41(1) *Alternative Law Journal* 52, 52.

140 See, for instance, College of Law, ‘Resilience@law’, <https://www.collaw.edu.au/learn-with-us/our-programs/practical-legal-training-programs/coursework/resilience> and the Council of Australian Law Deans, *Promoting Law Student Well-being: Good Practice Guidelines for Law Schools*, <http://www.cald.asn.au/assets/lists/Resources/Promoting%20Law%20Student%20Well-Being%20Good%20Practice%20Guidelines%20for%20Law%20Schools.pdf>. Most law societies now have confidential help lines for lawyers.

141 See, for example, P Baron and L Corbin, ‘Ethics Begins at Home’ (2016) 19(2) *Legal Ethics* 281.

intrinsic values and motivations, personal and cultural beliefs, conscience, or other defining parts of their personality and humanity.¹⁴² Krieger explains that lawyers:

who are deeply committed to their own values are less likely to pursue the values or desires of their clients with unethical or abusive tactics. ... [Conversely] an attorney who does the work primarily for the money or to bolster his image will be more frustrated with the process, less effective, and much less pleasant to work with (or against).¹⁴³

Krieger argues that a person's well-being 'results from experiences of self-esteem, relatedness to others, autonomy, authenticity, and competence'.¹⁴⁴ This argument is in line with definitions of well-being that emphasise that well-being extends beyond physical health:

Wellbeing is about more than living 'the good life': it is about having meaning in life, about fulfilling our potential and feeling that our lives are worthwhile ... our personal or subjective wellbeing is shaped by our genes, our personal circumstances and choices, the social conditions we live in and the complex ways in which all these things interact.¹⁴⁵

In recent empirical work conducted in the USA, Krieger and Sheldon¹⁴⁶ found that extrinsic motivations, such as money and status, did not contribute to the well-being of the lawyers in the study. Rather, factors such as autonomy, relatedness, self-determination and competence were important to well-being. This was borne out by the fact that the study found that lawyers in large firms and other prestigious positions were not as happy as public service lawyers; and that junior partners in law firms were no happier than senior associates, despite the better pay and higher status of the partners.

The second way in which the issue of lawyer well-being is directly related to legal professionalism and ethics is that mental disorders in lawyers have been directly linked to allegations of misconduct.¹⁴⁷ Mental health issues are thus increasingly important considerations in Australia in admissions proceedings and in misconduct matters. These issues are addressed throughout the book, but particularly in chapters 3 and 8.

142 Lawrence S Krieger, 'The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness' (2005) 11(2) *Clinical Law Review*, 425, 426.

143 Ibid 430.

144 Ibid.

145 Richard Eckersley, 'The Politics of Happiness' (2007) 93 *Living Now*, 6, www.richardeckersley.com.au/attachments/Living_now_happiness.pdf.

146 Lawrence S Krieger and Kennon M Sheldon, 'What Makes Lawyers Happy? A Data Driven Prescription to Redefine Professional Success' (2015) *George Washington Law Review* 554.

147 See further John Briton, 'Lawyers, Emotional Distress and Regulation' (Paper presented at the Bar Association of Queensland Annual Conference, 2009). Briton estimated that, as Legal Services Commissioner of Queensland, some 30 per cent of the complaints he received involved issues of lawyer mental health.

3.2.4 Marketing

Marketing has grown in importance in law firms in recent years. Marketing is defined as ‘the management process responsible for identifying, anticipating and satisfying customer requirements profitably’.¹⁴⁸ As Hodges¹⁴⁹ points out, in an increasingly competitive and globalised market place for legal services, most lawyers no longer have the luxury of waiting for business to come to them, and technical competence alone will not necessarily bring in new business or keep existing clients. Marketing is necessary to ensure firm survival. Yet the professional service firms, and particularly legal firms, were slow to accept the necessity for marketing and many law students still graduate without understanding that law is a business and that they will be expected to engage in the promotion and marketing of their firm.¹⁵⁰ For lawyers, marketing involves ‘getting the target client to want a meeting with them’.¹⁵¹ It is an increasingly recognised practice for large law firms to amalgamate or consolidate their practices for reputational or ‘brand name recognition’ purposes.¹⁵² But, as Hodges points out, marketing is now essential for all firms. She argues that, in order to market effectively, firms need to embed marketing in their firm culture, providing top management support, good marketing professionals, education, and a marketing structure within the firm.¹⁵³ Most importantly, she claims, ‘for marketing to succeed in a professional firm, every professional must participate and understand the competitive advantages of participating’.¹⁵⁴

3.2.5 Managerialism

As has been identified, the legal profession has experienced change because of the introduction of new technologies, human resources departments and marketing practices. These developments have necessitated the adoption of managerialism,¹⁵⁵ ‘a belief that good management is able to solve the problems of human service organisations, and make them more effective and efficient’.¹⁵⁶ In turn, this has

148 The Chartered Institute of Marketing is quoted in Neil A Morgan, *Professional Services Marketing* (Butterworth-Heinemann, 1991) 5.

