

Public Obligations

Introduction

This title investigates one specific aspect of professional obligation – the professional's obligation to the public interest. Professional public interest obligations are often contrasted with the ethos of business, which is focused primarily on profit. The public interest obligation is considered an essential part of the concept of profession. It is a reason for the greater status given to professions than that of business or of mere technical service. This paper has the following parts:

- The Professional's Obligation to the Public Interest
- Mechanisms for Compliance.

The Professional's Obligation to the Public Interest

While much of the focus of the professions relates to dealing with clients, it is the professional's obligation to act in the public interest. This has historically given them an elevated status in society. Doctors work to maintain the health system and hospitals and engender confidence in the sector. Lawyers similarly are an essential part of maintaining the court and justice system. The engineer's role is to ensure the safety of and public confidence in buildings and constructions. In contrast, the primary purpose of business is to make a profit, with no express duty to the welfare of society.

The distinction between professions and business, however, is not entirely clear. Professionals operate practices as businesses that need to make a profit, or they practice in-house in corporations and are subject to their employers' business demands.¹ Further, the clients of professionals are often businesses, whose focus on profit must remain a major factor in the professional's advice. Conversely, non-professional occupations and businesses can operate with an ethical public agenda. They can offer ethical products and services to distinguish themselves from their competition. As an example, investment managers now offer socially responsible investment funds, which avoid questionable industries such as tobacco.

Banking is another industry that straddles the line between profession and business.² It has a clear public interest purpose in maintaining a stable and functional financial system, and bankers were, at least once, seen as stewards of the community.³ However, since the global financial crisis, the banking industry has fallen from grace.⁴ This is blamed in part on the unethical behaviour of the banks, followed by further scandals involving the illegal manipulation of interest rate indexes and conflicted financial advice to consumers. Because of this, banking now cannot justify, if it ever could, any potential claim to be a

¹ See Hugh Breakey and Charles Sampford, 'The Ethical Responsibilities of Employed Professionals in Public Service and Private Enterprise: Dilemma, Priority and Synthesis' (2017) 40 *University of New South Wales Law Journal* 262.

² See, e.g., Dimity Kingsford Smith, Thomas Clarke and Justine Rogers, 'Banking and the Limits of Professionalism' (2017) 40 *University of New South Wales Law Journal* 411.

³ See Ross Buckley, 'The Changing Nature of Banking and Why It Matters' in Ross Buckley, Emiliios Avgouleas and Douglas Arner (eds), *Reconceptualising Global Finance and Its Regulation* (Cambridge University Press, 2016) 9.

⁴ Ross Buckley, 'The Changing Nature of Banking'; Kingsford Smith, Clarke and Rogers, above n 2.

profession.⁵ This is notwithstanding the banking industry having codes of conduct⁶ and, more recently, banking oaths.⁷ The lack of influence these codes and oaths have can be attributed in part to poor mechanisms for compliance, an issue discussed further below.

The importance of professional ethics and especially the public interest obligation was the focus of Emile Durkheim in the late 1800s in his seminal work, *Professional Ethics and Civic Morals*.⁸ During the industrialisation of Europe with concerns about the breakdown of the pre-existing societal structure, Durkheim saw the professions as a bulwark of ethical stability in an increasingly fragmented and disrupted society: 'it is imperative that there be special groups in the society, within which these morals may be evolved ... [W]hilst common morality has the mass of society as its sole substratum and only organ, the organs of professional ethics are manifold'.⁹

In the 1950s, the leading American legal scholar, Roscoe Pound, reaffirmed this mindset, describing professions as 'a group pursuing a learned art as a common calling in the spirit of public service – no less a public service because it may incidentally be a means of livelihood'.¹⁰

In the late 1970s however, there developed a critique of the role of professions. Magali Larson, in *The Rise of Professionalism*,¹¹ viewed the professions through the lens of neo-liberal capitalism, seeing the control of power and privilege that the professions enjoy as a form of market monopolisation.¹² She developed the idea of the 'professional project', a self-interested process of controlling and maintaining a collective social status. She labelled the professions 'monopolies of competence and sheltered markets',¹³ viewing them as opposing the neo-liberal ethos that competition is what ultimately most benefits the economy and society. As a case study, she described the medical profession as dealing in medicine as a 'commodity' to be controlled and profited from in the 'medical market'.¹⁴

