

THE VALUE OF CONTEMPORARY PROFESSIONAL ASSOCIATIONS

Report researched and
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Law



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**THE LAW SOCIETY
OF NEW SOUTH WALES**

FOREWARD

BETWEEN THE MARKET AND THE STATE: PROFESSIONS AND THE VALUE OF THEIR ASSOCIATIONS



This report was commissioned by the Professional Standards Councils (PSC), which is a statutory regulator of professional associations and through them, of professions. The report is part of a three-year program of research on the condition and challenges

of modern professions, funded by an Australian Research Council Linkage Grant, with the PSC and other organisations. With researchers from four Universities, the program of research was conducted out of the Centre for Law Markets and Regulation at UNSW Law.

Produced by Dr Justine Rogers and Deborah Hartstein, UNSW Law, this report answers the most difficult in a series of questions tackled within the program. Put simply, the report provides answers to the questions: ‘What is the value of professional associations to the good that professions do?’

‘And what do professional associations achieve that state regulation or leaving it to the market alone could not?’

Governments have a clear interest in answers to these questions. The interest of governments is in the work of professional associations that directly and indirectly protects consumers of professional services and supports the advancement of that profession as a whole. This protection is clearest in association standard setting and continuing training for competent, productive, ethical and empathic professional service delivery. It is also clear in professional associations’ work to deal with consumer complaints and discipline their members. Through a robust association – and this report investigates what this means - consumers get better advice and service, and government is saved from the expense and distraction of professional regulation and discipline. This saving may be partial because of co-regulation with government, but it is often the case that professional associations discipline the most serious cases and as this report shows, can be very tough on fellow-professionals. For the public, professions’ association-led pro bono work, and their contributions to public policy, legislation and its administration, is valued in the tens if not hundreds of millions every year.

When sectors are called on to be ‘more professional’ because of poor conduct or low public service commitment, it may be these associational contributions and associations’ general support for professionals that is missing.

However, as this report reveals in vivid detail, professions and their associations are in the process of immense change. In many ways, these social, political and business changes would indicate a greater role for associations than ever before, as critical bodies to guide professionals through these transformations. For example, professional work is becoming more technologically-supported (and, in some areas, threatened). Technological advances range, across professions, from materials science (engineering professionals) through information and communication technologies (virtually all professions, used by some such as medicine in startling ways) to technologies of data analysis, risk management and automated contracting (accounting and law). Associations could lead the way here, as ‘first-adopters’, standard setters and continuing educators. However, forces like globalisation, and the rise of the workplace as the professional’s primary site of professionalism, are unsettling the capacity of associations to maintain their collective influence.

This report explains what these challenges mean for professions and professionals, and provides strategies associations might pursue to maintain their relevance and legitimacy in the face of these changes.

Of course, in trying to single out what an association does compared to the market and state, the Report has to deal with their complicated status. Professional associations do their work as part of civil society between the market and the state, but they also work with the market and the state.

Most readers of this report will know that professional associations provide, or seek to provide, communities of practice to support professionals’ ethical obligations to clients and their public interest service. Inherently ‘unmeasurable’, these ethical and public regarding service obligations reflect civil society expectations of which associations are prominent promoters. Readers will also know that ethical obligations are now also part of statutory regulation of professions and enforcement by state agencies. However, while this is true, and the PSC itself is a statutory regulator, neither state requirements nor civil society ethics work best alone. A strategic combination of ‘external’ regulation and ‘internal’ ethical motivation is the most effective way to govern behaviour. Associations add value, or can add value, by promoting ethical practice and identity amongst a group of professionals who choose to share those values. Associations and professionals are also part of the market. Market competition, price-setting, entrepreneurial opportunity and risk taking apply to professional practices and non-professional businesses alike.

Associations have traditionally relied on a monopoly over professional services to temper overly commercial practices being adopted by professionals and their firms, which may erode professional values. In a competitive, de-regulated environment, including where association membership is no longer mandatory, associations must continue, and are continuing, to pursue these aims but in different ways. For example, aligned with the PSC's objects, associations are doing more to educate their members about good business practices including risk management.

Associations have, regarding large professional firms, placed obligations on the practice entity, not only on the individual professional.

Measuring or evaluating the value of professions and their associations, is like calculating the value of government. First, it requires comparison of current government with an unthinkable alternative – life with no government at all. An alternative which Hobbes warned would not only be 'nasty, brutish and short' but lived alone, in poverty and in continual fear. Second, measuring the material value of government is possible, but that is only part of what government offers. We prize the life- chances accorded by the meta-physical and immeasurable qualities of freedom, liberty and the social nature of consent to being governed. They are the social anti-dote to Hobbes' continual fear and isolation.

Like the value of government, the value of professional associations involves both the material and the meta-physical. Just like government, measuring the value of professions without a counter-factual is impossible. Putting a dollar value on professional ethics likewise misses the target.

However, it is possible to provide a model for the identification and evaluation of the contributions professional associations make, and this is what this report does. In the modern world where metrics sometimes distract from true value, this report provides a method for thinking about and demonstrating the material, meta-physical and social value of professional associations. With the authors, my hope is that the report will be a model that different professions apply and adapt to their own contexts to identify and demonstrate the value of a wide variety of professional associations - and the good that professions do.

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TABLE OF CONTENTS

<i>06</i>	• THE VALUE OF CONTEMPORARY PROFESSIONAL ASSOCIATIONS
<i>12</i>	• INTRODUCTION THE REGULATORY CHALLENGE: ASSOCIATIONS, The State or the Market?
<i>36</i>	• PART II: REGULATORY FUNCTIONS: VALUE AND CHALLENGES
<i>74</i>	• PART III: FINDINGS REPRESENTATIVE, COMMUNITY AND MEMBERSHIP FUNCTIONS – VALUE AND CHALLENGES
<i>92</i>	• PART IV: FINDINGS POSITIVE ATTITUDES AND BELIEFS ABOUT ASSOCIATIONS
<i>101</i>	• PART V: FINDINGS NEGATIVE ATTITUDES AND BELIEFS ABOUT ASSOCIATIONS
<i>106</i>	• PART VI: CONCLUSION AND RECOMMENDATIONS
<i>115</i>	• APPENDICES

THE VALUE OF CONTEMPORARY PROFESSIONAL ASSOCIATIONS

EXECUTIVE SUMMARY

i. Introduction

This Report was commissioned by the Professional Standards Councils ('PSC') and the Australian Research Council to examine the value of professional associations in the regulation of professions and professional services. Professional associations are member organisations comprising practitioners in a profession. The Report provides theory-driven standards of excellence as recommended benchmarks, cautionary guidance, and action points for associations and other bodies to use to assess, improve and promote their effectiveness in their roles.

Professions – like law, medicine and pharmacy, accounting and financial services, architecture and engineering – are prominent institutions across the world and at all levels of society. Governments must continuously ask how trustworthiness in professional services can best be obtained, and how high standards of competence, ethicality and commitment among professionals can be assured. This Report asks what role professional associations should play, and are able to play, in this professional regulation.

The Report details the multiple roles of professional associations, in service of their four stakeholders: the state, the public, the profession, and the members. It assesses the shared aspects and tensions of this combined role. To set the stage, the Report outlines the historical justifications for professional associations and their roles. It analyses those justifications by reference to competing theoretical accounts from 20th and 21st century scholarship. Building on that framework, the Report looks to the present and the future, and considers the added challenges to associations presented by environmental factors, such as increased influence of government and the professional's workplace.

ii. Research

The Introduction sets out the context of the Report and establishes the urgency of the questions it asks. It provides theoretical graphs for readers to better understand the current position of associations as well as their strengths and weaknesses compared to other, state or market, regulatory approaches.

GOVERNMENTS MUST CONTINUOUSLY ASK HOW TRUSTWORTHINESS IN PROFESSIONAL SERVICES CAN BEST BE OBTAINED, AND HOW HIGH STANDARDS OF COMPETENCE, ETHICALITY AND COMMITMENT AMONG PROFESSIONALS CAN BE ASSURED.

The Report then presents the findings of a comprehensive literature review of studies of professional associations in a variety of global contexts, and an in-depth interview study of members and leaders of the Law Society of New South Wales ('the Law Society'). The Law Society is used as a prototype to demonstrate how this type of inquiry could be extended to other professional associations and professions.

iii. Findings

The Report uses an adapted model of associational excellence, which associations and others (oversight bodies, researcher groups, etc) can use to assess their own activities. The findings are organised to assess whether associations perform – or are capable of performing – their regulatory functions to the standard of a highly performing regulatory body.

The Report also analyses associations' non-regulatory functions – their representative and membership functions – to allow an assessment of whether these functions are compatible with and/or beneficial to associations' regulatory roles.

Some key findings in each of these areas are set out below:

A. SUMMARY OF FINDINGS: REGULATORY ROLES

1. Responsibilities and functions

- a. **Standards and education:** Associations' formal education programs and publications can be a key benefit of membership, particularly for regional practitioners and those without in-house education options. However, associations can struggle to maintain the quality and relevance of their offerings, particularly in the face of technological change and growing managerial and business pressures.
- b. **Codes of ethics and conduct:** Formal codes can shape members' behaviour and help them navigate relationships with clients and peers. Associations may lose or lack control over the content of these codes and thereby lose the ability to formally maintain their professional values. Codes alone cannot guarantee ethical or competent practice.
- c. **Promoting self-regulatory behaviour:** Associations' communications, publications, ethics guidance and wellbeing services, networking opportunities and mentoring programs provide members with access to formal and informal professional support. They also provide members with valuable exposure to the broader profession and its driving ideals and commitments centred on individual responsibility and public service. However, associations are not the sole source of these services and their activities and ethos may not reach or may be of little value to some members.
- d. **Competence and conduct:** Associations can expertly, efficiently, independently and impartially discipline members. They may be 'tougher' than other regulators because they must maintain the profession's reputation and legitimacy. However, in some cases, self-regulation via associations may be, or appear to be, partial and biased.
- e. **Registration and certification:** Associations' maintenance of registers of practitioners and provision of meaningful certification can benefit members' careers, as well as providing a resource for the public and guaranteeing professional standards at registration or renewal. However, associations may struggle to maintain the rigour of their renewal procedures and certification may in itself be irrelevant and/or burdensome for some practitioners.