149 Silvia Hodges, ‘I Didn’t Go to Law School to Become a Salesperson: The Development of Marketing in Law Firms’ (2013) 26 *Georgetown Journal of Legal Ethics* 225, 225.

150 *Ibid* 226.

151 Clifford J Ferguson, ‘“Selling” Professional Services: A Practical Approach—Part II’ (1996) 34 *Management Decision* 19.

152 Ward Bower, ‘Trends in the Legal Profession and Planning Implications for Law Firms’ (1998–2000) (out of print, held by author).

153 Hodges, above n 149, 260.

154 *Ibid*.

155 It should be noted that this is one of the elements of the new ‘commercialised professionalism’ paradigm discussed above.

156 Jim Ife, *Rethinking Social Work: Towards Critical Practice* (Longman, 1997) 16.

prompted the larger law firms to employ non-legal professionals to manage the firm.¹⁵⁷ Traditionally, professionalism was seen as an occupational principle distinct from other work organisation methods, including managerialism.¹⁵⁸ Where professionalism is often characterised by notions of public interest, collegiality, self-regulation and individual responsibility, managerialism is associated with bureaucracy, managerial control and dehumanising tendencies.¹⁵⁹

The implications of the trend towards managerialism were considered by Sommerlad over 20 years ago. Although legal practice may have required reform, she argued, managerialism had far greater potential impact, posing:

a reconceptualisation of both the notions of justice and what is meant by service, through a managerial ideology which, using the methods of accountancy, is ultimately concerned to cut costs by relativising the notion of quality as a concept which in turn gains meaning from the constituency for whom the commodity is intended.¹⁶⁰

At the time Sommerlad was writing, it was common for managing partners with no real business expertise to run Australian firms through partnerships.¹⁶¹ Today, contemporary legal practice in Australia for many lawyers is carried out in large global firms, which employ many practitioners across jurisdictions and where the working environment is bureaucratic.¹⁶²

A number of writers since Sommerlad have expressed concern about managerialism and its influence on legal practice. Dirks, for example, suggests that managerialism reduces lawyers' work to a mechanical process that allows the practice to 'be managed as a business. Each client ... is merely the raw material and the finished product is a completed file. It is imperative that the cost of completing the work is reduced to a minimum in order to achieve maximum profit'.¹⁶³ Other critics suggest that whatever theorists argue to be the benefits of managerialism, in reality it aims to cut costs, improve efficiencies and raise productivity under the pretence of worker 'participation and a climate of choosing options that take into consideration the interests of those involved'.¹⁶⁴

157 Hanlon, above n 76, 811.

158 Daniel Muzio and John Flood, 'Entrepreneurship, Managerialism and Professionalism in Action: The Case of the Legal Profession in England and Wales' in M Reihlen and A Werr (eds) *Handbook of Research on Entrepreneurship in Professional Services* (Edward Elgar, 2012): 369, 369.

159 Ibid

160 Hilary Sommerlad, 'Managerialism and the legal profession: a new professional paradigm' (1995) 2 *International Journal of the Legal Profession* 159, 181.

161 Law Council of Australia, above n 30, 105.

162 Muzio and Flood, above n 158, 369.

163 James Dirks, *Making Legal Aid Pay and Franchising Development* (Sweet and Maxwell, London, 1994) cited in Hilary Sommerlad, 'Managerialism and the Legal Profession' (1995) 2 *International Journal of the Legal Profession* 172.

164 H Braverman, *Labour and Monopoly Capital: The Degradation of Work in the Twentieth Century* (Monthly Review Press, 1974) cited in Sommerlad, *ibid* 172.

All of these factors have changed the way that firms operate and ultimately affect the practitioners working within them, particularly in their dealings with clients. However, it has been argued that competitive pressures alone do not determine the character of an organisation. Individuals ultimately make their own choices about how they will conduct themselves.¹⁶⁵

CONCLUSION

In summary, we have suggested that the fundamental characteristic of lawyering is problem solving and that this occurs across a number of dispute resolution locations and in a variety of workplaces, including private law firms, corporate organisations and government departments. We have also noted that the legal practice environment has changed markedly as a result of factors such as technological advances, well-educated clients and the expectation of instant communication. Such changes have raised the question of whether law is now a business or a profession. In other words: is legal practice now operating under the commercialised professionalism paradigm, rather than the traditional understanding of what it means to be a lawyer? We suggest—particularly in the chapters on ‘Service and Access to Justice’ (Chapter 9) and ‘Fidelity to the Law’ (Chapter 4)—that the future of the legal profession ultimately depends on how individual lawyers choose to carry out the task of lawyering. This is a question that each individual lawyer must decide given their personal goals, and subject, of course, to the culture of their workplace; these matters are discussed in the next chapter, ‘The Framework of Lawyering’.

165 Michael J Kelly, ‘Thinking About the Business of Practicing Law’ (1999) 52 *Vanderbilt Law Review* 985.