In the 1990s, Keith Macdonald in *The Sociology of the Professions* acknowledges the professions' long tradition of protecting the public interest. He also highlighted government's increasing intervention in, but also support of, the professions.¹⁵ He outlined the way that the social exclusivity that the professions continue to enjoy relates to social stratification, patriarchy and the monopoly of knowledge.¹⁶

⁵ Kingsford Smith, Clarke and Rogers, above n 2.

⁶ See, e.g., Australian Bankers' Association, *Code of Banking Practice* <<http://www.bankers.asn.au/industry-standards/ABAs-code-of-banking-practice>> (accessed on 31 July 2017).

⁷ See, e.g., Banking and Finance Oath, *The Oath* <<http://www.thebfo.org/The-Oath>> (accessed on 31 July 2017).

⁸ Emile Durkheim, *Professional Ethics and Civil Morals* (Cornelia Brookfield trans, first published posthumously 1957, Taylor and Francis, 2003 ed) [trans of: *Leçons de Sociologie Physique des Moeurs et du Droit*].

⁹ Emile Durkheim, *Professional Ethics*, 7.

¹⁰ Roscoe Pound, *The Lawyer from Antiquity to Modern Times* (West Publishing, 1953) 5, as cited by Justice James Allsop, 'Professionalism and Commercialism: Conflict or Harmony in Modern Legal Practice?' (2010) 84 *Australian Law Journal* 765.

¹¹ Magali Larson, *The Rise of Professionalism: A Sociological Analysis* (University of California Press, 1977).

¹² Magali Larson, *A Sociological Analysis*.

¹³ Magali Larson, *The Rise of Professionalism: Monopolies of Competence and Sheltered Markets* (Transaction Publishers, 2013).

¹⁴ Magali Larson, *Monopolies of Competence*, 19-20.

¹⁵ Keith Macdonald, *The Sociology of the Professions* (Sage, 1995).

¹⁶ Keith Macdonald, *The Sociology of the Professions*.

More recently, Christine Parker and others have focused on how the interaction between government and the professions plays out in a 'regulatory bargain'. There the government is willing to limit its intervention if a profession can show its ability to self-regulate, often engaging the professional association as a co-regulator.¹⁷ Focusing on the legal profession, Parker considers how professionals can develop different interpretations of their public interest obligations. She identifies four approaches a lawyer might take: as 'adversarial advocate', 'responsible lawyer', 'moral activist' or 'ethics of care' lawyer.¹⁸

The adversarial advocate sees the lawyer's role as solely to 'advocate client's interests as zealously as possible within the bounds of the law', with the public interest obligation having a minimal role. The responsible lawyer wants 'to ensure integrity of and compliance with the spirit of the law ... [and] act as gatekeeper of law and advocate of the legal system against the client'. The moral activist sees their role as 'to make the law more substantively just (in the public interest) ... [and] seek to persuade clients of the moral thing to do'. Finally, the ethics of care lawyer believes that developing an in-depth relationship is what best serves the public interest.¹⁹ She notes there can also be a conflict between the public obligation to the court system and an obligation to the public more generally. The commitment to the administration of justice potentially exerts a conservative presence over what might otherwise be the more liberal internalised personal ethics of a lawyer.²⁰

Figure 1: Four Approaches to the Lawyer's Public Interest Obligation

Adversarial Advocate	Advocates client's interest exclusively with little regard for any possible public obligation other than legislated obligations
Responsible Lawyer	Insures integrity to the spirit of the law, thus promoting the public interest
Moral Activist	Makes the law more just through law reform and aims to influence the client to take similar moral view
Ethics of Care Lawyer	Develops an ongoing relationship with the client based on trust to benefit the public interest