2. Legislation advocacy and responsiveness

- a. **Interpreting legislation:** Associations can interpret changes in legislation to provide useful updates for members, the government, and the public. However, if legislation conflicts with the association's or profession's own interest, associations may struggle to maintain impartiality in interpretations.
- b. **Advocacy:** Associations' comments on law reforms can protect the public and represent its interests to the legislature. Internal divisions within associations can make this role difficult to perform.
- c. **Responsiveness:** Associations can work with external bodies to set and maintain standards aligned with the public interest and broader industry and social contexts. Consultations by association leaders and their committee structures can allow for beneficial outside influence and collaboration. Nonetheless, associations may not regularly consult with outside bodies or the public in their activities and may miss the opportunity for greater understanding of their needs.

3. Organisational and internal governance

- a. **Board governance:** Associations may ensure confidence in their boards or councils by conducting regular elections for council members. However, maintaining members' knowledge of and participation in these elections can be a significant challenge for associations.
- b. **Business processes:** Associations can liaise and co-operate with other regulators and bodies (including in co-regulatory arrangements) to ensure the alignment of their processes with external procedures. However, associations must rely on members' volunteerism and membership fees as significant resources, and this reliance can be vulnerable to sudden dips in those resources.

4. External governance and public accountability

- a. **Accountability and transparency:** Associations can provide information – via websites and other communications – to ensure public accountability and transparency, and to maintain their members' trust. Despite this capacity, the public and government often lack knowledge and understanding of associations and their roles, and can be perceived to have negative opinions of associations.

B. SUMMARY OF FINDINGS: COMMUNITY AND MEMBER FUNCTIONS

1. Representative and Member Functions

- a. **Representation:** Associations can lobby and advocate for members' interests to outside groups, utilising collective action advantages to act as 'spokesperson' where members alone might struggle. Associations can promote equality and diversity within the profession. Because members' views diverge, associations can struggle to adopt a unified collective voice when representing members.
- b. **Collective identity, inclusivity and symbolic community:** Associations facilitate community-forming and provide members with a sense of belonging, in turn benefitting their professional and personal lives. Associations can actively promote inclusivity of different member groups and demographics across the profession. Members' motivations, needs and attitudes can differ and associations' activities may not necessarily benefit or be of interest to all members equally.

2. Community and member function

- a. **Mediator of change:** Associations can act as intermediaries through their relationships with the profession, the public and the arms of government. Associations can use these connections and their focal role as a means of preparing members for broader changes (such as the rise of technology).

3. Membership functions and perks

- a. **Individual identity and personal needs:** Associations can help members develop their individual professional identities and promote those identities to the outside world. Associations can also provide meaningful personal and professional support for members and to a greater extent and higher quality than other sources. Associations can also offer private perks and incentives for membership. Some of these incentives may be less relevant for members in certain practice areas, and some aspects of membership may not be 'geared' toward certain sectors or practitioners.

C. SUMMARY OF FINDINGS: CONTEXTUAL CHALLENGES AND ATTITUDES TOWARDS ASSOCIATIONS

At the same time, the research revealed that the professional's workplace organisation represents a core challenge for all association activities: workplaces can control how practitioners interact with associations (by providing or withholding support for their participation in association activities); workplaces can supplant 'professional' values with their own internal beliefs and priorities; and workplaces can provide services that remove practitioners' needs for associations (like education and guidance). As a counter, the research revealed a core benefit, indicating that members' active participation in associations generates the greatest benefit for members themselves (by providing them with teamwork skills and opportunities, a forum for networking and career development, and reputational advantages), by extension benefitting their employers and their workplaces.

The Report also highlights another core challenge that associations face: their members' lack of awareness of and engagement with associations' activities and opportunities. Members may lack the time or interest to meaningfully interact with their association, and this has a compounding effect over time.

MEMBERS MAY LACK THE TIME OR INTEREST TO MEANINGFULLY INTERACT WITH THEIR ASSOCIATION, AND THIS HAS A COMPOUNDING EFFECT OVER TIME.

DESPITE HAVING MANY OUTSIDE OPTIONS, WHEN MAKING KEY DECISIONS PROFESSIONALS STILL LOOK TO THEIR ASSOCIATIONS FOR GUIDANCE AND SUPPORT AND TRUST THEIR COUNSEL OVER OTHER SOURCES IN MANY CONTEXTS.

The research also uncovered a number of positive attitudes toward associations and driving beliefs about their regulatory and representative roles: associations can be experts in setting and enforcing professional standards; peer-regulation can be particularly sought-after and effective; public values can underpin the functions and activities of associations and remain a driving concern in their operations; and associations' interests in the reputation of their profession aligns with the stringent regulation of their members. Further benefits include associations' volunteer-resourced regulatory and representative functions, saving significant amounts of time and money for government (and by extension the public). Associations' strong professional-value focus makes their regulatory activity preferable to a market-driven regulatory scheme, and associations are able to maintain their integrity and efficiency as actors in a co-regulatory regime with government.

Negative or problematic attitudes were also uncovered. These included the underlying tension between associations' representative function (to present and protect their members' and professions' interests) and their regulatory roles, and the pressures and effects of intra-professional competition. The findings also revealed several under-utilised strengths and missed opportunities for the association. Despite having many outside options, when making key decisions professionals still look to their associations for guidance and support and trust their counsel over other sources in many contexts.

iv. Recommendations

The Report produced 13 recommendations for associations to implement in response to these findings. These recommendations are presented in the Report alongside 13 practical action points:

Action Points

Action Point #1: *Use existing resources and platforms to promote association works, benefits and opportunities for members:* Members may lack the time or energy to engage with their association, and so fail to gain the full benefit of their membership. Associations should ensure that resources are directed toward informing members of benefits and opportunities that the association provides.

Action Point #2: *Prioritise publicity and promotion of the association's work beyond its membership, improving public, government and other stakeholders' access to information:* Outsiders may also lack knowledge or understanding of associations' roles and benefits. If associations direct energy to making resources and information about the association publicly available, they may be able to counter or avoid challenges associated with a lack of external knowledge.

Action Point #3: *Format publications to grab members' attention and enable quick, easy reading:* Members may be too busy to read association publications in full or dedicate time to content beyond the headlines. Smaller, easy-read publications and attention-grabbing formatting can address some of these constraints.

Action Point #4: *Develop a range of engagement options – from big conferences to small contribution opportunities – to capture all members' interests and personal styles:* Some members may be keen to participate in association activities and events, but may not be suited (perhaps due to time constraints, lack of initiative, or their personal tastes) to existing opportunities. Associations should ensure that a range of opportunities exist to spark members' interests and allow their engagement on a personally manageable level.

Action Point #5: *Aim to be the CPD-provider of choice. Make quality, industry-leading, and innovative education programs a priority and ensure that ethics offerings are informed by data from complaints:* Associations can be crucial education providers. If they ensure that their programs are timely and address most needed areas – for example, IT skills and other forward-looking programs – associations can boost program participation and improve their own reputations at the same time.

Action Point #6: *Use and improve partnerships with universities to encourage association participation throughout members' careers:* Associations by necessity operate alongside the universities educating their members. If they devise schemes to attach graduate programs to practitioners' experiences, associations can build links with universities that persist throughout members' careers.

Action Points

Action Point #7: *Devise usable, everyday educational tools and accessible, engaging and relevant programs, and make research and resources available online:* Associations can use their experience in education and other regulatory activities to create useful tools – like practice handbooks and other reference materials – for practitioners’ daily use. Providing accessible, short-form ‘refresher’ courses would also allow associations to maintain members’ high standards while being more integrated into their regular practice.

Action Point #8: *Realise the informative potential in research and publications, and do not sacrifice their rigour:* Associations often have a number of existing publications. These should be put to meaningful, valuable uses – for example, disseminating research and updates for members. Associations should ensure that the content of their publications does not tend toward the overly commercial.

Action Point #9: *Act on opportunities to boost the association’s image and engage with members facing new problems:* When association members are faced with new issues – like changing workplace cultures and business pressures – associations, if they pay attention to members’ needs, have the opportunity to step in early and cement themselves as leading sources of guidance and education.

Action Point #10: *Where possible, cooperate and integrate with stakeholders and bodies across jurisdictions, to unify systems, help members in multi-state firms and interstate practice, and ensure global best practice:* Practitioners and firms working across jurisdictions may benefit from additional association assistance to ensure that their obligations are met in all areas and that their practice can continue to run smoothly. Associations again have an opportunity to be leading sources of members’ support in these areas. These efforts should be part of the association’s wider endeavour to articulate global standards where appropriate.

Action Point #11: *Actively and regularly assess members’ perceptions of the association, and seek their input on its activities:* Associations must maintain their members’ loyalty and participation in order to perform any of their functions. Ongoing evaluation of members’ needs and perceptions is necessary to enable the association to continue to operate and improve.

Action Point #12: *Stay up-to-date with the public opinions and experiences that are shaping and being shaped by social, political and technological changes – both nationally and internationally. Continually assess the association’s and profession’s roles in these changes. Associations have a significant role in translating external pressures into regulation and guidance for their professions and members – and vice versa:* they are entrusted to harness their professional expertise and influence over members for the greater public good. To achieve these ends, associations should pay keen attention to outside contexts, including those beyond the immediate professional sphere, and establish open-but-critical relationships with outsiders in their different operations.

Action Point #13: *Rigorously and continually assess all association functions and processes, impartially taking into account insider and outsider perspectives:* Associations must perform well in order to maintain the faith of their members, of governments, and of the public – and associations are the only stakeholders in a sufficiently privileged position to assess the entirety of their operations. Continuous assessment and evolution is a central task for associations’ survival and flourishing.

INTRODUCTION THE REGULATORY CHALLENGE: ASSOCIATIONS, THE STATE OR THE MARKET?

1. BACKGROUND AND OBJECTIVES

An urgent contemporary challenge for governments around the world is how to ensure the trustworthiness of the professions. The presence of professions is felt at every level of society and in every stage of life:

Professions are involved in birth, survival, physical and emotional health, dispute resolution and law-based social order, finance and credit information, educational attainment and socialisation, physical constructs and the built environment, military engagement, peace-keeping and security, entertainment, the arts and leisure, religion and our negotiations with the next world.¹

The professions whose trustworthiness we are most interested in are those occupations whose highly specialised knowledge applies to (and in the process defines) fundamental social problems. Moreover, in these professions, users can be especially vulnerable, or even at risk, when they seek and receive professional services. These users have a sensitive problem or need that requires specialised knowledge to address – an illness, a marriage ending, the accuracy and legality of financial records – and yet cannot, without that specialised knowledge, be fully informed before they seek professional assistance. They are in the hands of the professional, and so must be able to trust that the professional is competent and that their unique needs and welfare will be central to any decision-making. In a broader sense, these users, the government, other stakeholders, and the public need to be able to trust that the system as a whole works. They have an interest in the stability and rational advancement of the wider professional institutions in which professionals practise – like hospitals, the court system, banks and schools.