Mechanisms for Compliance

Any claim to professional ethics including the public interest obligation, however, will be hollow without mechanisms for compliance. Banks, for example, may have a code of conduct²¹ and now even an oath.²² If there is little way of ensuring compliance, any claim to professional ethics will be limited. It is the support structures and individual internalisation of those ethics that is the key. For modern professions, there are several mechanisms to enforce or at least encourage compliance: government requirements, professional

¹⁷ Christine Parker, 'Regulation of the Ethics of Australian Legal Practice: Autonomy and Responsiveness' (2002) 25 *University of New South Wales Law Journal* 676; Christine Parker, Tahlia Gordon and Steve Mark, 'Regulating Law Firm Ethics Management' (2010) 37 *Journal of Law and Society* 466.

¹⁸ Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 2nd ed, 2014) ch 2, 32.

¹⁹ Christine Parker and Adrian Evans, *Inside Lawyers' Ethics*.

²⁰ Christine Parker and Adrian Evans, *Inside Lawyers' Ethics*, 38-9.

²¹ See, e.g., Australian Bankers' Association, *Code of Banking Practice*, above n **Error! Bookmark not defined.**.

²² See Banking and Finance Oath, *The Oath* <<http://www.thebfo.org/The-Oath>> (accessed on 31 July 2017).

association rules, discipline and support, a professional oath, professional norms, on-the-job training and mentoring, and peer pressure.

Figure 2: Mechanisms for Compliance



Government Requirements

Most professions today are subject to some form of government regulatory regime. NSW Lawyers, for example, are regulated by the *Legal Profession Uniform Law* and Australian doctors, by the *Health Practitioner Regulation National Law*. Such regimes are typically extensive and codify many of the pre-existing professional association obligations. There is some debate as to whether such obligations should be considered professional obligations given they are no longer exclusively ‘civil society’ requirements. There is no doubt they still make up many of the public interest obligations for the professions. For example, the *Legal Profession Uniform Law* and its associated Rules require a lawyer to ensure their paramount duty is to the court over and above the duty to the client. They must also be a ‘fit and proper person’, act with civility and respect, avoid any compromise to their integrity and professional independence. They must also act with independence and without bias in court, not deceive the court and make responsible use of court process and privileges.²³

²³ *Legal Profession Uniform Law Australian Solicitors’ Conduct Rules 2015* (NSW) rr 3, 5, 4.1.2, 4.1.4, 19.1, 21.

Professional Association Rules, Discipline and Support

Traditionally, it was the professional association that imposed ethical obligations, including public interest obligations, on a profession. It did this through formal rules or a code of conduct. It enforced those requirements on its members, when usually being an association member was essential, or at least highly valuable, to practice. In professions today, this is largely still the case. NSW solicitors, for example, still must obtain their practicing certificate from the Law Society of NSW. Because of this monopoly or near monopoly, professional associations have significant clout in influencing compliance. This ranges from minor disciplinary sanctions through to expulsion in severe cases of professional misconduct. The Australian Medical Association's code of conduct for doctors includes numerous public interest obligations in areas such as teaching and mentoring. It includes medical research, working within the health care system, using resources wisely, public health advocacy and giving expert evidence in court.²⁴ Similarly, Engineers Australia's code of ethics has numerous public interest obligations, requiring members to:

Respect the dignity of all persons ... Promote sustainability ... Engage responsibly with the community and other stakeholders ... Practise engineering to foster the health, safety and wellbeing of the community and the environment ... Balance the needs of the present with the needs of future generations.²⁵

The two major professional associations in Australia for accountants, CPA Australia and Chartered Accountants Australia and New Zealand, require their members to comply with an extensive joint code. This contains numerous public interest obligations and there is an Accounting Professional and Ethical Standards Board to oversee administration of the code.²⁶

Professional associations can also play a proactive, supportive role in assisting with public interest issues. The Law Society of NSW, for example, has established a dedicated Ethics Unit, which offers assistance to members, including a dedicated Ethics Assistance Line, on ethical issues confronting them and has published numerous Protocols and Guidelines.²⁷

Professional Oath

Another way of influencing compliance is through the professional oath. While there is often no formal mechanism for enforcing the oath, its moral weight and normative effect can still be strong. Ideally this should see internalisation of ethical norms and a sense of duty, particularly on new entrants to the profession. The oath for NSW lawyers, for example, requires entrants to swear: 'I will truly and honestly

²⁴ Australian Medical Association, *Good Medical Practice: A Code of Conduct for Doctors in Australia*, i-ii <https://ama.com.au/sites/default/files/documents/AMC_Code_of_Conduct_July_2009.pdf> (accessed on 31 July 2017).