The formidable task for government is to answer – on behalf of the public and itself – these core questions:

Question 1:

Which regulatory model most effectively assures the trustworthiness of professional services?

Question 2:

By what means can high standards of competence, ethicality and commitment among professionals be assured?

Historically, the answers have been professional self-regulation, through professional associations.

This Report examines the value of professional associations and has two main objectives:

Objective 1:

To assess the value and effectiveness of professional associations as a regulatory strategy, in the current climate and while recognising that associations also have profession-serving and membership functions.

Objective 2:

To provide standards of excellence, cautionary guidance and action points for professional associations and other bodies to assess and improve associational effectiveness in all domains of their activities.

¹ Julia Evetts, 'The Concept of Professionalism: Professional Work, Professional Practice and Learning' in Stephen Billett, Christian Harteis and Hans Gruber (eds), International Handbook of Research in Professional and Practice-based Learning (Springer, 2014) 29, 33, paraphrasing and adapting a list in Vittorio Olgiati, Louis Orzack and Mike Saks (eds), Professions, Identity and Order in Comparative Perspective (Oñati: International Institute for the Sociology of Law, 1998).

A. Professional associations as a means of professional regulation

Associations are seen as a regulatory option that fits somewhere ‘between’ state² and market modes of regulation.³ These three options are depicted in the model below.

A professional association is usually a non-profit member organisation comprising volunteer-practitioners from that profession. Its task is to advance the interests of the public, its profession, and its members. Associations have traditionally been regarded as most able to set and enforce standards of admission and practice for their members. Further, as association membership is often a condition (or quasi-condition) of practice, their influence extends to the profession as a whole. Associations have been considered key actors in protecting and improving their relevant professional institutions, by creating contexts for the articulation and reinforcement of professional values and expertise. They then foster the collegiality and communication to enact them. Finally, associations have been perceived as best placed to support and motivate their members to act as fiduciaries to their clients, and to pursue the public interest over purely self-interested ends.

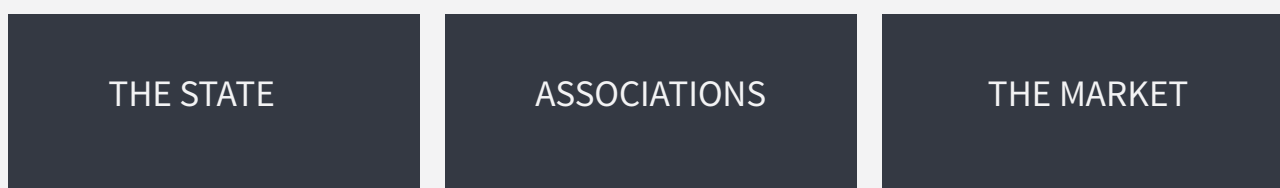
To achieve their goals, associations’ strategies have been direct or ‘tangible’ – for instance, controlling admissions and licensing procedures, codes of ethics, complaints and discipline processes, and performing advocacy work for the profession. Strategies have also been indirect or ‘symbolic’ – such as encouraging members’ professional mentoring and socialisation, fostering beliefs, values, collegial support and recognition, and providing networking and career opportunities.⁴ The target of this regulation has traditionally been the individual practitioner, reflecting the self-employed ways

professionals have worked, and beliefs about the work as essentially grounded in individual judgement and responsibility. These features have contributed to an individual’s self-identification as belonging to a profession.

In exchange for associations’ work, and to bolster this self-regulatory model, professions were given monopoly protection of certain practice areas by states, and were permitted to develop their own internal ‘conventions’ to reduce competition and assure members’ status and income. The understanding was that the moral commitments of professionals (to avoid self-interested, exploitative, uncivil or aggressive behaviour and to engage in continuous training) were more easily realised in a more secure practice environment in which a certain level of status and financial reward was guaranteed.

ASSOCIATIONS HAVE BEEN CONSIDERED KEY ACTORS IN PROTECTING AND IMPROVING THEIR RELEVANT PROFESSIONAL INSTITUTIONS, BY CREATING CONTEXTS FOR THE ARTICULATION AND REINFORCEMENT OF PROFESSIONAL VALUES AND EXPERTISE.

Figure 1 – The available means of professional regulation



² By ‘state regulation’; in the discussion that follows, we do not mean ‘regulation’ in a limited practical sense (as in, for example, discipline by a state body); instead we refer to the range of approaches available to states in ‘regulating’ professional services. These approaches include monitoring (by state or state-sanctioned profession-external agencies) of standards and discipline, legislative measures to control entry and set educational requirements, and special obligations or fiduciary duties also enacted into legislation: see Rob Atkinson, ‘Medicine and Law as Model Professions: The Heart of the Matter (and How We Have Missed It)’ (2013) 22 Health Matrix 345, 362.

³ See, eg, Richard L Abel, *English Lawyers between Market and State* (Oxford University Press, 2003) in particular 403.

⁴ See, for discussion on the tangible/intangible distinction, Gergana Markova et al, ‘Professional Associations and Members’ Benefits – What’s in It for Me?’ (2013) 23 Nonprofit Management and Leadership 494. See also, James Guthrie, Elaine Evans and Roger Burritt (eds), ‘Relevance and Professional Associations in 2026’ (Report, Chartered Accountants Australia and New Zealand and RMIT University, 2016) 11 (‘2026 Report’).

B. A regulatory preference for professional associations

Professional regulation driven by associations has historically been preferred over state-only control and has also been favoured over simply leaving standards to be worked out by the market. There are a number of risks entailed in purely state or market models, which the use of professional associations may avoid. Complete state control may risk the erosion of public institutions and doctrines by partisan ones, can give rise to undesirable monopolies, entails state supervision and enforcement costs, and can threaten innovation. Market control, meanwhile, may produce competitiveness and profit-oriented practices, the exploitation of users of professional services, and may inflict wider harms on professional institutions, the community, and the environment. The historical preference for association regulation is depicted in the figure below.

C. A changing regulatory landscape

Despite the risks of state and market regulation, and the benefits associations may offer, associations have for the past forty years been overhauled by governments for perceived failures in their self-regulatory roles. Driven by twin agendas of competition and consumer protection, the trend has been to strip associations of all or some of their regulatory functions, replacing them with government bodies, sometimes in co-regulatory arrangements.⁵ Governments have taken away associations' ability to require compulsory membership, reducing associations' influence, while generally increasing state-sanctioned regulation, standardisation, and measurement of professional practice.

At the same time, there have been other drastic changes to the environments of professional associations and their members – challenges now coming from 'inside' the professions themselves. New communication technologies and social media place associations'

control over specialised knowledge in danger.⁶ Entry to the profession is increasingly determined by higher education institutions, who by controlling enrolments can affect the potential field of professionals.⁷ Professional workplaces may increasingly supplant practitioners' 'professional' values with commercial ones,⁸ and have become more central to professional socialisation than the wider occupation.⁹ Recent research indicates that organisational workplaces and sectors have become the most important sources of standards and ethics, and certain areas of professions derive professional norms less from associations, and more from seniors, clients, and insurers.¹⁰ Professionals increasingly work in global markets or at least collaborate with people in other professions and jurisdictions. In certain areas, to match client demand and business opportunity, their own organisations have expanded globally. The introduction of Artificial Intelligence ('AI') into professional work represents further challenges to whom is entitled to provide professional work, whom or what is responsible for its proper exercise, and on what basis and measured in relation to whose values. In sum, many of the activities of knowledge-building, standards and socialisation are being undertaken (or potentially undertaken) outside the associations' traditional sphere of influence.¹¹

There is also a connection between these external (or 'political') and internal (or 'business') pressures. As one clear example, the government's pursuit of professional deregulation has sharpened existing competition among what are now known as 'professional service providers'.¹² Political pressure to reform regulation can thus contribute to the formation of a business-oriented professional landscape. These practitioners are increasingly focused on maintaining loyalty to and serving their firms and less on their identification as a member of an association and profession.

Figure 2 - Professional self-regulation typically emphasised the role of the association



⁵ See Introduction, Section 3A(b)(i) below, discussing co-regulatory arrangements as a result of economic reforms targeting professions and professional associations. For a description of co-regulatory arrangements in the context of this report, see Part II: Findings: Regulatory Functions – Value and Challenges, Section 1D(2)(a): Complaints Handling, and related discussion, below.

⁶ 2026 Report, above n 4, 12.

⁷ Andrew M Francis, 'Out of Touch and Out of Time: Lawyers, Their Leaders and Collective Mobility within the Legal Profession' (2004) 24 *Legal Studies* 322, 332–3.

⁸ *Ibid* 325.

⁹ See, eg, Julia Evetts, 'The Management of Professionalism: A Contemporary Paradox' in Sharon Gerwitz et al (eds), *Changing Teacher Professionalism: International Trends, Challenges and Ways Forward* (Routledge, 2009).

¹⁰ For one such piece, and a summary of recent research in this vein, see Leslie C Levin, 'The Ethical World of Solo and Small Law Firm Practitioners' (2004) 41 *Houston Law Review* 309, in particular 316–8.

¹¹ 2026 Report, above n 4, 9, citing Ross Dawson, 'The Future of Associations' (2016) 7 *Academic Leadership Series* 25.

¹² *Ibid* 13.

RECENT RESEARCH INDICATES THAT ORGANISATIONAL WORKPLACES AND SECTORS HAVE BECOME THE MOST IMPORTANT SOURCES OF STANDARDS AND ETHICS, AND CERTAIN AREAS OF PROFESSIONS DERIVE PROFESSIONAL NORMS LESS FROM ASSOCIATIONS, AND MORE FROM SENIORS, CLIENTS, AND INSURERS.

These new pressures and the regulatory changes they have created are depicted in the figure below.