²⁵ Engineers Australia, *Code of Ethics* (28 July 2010) <<https://www.engineersaustralia.org.au/ethics>> (accessed on 31 July 2017).

²⁶ CPA Australia, *Accounting Professional and Ethical Standards* <<https://www.cpaaustralia.com.au/professional-resources/accounting-professional-and-ethical-standards>> (accessed on 31 July 2017).

²⁷ Law Society of NSW, *Ethics* <<https://www.lawsociety.com.au/ForSolicitors/professionalstandards/Ethics/index.htm>> (accessed on 31 July 2017).

conduct myself in the practice of a legal practitioner of the Supreme Court of New South Wales and I shall faithfully serve as such in the administration of the laws and the usages of that State'.²⁸ The Australian Medical Association has adopted a modern variant of the historical Hippocratic Oath, called the Geneva Declaration, which includes public interest obligations: 'I solemnly pledge to consecrate my life to the service of humanity; ... I will practice my profession with conscience and dignity; ... I will maintain, by all the means in my power, the honour and the noble traditions of the medical profession'.²⁹

Professional Norms

Professional norms are often incorporated into professional association rules and government regulatory requirements. However, norms can also transcend written requirements and can be found in a spirit or ethos of how the profession lives its professional ethics in daily professional practice. As such, ethical norms are in a tangible way fundamental to professional compliance with their public interest obligations.

On-the-job Training and Mentoring

On-the-job training and mentoring is a usual aspect of early professional life. It is what instils into new professionals how ethics, including public interest obligations, should apply in everyday practice. In later years, there is usually also an obligation to complete continuing education in each year of practice. Australian doctors, for example, generally must complete 50 hours of continuing professional development each year, while lawyers normally complete 10 hours³⁰ and accountants, 20 hours,³¹ with public ethics being a mandatory component.

Peer Pressure

Finally, peer pressure is a further mechanism for ensuring compliance by professionals with their public interest obligations. Peers can ostracise or shame a professional who has not conducted themselves properly. This may be particularly for breaches of public interest and thus can have the greatest impact on the image and status of the profession.

²⁸ *Supreme Court Rules 1970* (NSW) sch F Form 70AA.

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³⁰ Medical Board of Australia, *Registration Standard: Continuing Professional Development* (1 October 2016); Law Society of NSW, *Continuing Professional Development* <<https://www.lawsociety.com.au/ForSolicitors/practisinglawinnsw/mclecpd/index.htm>> (accessed on 31 July 2017).

³¹ CPA Australia, *Continuing Professional Development* <<https://www.cpaustralia.com.au/member-services/continuing-professional-development>> (accessed on 31 July 2017).

Summary

The obligation to the public interest is perhaps the most important distinguishing factor between professionals and non-professional occupations. It distinguishes the professions from general business endeavours. These public interest obligations have traditionally given the professions special status and privilege. However, over the past few decades, this idea has been critiqued with the argument that the professions are acting primarily to perpetuate monopolies. There have also been debates over what role government should play in the 'regulatory bargain' with the professions and analysis of the many ways individual professionals might interpret and internalise their concept of the public interest.

As important as the substance of the public interest obligations, are the mechanisms influencing and enforcing their compliance. These include government requirements, professional association rules, professional oaths, professional norms, on-the-job training and peer pressure. It is arguably the effectiveness of these compliance mechanisms that distinguish the true professions from those occupations merely aspiring to that status.

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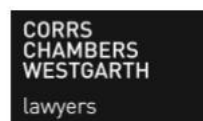


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