D. A prognosis, and a reality check for associations

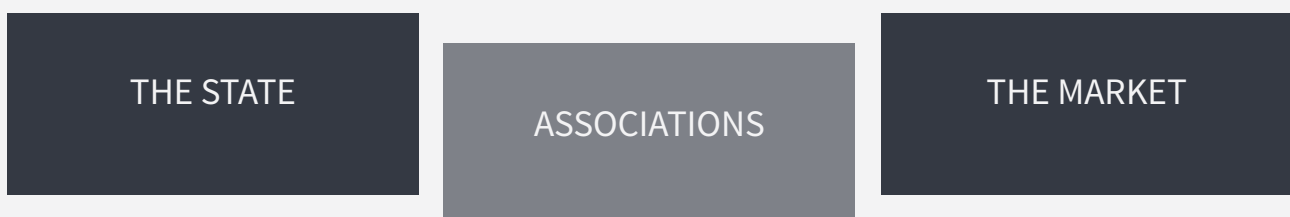
The lines between professions, and professionals and their clients, are no longer as clear as they once were, and it would appear the reach of the association is waning.¹³ In these increasingly challenging conditions, associations must now prove themselves to governments and the wider public, and also to their own members. These stakeholders were recently described by an associational leader quite pointedly as associations' 'three masters'.¹⁴ In this Report, we also look at the interests of the profession itself: associations – and to some extent regulation in general – must consider not only the needs and behaviours of individual professionals, but those of the profession as a group with a collective identity and interests. In the Report we examine these four stakeholders (the state, the public, members, and the profession) as both 'masters' – and beneficiaries – of associational activity.

In conjunction with governments and government regulators, professional associations appear to be

adapting to some of these conditions or attempting to do so. In some contexts, in response to the rise of workplace organisational authority, they may be supplementing individual-based regulation with entity-based forms in which the organisation itself is made accountable. In response to online and automated/artificially intelligent forms of professional practice, they may be considering, or will need to consider, 'professional services' to be the target of regulation, not simply the individual practitioner. AI systems require explainability and 'de-biasing' mechanisms to be built in to their design, therefore more research is needed on what strategies would be most effective in future, for example, for ensuring ethical and competent AI-supported professional services and systems.⁷

Some commentators feel the challenge is lost, and regard today's professional associations as of limited value, both 'Out of Touch and Out of Time'.¹⁵ Some claim that new institutional actors are directly usurping associations' roles. Writing of globalisation and the accounting profession, Suddaby, Cooper and Greenwood argue that rather than 'traditional' professional regulation negotiated between associations and states, a new regulative bargain¹⁶ exists on an international level – now between powerful conglomerate professional service firms and 'quasi-regulatory actors' like transnational trade organisations.¹⁷

Figure 3 - State and market pressures increasingly overpower associations' roles



¹³ See, eg, Roy Suddaby, David J Cooper and Royston Greenwood, 'Transnational Regulation of Professional Services: Governance Dynamics of Field Level Organizational Change' (2007) 32 Accounting, Organizations and Society 333, in particular 342.

¹⁴ Brian Green, 'Understanding the Value of Professionals and Professional Associations' (Report, Chartered Institute of Building, 2015) 3 ('CIoB Report').

¹⁵ Francis, 'Out of Touch', above n 7. For an elaboration of Francis' 'Out of Touch' research and argument, see Introduction, Section 3A(b) below.

¹⁶ The interdependence between state and professions has been described as a 'regulative bargain' in which the state grants professions autonomy and a monopoly over a defined jurisdiction in return for self-regulation and reciprocal assistance in maintaining state authority': Suddaby, Cooper and Greenwood, above n 13, 337.

¹⁷ Ibid 354.

THE LINES BETWEEN PROFESSIONS, AND PROFESSIONALS AND THEIR CLIENTS, ARE NO LONGER AS CLEAR AS THEY ONCE WERE, AND IT WOULD APPEAR THE REACH OF THE ASSOCIATION IS WANING.

Though alarming, this grim assessment of associations' relevance should be read in light of the fact that there is limited information – and certainly little consolidated information – about contemporary associations. Much of what is written about associations is outdated or without empirical basis.¹⁸ Moreover, governments continue to rely on professional associations for the work of safeguarding professional trust. As some of our findings show, though governments may not entirely trust associations, they do continue to expect them to do an immense amount of regulatory and other work to build and safeguard professional domains.

A more realistic depiction of professional regulation would take into account how the expectations of the 'four masters' together shape approaches to regulation. In the figure below, we show how associations, the state and the market can play independent but simultaneous and interrelated roles in the regulation of professionals, professional practices and professional services. The means of professional regulation is influenced by the profession itself, the public, the state and the market.

In light of the dearth of contemporary, comprehensive research, it is clear that more work is needed to understand what roles associations are playing. We need to understand more about this last figure: how large are these overlaps, and how strong is each regulatory circle? Are associations being slowly ejected, or do they continue to provide meaningful checks on state and market pressures? If so, how are they doing it, and what more could they be doing?

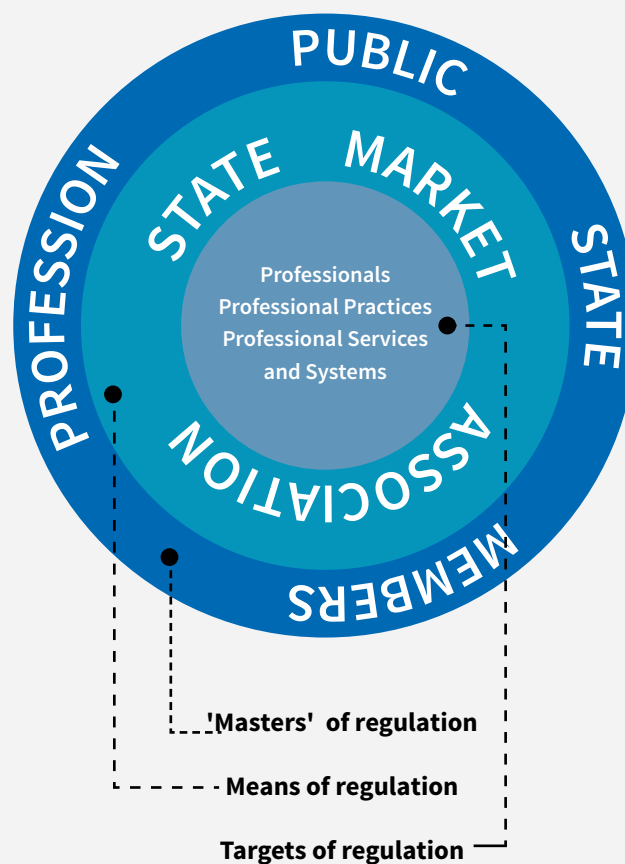


Figure 4: Means of professional regulation, and stakeholder forces driving regulation

Finding these answers must begin with an assessment of associations on a fundamental level: by supporting and regulating professions, what contributions are associations making to the public and to users of professional services?

This Report takes a step toward understanding these issues and answering these questions.

BY SUPPORTING AND REGULATING PROFESSIONS, WHAT CONTRIBUTIONS ARE ASSOCIATIONS MAKING TO THE PUBLIC AND TO USERS OF PROFESSIONAL SERVICES?

18 Of course, empirical work does exist. Francis makes its arguments and assessments from an empirical basis: Francis, 'Out of Touch', above n 7, as do the studies cited later in this Report.

2. OVERVIEW OF THE REPORT

We return to the two questions governments must answer:

Question 1:
Which regulatory model most effectively assures the trustworthiness of professional services?

Question 2:
By what means can high standards of competence, ethicality and commitment among professionals be assured?

As we saw above, professional associations have long been considered the answer to these questions. This Report aims to understand why, and to what extent that answer continues to be valid. The overall objective of the Report is to contribute to wider policy debates about effective regulatory strategies, and we might reframe the above questions considering this research objective:

Research Question 1:
Are associations needed to ensure professional standards and ethics, and secure trust in the professions?

Research Question 2:
If so, what features and strategies will associations need to succeed?

Research Question 3:
If associations are not ideal professional regulators, would a market or state regulatory approach achieve better results?

To answer these questions and contribute to regulatory policy debates, the authors conducted a literature review of relevant studies on associations' activity and value, and conducted an in-depth interview study of the Law Society of New South Wales, the association for NSW lawyers.¹⁹ The findings and analysis are of relevance, then, to all contemporary professional associations.

As highlighted above, contemporary associations do more than act as purely 'regulatory' bodies'; an association exists to represent its profession and members – and much of its activity and energy is directed toward functions that maintain professional identity and allegiance to professional community. While associations' activities in these areas are not directly 'regulating' their professions, these activities can support or undermine the regulatory role associations play.

This Report therefore examines associations' regulatory functions and then delves into these representative and membership functions. The Report also examines positive attitudes and beliefs that drive associational activity and member engagement. It also looks at challenges to associational influence – including negative attitudes, low awareness and engagement, and dominant features of professional practice that appear to diminish associations' roles. These attitudes, positive or negative, reflect arguments for or against associations as an alternative to state or market professional regulation. The report concludes with a series of action points for contemporary associations to improve their effectiveness and improve member engagement.

¹⁹ A full Methodology is provided in the final section of this Introduction.

The Report findings and analysis answer a series of specific questions. Each question represents a part the Report and makes up its structure:

Report Structure

Part II: REGULATORY FUNCTIONS: VALUE AND CHALLENGES

What do contemporary associations do?
How do these activities protect the public and users of professional services?
How do associations undertake their activities? And how effective are they?
What are associations' core challenges to regulatory effectiveness?

Part III: REPRESENTATIVE AND MEMBERSHIP FUNCTIONS: VALUE AND CHALLENGES

What do contemporary associations do for the profession as a whole and for their members?
How do associations undertake their activities? And how effective are they?
How do these activities support or undermine associations' regulatory role?

Part IV: POSITIVE ATTITUDES AND BELIEFS

What supportive attitudes and beliefs are driving the activities of associations?
What supportive attitudes and beliefs are driving the engagement of their members (as practitioners)?
How and why are associations' activities seen as preferable to alternative regulatory options?

Part V: NEGATIVE ATTITUDES AND BELIEFS: AWARENESS AND ENGAGEMENT CHALLENGES

Are professionals engaged in their associations, and if not, why not?
Are they aware of the value of their associations?
Do members support associations' regulatory roles, as opposed to alternative arrangements?

Part VI: CONCLUSION AND RECOMMENDATIONS

What strategies could improve associations' effectiveness and better support members' engagement?
What are the 'action points' associations can apply in their work?

3. CONCEPTUAL FRAMEWORKS AND CONTEXT

To best understand the significance of this Report and the findings it contains, in this section we provide a brief introduction to some theoretical understandings of professional associations.

First, we summarise three theories that aim to explain why professional associations exist. Each theory has, at some stage, received support in the ‘professions’ literature, and each has a different idea of the main purpose of associations and the main interests they serve. In the end, these theories are not necessarily conflicting, and all are to some extent borne out by ongoing research (such as it exists).

Second, we outline the main arguments for and against associations as a means of regulation, and contrast these to arguments for and against state and market regulation. These points are intended to guide the reading of the Report, so that its findings about associations can be viewed against the broader regulatory context in which they exist.

PROFESSIONALISM IS AN AREA REPLETE WITH MYTHS, STEREOTYPES AND CONTRADICTIONS, AND CAUSAL CONNECTIONS ARE NOTORIOUSLY HARD TO PIN DOWN.

A. WHY DO PROFESSIONAL ASSOCIATIONS EXIST?

The following section details three archetypal models for the existence of professional associations. Each model is defined by reference to its view of who or what is an association’s primary beneficiary – the public, the profession, or association members. It is important to stress that these models correspond imperfectly to real life. Indeed, professionalism is an area replete with myths, stereotypes and contradictions, and causal connections are notoriously hard to pin down.²⁰

However, the models help explain the functions and activities of associations, the tensions in their roles, and the different grounds upon which they might be improved. Each model was prominent at one stage in the literature, but favour has shifted over time. To give a sense of the chronology, we sketch out the first two associational models, then introduce the primary political and social changes that have (actually and theoretically) unsettled these models. We then detail the third, final model – the one indicated most strongly by current circumstances.

We suggest that associations can, and usually do, exhibit features of all three models, but the point of emphasis varies according to broader goals and arrangements.

Over the page, we summarise the key points of the first two models – Model 1: Self-Regulation as Moral Community; and Model 2: Self-regulation as Professional Project. The discussion continues on the pages following.

²⁰ Daniel Muzio and John Flood, ‘Entrepreneurship, Managerialism and Professionalism in Action: The Case of the Legal Profession in England and Wales’ in Markus Reihlen and Andreas Werr (eds), *Handbook of Research on Entrepreneurship in Professional Services* (Edward Elgar, 2012) 369; Evetts, ‘The Concept of Professionalism, above n 1, in particular 31–50. Justine Rogers, ‘Representing the Bar: How the Barristers’ Profession Sells Itself to Prospective Members’ (2011) 32 *Journal of Legal Studies* 202.

A. Early theoretical models of associations: the public interest and the professional project

MODEL	CORE	TIMING	BASIC CONCEPTS AND ARGUMENTS
Model 1: Self-Regulation as Moral Community	Public as primary beneficiary	First wave of 'professions' scholarship (1930s–1960s)	<ul style="list-style-type: none"> • Associations gather their members into a moral community for the public interest – a 'pledge to a self-controlled "collectivity orientation"'²¹ • Associations act as intermediaries between their members and the outside world, 'serve as the custodians of professional traditions and help to keep a profession's moral commitments relevant'.²² • Moral commitments are formally articulated and enforced – such as those embodied in credentialing, codes of ethics²³, oaths, and 'fit and proper' person tests. • Moral commitments encourage cooperation (sharing knowledge, curbing competition, engaging in mentoring) as well as practitioner pride and satisfaction in work performance – a form of individualised self-regulation.²⁴ • This view sees associations as 'the group best able to cultivate, enforce and publicly project the existence of professional duties and qualities'.²⁵
Model 2: Self-Regulation as Professional Project	Profession as primary beneficiary	Second wave of 'professions' scholarship (1970s–2000s)	<ul style="list-style-type: none"> • Professions' (and their associations') defining feature is not their public interest, but their degree of control over their jurisdiction and work. • Associations are central to the power of the professions. • Work associated with Larson's hugely influential 1977 study saw professional associations as using strategies of control over entry and work jurisdiction to advance the financial and status interests of the profession as a whole. These strategies and goals are its 'professional project'.²⁶ • By controlling entry, creating and enforcing educational standards and codes of ethics, associations 'create normative values, standardise practices, and present a unified identity' on behalf of the profession.²⁷ • This collective identity and status mean a profession can lobby on its own behalf. • The professional project succeeds when a profession secures a 'monopoly in the market for its service, and status and upward mobility in the social order'.²⁸ • This model supports the profession's collective advantage, but these benefits also accrue at the individual level for practitioners/associational members.

21 Justine Rogers, Dimity Kingsford Smith and John Chellew, 'The Large Professional Service Firm: A New Force in the Regulative Bargain' (2017) 40 University of New South Wales Law Journal 218, 226, citing Dietrich Rueschemeyer, 'Doctors and Lawyers: A Comment on the Theory of the Professions' (1964) 1 Canadian Review of Sociology 17, 17.

22 Mark S Frankel, 'Professional Codes: Why, How and with What Impact?' (1989) 8 Journal of Business Ethics 109, 114.

23 Evetts, 'The Concept of Professionalism', above n 1, 37.

24 Ibid.

25 Rogers, Kingsford Smith and Chellew, above n 21, 225.

26 Magali Sarfatti Larson, *The Rise of Professionalism: A Sociological Analysis* (University of California Press, 1977); Julia Evetts, 'Professionalism beyond the Nation-State: International Systems of Professional Regulation in Europe' (1998) 18(11/12) International Journal of Sociology and Social Policy 47, 50.

27 Aimee Yang and Maureen Taylor, 'A Global Perspective on Public Relations Professionalism: Mapping the Structure of Public Relations Associations' International Networks' (2014) 91 Journalism and Mass Communication Quarterly 508, 509.

28 Evetts, 'The Concept of Professionalism', above n 1, 38, citing Larson, above n 26.

Some writers recognise the connection between the second model and the first. Though the professional monopoly (or, in many cases, quasi-monopoly)²⁹ is undoubtedly in a profession's interest, by removing the pressure of external competition it also enables the profession to 'concentrate more fully on developing the service-orientated and performance-related aspects of [its] work'.³⁰ By promoting such 'professionalism', associations provide the 'vehicle' for professions' attainment of moral legitimacy,³¹ in turn enabling their professions to maintain the standards, ethics, and esteem necessary to the continuation of their monopolies. In that way, the second model might in fact support the first, and, though a subject of debate, no fundamental conflict between the two models necessarily arises.

B. Developments in politics, practice, and scholarship: disruptions to the models

Political circumstances and practice conditions for professional associations (and their professions) have changed since the above issues and models were debated. Recent research argues that associations are no longer able to guarantee professional trustworthiness, irrespective of whether this was previously so. As noted, one of the strongest critiques comes from Andrew Francis, whose study of the Law Society of England and Wales reached the conclusion in its title: professional associations are both 'Out of Touch and Out of Time'.³² Francis argues that associations are failing to confront the continuing challenges of '[lost] exclusivity, increased segregation of specialised knowledge, globalisation and a fractured (and fractious) relationship with the state'.³³ On the other hand – if associations 'succeed' and adapt wholeheartedly to these pressures, they may be doing so at the expense of their 'professional' ethos, thereby compromising the public trust that justifies their existence.³⁴ In the following discussion we have focussed on these arguments in the Australian context, but as we will see, research from other countries remains highly relevant to these issues, and they are debated on a global scale.

AUSTRALIAN PROFESSIONS HAVE BEEN INCREASINGLY CONFRONTED BY NEW MARKET-BASED INCENTIVES AND CONSUMER PROTECTION REGULATION.

- i. State pressures: economic reforms targeting professions and their associations

Since the 1980s, in response to broader trends toward liberalisation, the professional self-regulatory model has been challenged by governments on two main grounds: first, that traditional self-regulation is 'protectionist and anti-competitive'; and second, that it fails to 'serve the interests of the 'consumer'.³⁵ Following a number of reports that concluded that professions were anti-competitive, charging too much, and failing to meet consumer protections standards,³⁶ Australian professions have been increasingly confronted by new market-based incentives and consumer protection regulation.³⁷

As was the case for the UK,³⁸ these reforms have 'sought to weaken professional monopolies, dismantle restrictive arrangements, and challenge entrenched privileges'.³⁹ Professions have lost their monopolies over key work jurisdictions and must now compete with other 'providers' or otherwise satisfy additional managerial processes set by government.⁴⁰ Through these reform initiatives, professional associations have lost their regulatory functions, or else had them supplemented with co-regulatory arrangements with independent, quasi-government bodies (as is the situation in NSW for lawyers).⁴¹ The associations can no longer require mandatory membership.

29 Rogers, Kingsford Smith and Chellew, above n 21, 224.

30 Evetts, 'The Concept of Professionalism', above n 1, 39, citing Evetts, 'Professionalism beyond the Nation-State', above n 26, and Terence C Halliday, *Beyond Monopoly: Lawyers, State Crises and Professional Empowerment* (University of Chicago Press, 1987).

31 Royston Greenwood, Roy Suddaby and C R Hinings, 'Theorizing Change: The Role of Professional Association in the Transformation of Institutionalized Fields' (2002) 45 *Academy of Management Journal* 58, 74.

32 Francis, 'Out of Touch', above n 7.

33 *Ibid* 323.

34 2026 Report, above n 4, 93.

35 Rogers, Kingsford Smith and Chellew, above n 21, 237.

36 *Ibid*. The Australian reforms up to the 'Hilmer Report': Independent Committee of Inquiry into National Competition Policy, Parliament of Australia, 'National Competition Policy Review' (Report, 1993). See also Edward Shinnick, Fred Bruinsma and Christine Parker, 'Aspects of Regulatory Reform in the Legal Profession: Australia, Ireland and the Netherlands' (2003) 10 *International Journal of the Legal Profession* 237, 244.

37 Rogers, Kingsford Smith and Chellew, above n 21, 237. For discussion of these reform initiatives, see Shinnick, Bruinsma and Parker, above n 36.

38 For an analysis of the UK context, see Gerard Hanlon, *Lawyers, the State and the Market: Professionalism Revisited* (Macmillan Press, 1999); Abel, *English Lawyers between Market and State*, above n 3, 2–8; Richard L Abel, *The Legal Profession in England and Wales* (Basil Blackwell, 1987).

39 Daniel Muzio and Stephen Ackroyd, 'On the Consequences of Defensive Professionalism: Recent Changes in the Legal Labour Process' (2005) 32 *Journal of Law and Society* 615, 622.

40 Rogers, Kingsford Smith and Chellew, above n 21.

41 *Ibid* 237. For example, medical practitioners in Australia, along with other allied professions such as nursing, dentistry and psychology, are now regulated by the Health Practitioner Regulation National Law, a national scheme, where each profession is predominately regulated by the relevant government body – in the case of medicine, the Medical Board of Australia – with the role of the various professional associations now having very limited scope.

This program has adversely affected certain areas of each profession more than others – indeed, some areas have been offered real opportunities to benefit. It would be naïve to see this move towards ‘entrepreneurial’ and ‘managerial’ professionalism, explained shortly, as a government-only agenda when the models of the private sector have been used and followed.⁴²

ii. Social and digital economy pressures: changes in the nature and context of professional work

Along with the reforms discussed above, recent research argues that contextual challenges like the increasing authority of the workplace in professional practice, demographic changes and specialisation, and the rise of technology are further weakening associations’ influence. Scholars describe these changes as ‘fragmentation’ within a profession – a growing ‘diversity, in terms of size of firm, geographical area, knowledge base, type of client and source of funding’ as well as an increasing ‘diversity and number of locations which shape informal ethical norms and form the context for compliance’ with professional codes.⁴³ Though the word itself is not necessarily used, this ‘fragmentation’ can be felt by practitioners in daily practice – even just as a feeling that certain groups or practice areas are not ‘part of the same profession’ anymore.⁴⁴

Though these changes may challenge associations’ abilities to maintain their ‘traditional’ roles and influence (as we will see later)⁴⁵, some scholars feel that fragmentation is positive, as it allows for the evolution of values and dismantling of entrenched power structures. These scholars feel that maintaining a small profession, tightly controlled by members with shared incentives and homogenous views, is an undesirable control strategy, through which the profession as a group agrees on social problems and their solutions for its own financial and social rewards.⁴⁶ Whether these shifts are positive or negative, it remains important to understand their sources and effects. Below, we outline three key drivers of fragmentation in professions: workplace influences; changing demographics and increased specialisation; and technological change.

a. Workplace influences

Writers have singled out workplace organisations as increasingly the most important site of professionalisation.⁴⁷ Some see new ‘logics’,⁴⁸ based on business and managerial values, as an increasingly important source of professional thinking, knowledge and practice. Again, there is debate over whether these emerging managerial and entrepreneurial logics have had positive, ‘blending’,⁴⁹ or negative⁵⁰ effects on traditional modes of professionalism⁵¹ and the modern realities of professional practice.

Some authors feel that business and managerial logics, and workplaces’ emphases on ‘hierarchy, bureaucracy, output and performance measures’ and ‘standardized work practices’ may mean that ‘enterprise’ values are mistaken for or even override professional ones: ‘managerial demands for quality control and audit, target setting and performance review become reinterpreted as the promotion of professionalism’. In the Australian legal context, for example, changing client demands and firm pressures have been said to mean that, particularly in large firms, ‘it is becoming more difficult for individuals to discharge professional obligations to realise the public interest’.⁵²

‘FRAGMENTATION’ CAN BE FELT BY PRACTITIONERS IN DAILY PRACTICE – EVEN JUST AS A FEELING THAT CERTAIN GROUPS OR PRACTICE AREAS ARE NOT ‘PART OF THE SAME PROFESSION’ ANYMORE.

42 For a detailed overview of these issues, see Rogers, Kingsford Smith and Chellew, above n 21, 218.

43 Andrew M Francis, ‘Legal Ethics, the Marketplace and the Fragmentation of Legal Professionalism’ (2005) 12 *International Journal of the Legal Profession* 173, 173.

44 Francis, ‘Out of Touch’, above n 7, 331.

45 See Part III: Findings: Representative, Community and Membership Functions – Value and Challenges, Section 1B(1)(4) Collective identity, inclusivity and symbolic community – Specific Challenges, below.

46 See, eg, Graham P Martin et al, ‘Professionalism Redundant, Reshaped or Reinvigorated? Realizing the “Third Logic” in Contemporary Health Care’ (2015) 56 *Journal of Health and Social Behaviour* 378, 379, discussing the view held in Larson, above n 26.

47 See Introduction, Section 3A(b)(iii)(a), above.

48 ‘Logics’, in sociology literature, refers to ‘material practices, assumptions, values, beliefs and rules’ that govern individual behaviour; ‘institutional logics’ are those that form a ‘socially constructed, historical pattern’ – making discrete behaviours and values ‘institutionalized’, such as in the defining of a ‘profession’: see Martin et al, above n 46, 380, citing Patricia H Thornton and William Ocasio, ‘Institutional Logics and the Historical Contingency of Power in Organizations: Executive Succession in the Higher Education Publishing Industry, 1958–1990’ (1998) 105 *American Journal of Sociology* 801, 804.

49 See, eg, discussion in Martin et al, above n 46, 381, citing Ruth McDonald et al, ‘Competing and Coexisting Logics in the Changing Field of English General Medical Practice’ (2013) 93 *Social Science and Medicine* 47; Trish Reay and C R Hinings, ‘Managing the Rivalry of Competing Institutional Logics’ (2009) 30 *Organization Studies* 629.

50 See, eg, Julia Evetts, ‘New Professionalism and New Public Management: Changes, Continuities and Consequences’ (2009) 8 *Comparative Sociology* 247, 248.

51 Julia Evetts, ‘A New Professionalism? Challenges and Opportunities’ (2011) 59 *Current Sociology* 406, 412.

52 Rogers, Kingsford Smith and Chellew, above n 21, 231.

This shifting emphasis risks undermining the profession's core 'service ethic',⁵³ and also its 'social cohesion' – weakening 'traditional' associations' connections with members,⁵⁴ and ultimately diluting associational influence.⁵⁵ According to Francis, if associations cling too tightly to their 'traditional' ideals, they may fail to 'respond to the current marketplace' and become irrelevant.⁵⁶

b. Changing demographics and increased specialisation

Meanwhile, the associations' ability to maintain a 'shared' culture and meaningfully control the profession's knowledge-base and jurisdiction depends greatly on there being a homogenous profession with a small membership, close interaction, shared experiences and expertise, and geographical concentration.⁵⁷ '[S]hifting demographics and value perceptions' make members' needs increasingly specialised and complex. These dynamics may also cause associations' 'traditional' networking and social functions to be 'supplanted' by 'informal networks', workplaces and external groups.⁵⁸ These trends are 'often to [associations'] detriment', and if the association loses support, the 'cohesiveness and solidarity of the profession' may suffer.⁵⁹ Francis writes that 'stratification' of the profession presents a 'fundamental challenge to the ability (and structural capacity) of ... professional associations to exercise regulatory (and representative) authority for a diverse profession'.⁶⁰

c. Technological change

Throughout history, technological change has allowed – and required – social institutions and industries to adapt, reconfiguring roles and re-establishing relevance and legitimacy.⁶¹ Changes happen constantly, and on many levels may threaten the ability of professions and their associations to hold onto their 'traditional' roles and values. At one extreme, for example, is the impending-doom notion of technology rendering human professionals obsolete (or at least irrelevant).⁶² On a subtler level, technological development has been identified as an immediate threat to associations' value and influence: associations may lack the resources to keep their processes and offerings up-to-date and 'stay on the crest of the technology wave',⁶³ as professional work becomes

increasingly mechanised. At the same time, technology allows members to easily access knowledge and other social benefits that once would have been primarily the associations' domain.⁶⁴

d. Conclusion on disruptions to early theoretical models

Whether net-positive or negative for society generally, these changes have clear significance for associations: the borders of professional knowledge are becoming less clear. Values and practices are increasingly determined without associations' input, and associations' claims to special, publicly-minded status on behalf of their membership appear less credible than they once were. Associations may be able to confront these challenges, but this will require constant attention and vigilance, and perhaps in some cases sweeping overhauls.

Whether associations can, or should, overcome the obstacles of fragmentation will have a significant impact not only on their own survival but on the performance of professional work overall.

53 Martin et al, above n 46, 378, citing Eliot Freidson, *Professionalism: The Third Logic* (Polity Press, 2001).

54 Susan Henczel, 'The Impact of Library Associations: Preliminary Findings of a Qualitative Study' (2014) 15 *Performance Measurement and Metrics* 122, 130.

55 Everts, 'A New Professionalism?', above n 51, 412.

56 Francis, 'Out of Touch', above n 7, 342–4.

57 Francis, 'Legal Ethics', above n 43, 173.

58 Henczel, 'The Impact of Library Associations: Preliminary Findings', above n 54, 123–4. Members in Henczel's study explicitly expressed concerns about the potential damaging effect of fragmentation, creating 'gulfs' between practitioners and practice areas: at 141.

59 *Ibid* 124.

60 Francis, 'Legal Ethics', above n 43, 175.

61 See, eg, Geoffrey Stokes, 'Relevance and Professional Associations in 2026: Towards a New Role for Thought Leadership' in James Guthrie, Elaine Evans and Roger Burritt (eds), 'Relevance and Professional Associations in 2026' (Report, Chartered Accountants Australia and New Zealand and RMIT University, 2016) 44.

62 See, eg, Richard Susskind and Daniel Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts* (Oxford University Press, 2015).

63 Stephen Abram, 'Technoschism: The Real World and Libraries, Librarians and Our Associations: A View from Canada' (2006) 27(1/2) *Library Management* 14, 15.

64 See, eg, Henczel, 'The Impact of Library Associations: Preliminary Findings', above n 54, 123–4.

C. The third model: associations’ corporate mentalities

Reflecting the tense contemporary climate, a third model has emerged (or is emerging) to ‘explain’ the existence of professional associations. This model is corporate associationalism, in which the primary beneficiary is the membership and, by extension, the association itself (reliant on membership for its own survival). The existence and nature of this model is a subject of the Report, and its arguments will return many times. A summary of this third model appears at the bottom of this page.

D. The three models together: a synthesis

We have now canvassed three archetypal models of professional associations and the potential benefits they offer – the moral, publicly-interested association; the profession-centric association; and the self-interested, corporate association. Possible tensions between these models are debated in the literature. But as we saw in analysing the first two models, there is no inherent conflict between the interests of the public and the

interests of the profession. Likewise, there is no inherent conflict between the first two models and the third; they can co-exist harmoniously, and their features can overlap. This fact is explicable when it is accepted that associations do in fact hold ‘multiple and not always easily reconcilable functions’,⁶⁶ all of which they must exercise simultaneously. They must balance the need to serve their members’ interests with their duty to uphold the public interest. At the same time, they must maintain a sufficient membership to meaningfully represent – and regulate – their profession.⁶⁷ If they lose the respect and loyalty of their members, associations cannot effectively exert influence in the public interest,⁶⁸ nor can they advance the goals and status of their profession. In that case, whether because of ‘professional altruism or more instrumental purposes’, associations might seek to maintain their power by consciously aligning their members’ and the profession’s interests with the public interest, and can in doing so develop both public and private interests simultaneously.⁶⁹

MODEL	CORE	TIMING	BASIC CONCEPTS AND ARGUMENTS
Model 3: Corporate Professional Associations	Associations and their members as primary beneficiaries	Ongoing debate and discussion in ‘professions’ scholarship (2000s–present)	<ul style="list-style-type: none"> • No compulsory membership • No regulatory function or else in co-regulatory arrangement with the state • Professionals are in competition with each other (no restrictive trade practices among themselves) but also subject to extensive state regulation. • Associations must attract and maintain membership by proving its ongoing value/perks⁶⁵ of membership: useful services, career benefits, and other material perks. • Complement workplace and specialty area programs (training, regulation, etc). • Support market goals and ethos. • Guarantee professional survival in face of vast change. • Cementing membership loyalty is key to associations’ own survival.

65 Ted Schneyer, ‘Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct’ (1989) 14 Law and Social Inquiry 677, 692, citing Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard University Press, 1965).

66 Robert K Merton, ‘The Functions of the Professional Association’ (1958) 58(1) *The American Journal of Nursing* 50, 51.

67 *Ibid* 54; Schneyer, above n 65, 692.

68 Elizabeth Popp Berman, ‘Before the Professional Project: Success and Failure at Creating an Organizational Representative for English Doctors’ (2006) 35 *Theoretical Sociology* 157, 190, citing Émile Durkheim, *Professional Ethics and Civic Morals* (Cornelia Brookfield trans, Routledge, 2nd ed, 1992 [trans of: *Leçons de sociologie physique des moeurs et du droit* (first published 1904)]).

69 Evetts, ‘The Concept of Professionalism’, above n 1, 39, citing Mike Saks, *Professions and the Public Interest: Medical Power, Altruism and Alternative Medicine* (Routledge, 1995).

E. Conclusions and a map for ongoing enquiry

In looking at the three models, we have seen that it is possible to reconcile them with one another when we accept that beneficiaries' interests may not necessarily be in conflict. This suggests that associations will be best prepared to maintain their value and relevance by seeking to balance the interests of the public, the profession, and association members. In the remainder of this Report, we will refer back to these models when discussing associations' functions and benefits. As we summarised above,⁷⁰ our Findings that look at associations' functions are split into two main headings:

PART II: REGULATORY FUNCTIONS: VALUE AND CHALLENGES

PART III: REPRESENTATIVE AND MEMBERSHIP FUNCTIONS: VALUE AND CHALLENGES

As we will see, each different group of functions is most closely related to one of the three models. Associations' regulatory functions link to Model 1 – the publicly interested moral community; associations' representative functions link to Model 2 – the profession-benefitting 'professional project'; and associations' membership functions link to Model 3 – association- and member-benefitting corporate associations. The models' links to association functions are depicted in the diagram at right:

These links will be highlighted in the relevant sections of the Findings. In the next section, we round out this Introduction with a summary of some arguments for and against state regulation, market regulation, and regulation by professional associations. These points are intended to be used as a resource, to encourage and guide reflection on whether associations are valuable (or necessary), and whether state regulation or market pressures alone could secure the value of professions for society.

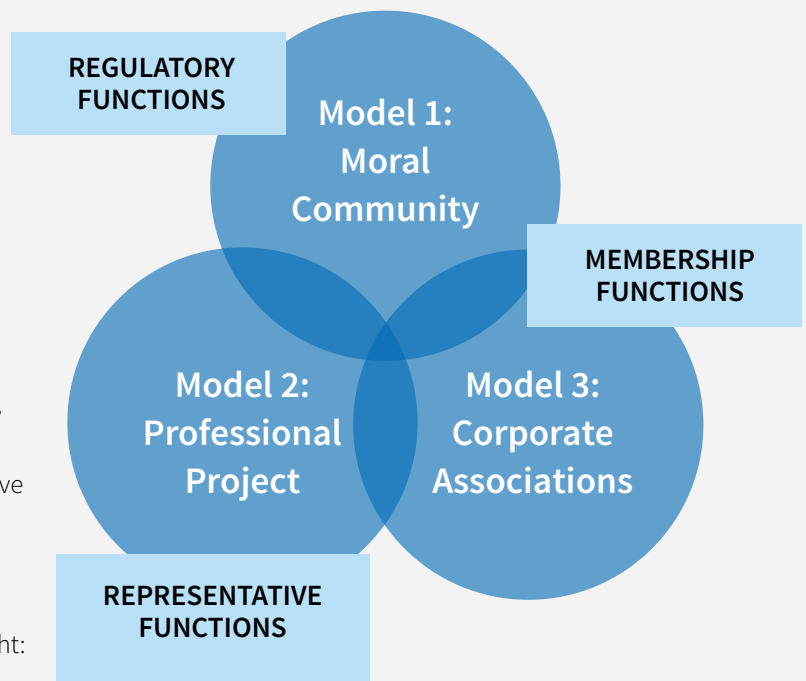


Figure 5: Overlapping theoretical models of associations linked to associations' functions and beneficiaries

⁷⁰ See Introduction, Section 2: Overview of the Report; Report Structure, above.

B. WHY SHOULD ASSOCIATIONS CONTINUE TO PLAY A SIGNIFICANT ROLE?

As we will see throughout the Report, professional associations and professions cannot be singled out for analysis in a vacuum. This is evident in the overlapping and sometimes multi-faceted nature of the findings we present. Professional associations and professions are neither ‘above the law’ nor ‘outside the market’. Their field of influence is defined by their coexistence with both state and market influences.⁷¹ Indeed, ideal professional regulation likely ‘incorporates a mix of self-regulation, state regulation and market-based incentives for performance’.⁷² Because associations operate alongside or ‘between’ state and market regulation⁷³ their impact has to be assessed with that ‘mix’ in mind.

To elaborate, state and market pressures not only shape how associations’ effects are felt across society, but also directly influence how associations must operate in practice. For example, professional codes of conduct and ethics may be enshrined in legislation; when enforcing these codes, associations are ‘embodying’ legislative power. At the same time, the codes themselves may be interpreted and taught by associations in accordance with contemporary market pressures and the realities of professional practice. In that case, the state has granted – and delimited – the associations’ regulatory power,⁷⁴ and the market has given content to that power’s exercise.⁷⁵

To appreciate why reforms to associations might be proposed and enacted – that is, why an increase in state or market power might be desirable – we need to understand what state and market regulation might be able to do that an association cannot (or cannot do as effectively). At the same time, because self-regulation continues to play at least some role, we also need to understand why associations maintain the authority that they do – what it is that they do better than states or markets.

We now give a brief list of the arguments for and against ‘pure’ forms of market and state regulation, and finally a summary of the pros and cons in respect of professional associations. By understanding these arguments and perhaps referring back to them, readers can appreciate some of the alternatives to the associational approaches that we analyse in this Report.

⁷¹ Atkinson, above n 2, 413.

⁷² Shinnick, Bruinsma and Parker, above n 36, 262.

⁷³ See, eg, Abel, *English Lawyers between Market and State*, above n 3, in particular 403.

⁷⁴ Atkinson, above n 2, 391.

⁷⁵ See, eg, Gerald M Hampton et al, ‘Market Orientation and Professionalism in Higher Education’ (2009) 13(1) *Academy of Educational Leadership Journal* 87.

A. Arguments for and against each regulatory option

Positives of Free Market	Pitfalls of Free Market
<ul style="list-style-type: none">• Practitioners can ‘compete freely to be chosen’ by employers or clients.• Consumers choose what services are offered.• Diversity of entrants and entry paths• Simpler, clear and more transparent goal for practitioners: maximise income• Innovation and experimentation	<ul style="list-style-type: none">• Information asymmetry: consumers cannot be well enough informed to choose quality providers.• Adverse selection: the market favours cheap – and usually low-quality – services.• Incompetent, unethical practitioners are not weeded out.• Negative externalities: costs of incompetent, unethical practices born by society (for example, an incompetent lawyer taking up unnecessary court time).⁷⁶• Markets cannot achieve distributional ends or ‘or ‘accomplish social justice’,⁷⁷ and thus cannot ensure that professional services are provided in line with the public good.

Positives of State Regulation	Pitfalls of State Regulation
<ul style="list-style-type: none">• State provides uniform certification and entry and practice standards, and a protected monopoly or quasi-monopoly over occupational domain• Professionals are no longer incentivised by maximised profits.• Secures employment cultivates altruism.• Can address information asymmetry, negative externalities and distributional concerns.• Can discipline substandard professionals.	<ul style="list-style-type: none">• Inflexibility of standards• Reduces individual discretion and the value of professional work.• Might create incentives for minimal compliance or worse, seeking ways of getting around the system.• May fail to encourage the development of individual ethical judgment.• May stymie innovation and experimentation.

⁷⁶ Atkinson, above n 2, 361.

⁷⁷ Shinnick, Bruinsma and Parker, above n 36, 257.

Positives of Professional Associations	Pitfalls of Profession Associations
<ul style="list-style-type: none"> • Associations generate and enforce more precise certification and entry and practice standards based on insider knowledge of best practice. • Only members of the association (who meet those standards) can supply those professional services. • Professionals are incentivised by a mix of values and interests. • Some degree of secure employment cultivates altruism • Context for group mission, virtues, collegiality and improvement • Can offer the ‘symbolic rewards’ and sanctions of peer recognition and reputation. 	<ul style="list-style-type: none"> • Potentially merely acting as ‘agencies of the state’ with same rigidity issues as found in state regulatory model • The ‘professional project’ critique above: associations seek financial rewards and status for their members through high entry barriers and monopolies. • Exclusionary entry and participation regimes • Consumers have limited control over the work they need to solve their problems. • Low standardisation and efficiency of services compared to full state regulation.

These insights can be used in a practical way when reading this Report:

For example, when reading a finding that discusses associations’ value in performing certain functions (for example, legislation interpretation), readers might consult the above tables to ask whether the value would be increased by state or market regulation, or whether the pitfalls of those methods mean associations are the best for the role. When reading about a barrier associations face (for example, diminishing influence over members’ ethics and practice), readers might ask whether state or market regulation could offer an alternative means of securing the needed value for society, or might find that pitfalls might nonetheless affect those methods, too.

C. WHAT SHOULD ASSOCIATIONS DO? (OR WHAT ARE WE LOOKING FOR FROM ASSOCIATIONS AND WHY ARE THOSE THINGS IMPORTANT?)

As we have seen and will see again in the Report's Findings, associations may have a variety of functions: some of which are regulatory and in the public interest (like registration and complaints-handling functions) – captured in the theoretical publicly-interested 'Model 1' above;⁷⁸ some of which are representative (like advocacy for the profession) – as in the theoretical profession-oriented 'Model 2' above;⁷⁹ and some of which are member-oriented (like providing membership 'perks') – linking to the 'corporate' or member-focused 'Model 3' above.⁸⁰

To measure associations' benefits, we must compare their regulatory activities to other regulatory options, and we must understand how their regulatory roles are supported and enabled by non-regulatory activities. In this section, we provide an overview of the range of functions and activities that an ideal (albeit generalised) association might perform. Later, we will use this same collection of functions as a basis for the organisation and analysis of our Findings about associations' successes and failures in these areas.

A. Regulatory functions

In the body of the report, we will examine associations' regulatory activities looking to the '40 Elements of Professionalisation'.⁸¹ The Professional Standards Councils ('PSC') uses a reference model (the 'Benton Model') to identify 'the key standards, processes and practices a group should strive to have in place before it can be defined as a profession'.⁸²

The Benton Model is the outcome of a 2013 study which aimed to 'generate international consensus on a contemporary definition of professional nurse regulation'. Other aims were to 'articulate the key features of a highly performing regulatory body', and to 'postulate which regulatory model and administrative arrangements are

best suited to attain the key features'.⁸³ The eventual Model is the product of three rounds of surveys of 75 randomly-selected professional and lay stakeholders⁸⁴ with experience in various regulatory contexts around the world.⁸⁵ The participants were asked to identify and agree upon key features of a highly performing associational body to regulate professionals (in particular, nurses).⁸⁶ After the repeat surveys' testing for importance, feasibility and desirability and confidence in the outcomes, a consensus produced 47 indicators of associational excellence.⁸⁷ These indicators were categorised under four key performance areas: legislation advocacy and responsiveness; organisational and internal governance; external governance and public accountability; and responsibilities and functions.⁸⁸ Under each of these major categories there are a number of more specific activities and standards.⁸⁹ Though the study participants were connected with the nursing profession and one of the study aims pertains to nurse regulation, the resulting model relates primarily to the study's second aim – to articulate key features of highly performing regulatory bodies. The standards are expressed in general terms, allowing its application to non-nursing regulatory bodies (as the PSC now does). A pared version of the Benton Model used by the PSC is attached as an appendix.⁹⁰

In our Findings and the summary that follows, we will discuss a version of the Benton Model that we have further modified. Although we were assessing associations as 'regulatory bodies', the roles and functions of associations – as a particular form of regulatory body – are not fully encapsulated by the Model alone. Because of the form and aims of our research, described in the Methodology section below,⁹¹ some indicators in the Model could not be measured. The model we have developed, adapted from Benton's, is best suited to extensive self-assessment combined with an external review combining observational and survey methods.

Below, we provide a brief, generalised and idealised overview of associations' regulatory activities that feature in the Benton Model and have been incorporated into our analysis. Here, where relevant, we have also included references to works relevant to each activity.

78. See Introduction, Section 3A(a) Early theoretical models of associations: the public interest and the professional project, Model 1, above.

79. *Ibid.*

80. See Introduction, Section 3A(c) The third model: associations' corporate mentalities, Model 3, above.

81. See Professional Standards Councils, What Is a Profession? The Academic View <<https://www.psc.gov.au/what-is-a-profession/academic-view>>.

82. Adapted from D C Benton, M A González-Jurado and J V Benoit-Montesinos, 'Defining Nursing Regulation and Regulatory Body Performance: A Policy Delphi Study' (2013) 60 *International Nursing Review* 303, 308.

83. *Ibid.*

84. *Ibid.* 304.

85. *Ibid.*

86. *Ibid.*

87. *Ibid.* 307.

88. *Ibid.* 308.

89. *Ibid.*

90. See Appendix 1: Benton Model (Streamlined Version).

91. See Introduction, Section 4: Methodology, below.

REGULATORY ROLES

1. Responsibilities and functions of associations

- a. They continually assess the professional competence of their members, to ensure that members maintain competence needed for current practice;⁹²
- b. They have complaints-handling functions, and procedures surrounding those functions;⁹³
- c. They develop and promulgate codes of ethics and conduct that are more demanding than the minimum legal requirements;⁹⁴
- d. They may impose disciplinary sanctions on members who fail to adhere to their codes and standards;⁹⁵
- e. They maintain publicised registers of practitioners;⁹⁶
- f. They certify eligible practitioners, and may provide specialised certification to reflect further training;⁹⁷
- g. They provide continuing education programs and other formal education services, like conferences and online services;⁹⁸ and
- h. They promote members' self-regulatory behaviour, both through formal education and by offering networking and other social opportunities to members.⁹⁹

2. Legislation advocacy and responsiveness

- a. Associations interpret legislation relevant to their fields, informing and educating their members and the public of their interpretations;¹⁰⁰ and
- b. They work to update their practices and regulatory materials to keep in line with current public expectations.¹⁰¹

3. Organisational and internal governance

- a. Associations must maintain the standards of their own internal processes, by ensuring that their board election processes are robust;
- b. They maintain their ability to discharge their duties by keeping adequate resources;
- c. They have internal mechanisms in place to work toward the efficient and prudent performance of their regulatory functions; and
- d. They continually monitor and update their own performance, and adapt to external change.¹⁰²

4. External governance and public accountability

- a. Associations have measures in place to maintain their accountability to members, the public and other stakeholders;¹⁰³
- b. They publicise information about their function and processes;¹⁰⁴ and
- c. They engage and collaborate with external stakeholders when developing their policies and standards, acting as a mediator between their members and external forces.¹⁰⁵

92 Theo Van Achterberg et al, 'Promoting Evidence-based Practice: The Roles and Activities of Professional Nurses' Associations' (2006) 53 *Journal of Advanced Nursing* 605.

93 See, eg, Christine Parker, 'Regulation of the Ethics of Australian Legal Practice: Autonomy and Responsiveness' (2002) 25 *University of New South Wales Law Journal* 676.

94 See also Dimity Kingsford Smith, Thomas Clarke and Justine Rogers, 'Banking and the Limits of Professionalism' (2017) 40 *University of New South Wales Law Journal* 411, 452.

95 See, eg, H W Arthurs, 'The Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs?' (1995) 33 *Alberta Law Review* 800.

96 Mark A Hager, 'Engagement Motivations in Professional Associations' (2014) 43(25) *Nonprofit and Voluntary Sector Quarterly* 395.

97 *Ibid.*

98 See, eg, Jean Chamberlain et al, 'The Role of Professional Associations in Reducing Maternal Mortality Worldwide' (2003) 83 *International Journal of Gynecology and Obstetrics* 94, 100.

99 Lynn Mather and Leslie C Levin, 'Why Context Matters' in Leslie C Levin and Lynn Mather (eds), *Lawyers in Practice: Ethical Decision Making in Context* (University of Chicago Press, 2012) 1. See also 2026 Report, above n 4, 11.

100 Ross Ray, 'Promoting and Defending the Rule of Law – the Role of Professional Associations' (2008) *Ethos* 21.

101 Cf Henczel, 'The Impact of Library Associations: Preliminary Findings', above n 54, 138.

102 See, eg, Beth Gazley, 'Good Governance Practices in Professional Associations for Public Employees: Evidence of a Public Service Ethos?' (2014) 74 *Public Administration Review* 736.

103 Marilyn L Dollinger, 'Professional Associations: Ethics, Duty and Power' (2000) 31(2) *Journal of the New York State Nurses Association* 28, 29.

104 Saeed Askary and Marc Olynk, 'Public Interest, Ethics, and the Balanced Scorecard: Implications for the Accounting Profession' (2006) 16 *Australian Accounting Review* 51, 56.

105 Greenwood, Suddaby and Hinings, above n 31, 58

B. Representative, community, and member-oriented functions

Unlike a purely ‘regulatory’ body, an association exists to represent its profession and members – and much of its activity and energy is directed toward functions that maintain the professional community and members’ allegiance. While associations’ activities in these areas are not directly ‘regulating’ their professions, these activities can support or undermine the regulatory role associations

play. For this reason, we have included additional factors in our analysis – aspects of associations that the Benton Model and its definition of ‘regulatory body’ does not capture.

We have separated these additional functions into three categories, set out in more detail below: representative and community functions; profession and member adaption functions; and membership functions.

Representative and Community Functions

1. Advocacy and representation for the profession
 - a. Associations understand,¹⁰⁶ influence,¹⁰⁷ and represent the profession’s interests in contributing and responding to legal reform and change.¹⁰⁸
2. Collegiality and community
 - a. They can build and support the profession’s collective identity; defining what it is that professionals ‘do’.¹⁰⁹

Profession and Member Adaption Functions

1. Mediator of change
 - a. Associations must conduct research, provide education and reinforce responsibilities to enable the profession and members to adapt to changes in the industry and society.¹¹⁰

Membership Functions

1. Personal ‘professional’ benefits
 - a. Associations should help members self-define their individual professional identities;¹¹¹
 - b. They may help members to establish valid reputations within the profession;¹¹²
 - c. They should provide organic career advancement opportunities;¹¹³
 - d. They must allow for external recognition of their members’ qualifications.¹¹⁴
2. Individual support
 - a. They should provide members with a sense of professional and personal belonging and support.¹¹⁵
3. Private and commercial benefits
 - a. They may provide additional membership incentives – like discounts, credit cards, and other ‘perk’-like benefits.¹¹⁶

In the final part of the Introduction, we provide the methodological details for readers to be able to better critically engage with the Report’s findings and recommendations.

106 Cf Elizabeth Chambliss and Bruce A Green, ‘Some Realism about Bar Associations’ (2008) 57 DePaul Law Review 425.

107 See, eg, Tina Maragou Hovekamp, ‘Professional Associations or Unions? A Comparative Look’ (1997) 46 Library Trends 232, 233

108 See, eg, Charles Oppenheim and Natalie Pollecutt, ‘Professional Associations and Ethical Issues in LIS’ (2000) 32 Journal of Librarianship and Information Science 187, 197.

109 Greenwood, Suddaby and Hinings, above n 31, 62, 76.

110 Ibid 58.

111 Markova et al, above n 4, 494.

112 Henczel, ‘The Impact of Library Associations: Preliminary Findings’, above n 54, 131.

113 2026 Report, above n 4, 11.

114 Ibid.

115 See, eg, Henczel, ‘The Impact of Library Associations: Preliminary Findings’, above n 54, 131.

116 See, eg, Mary Frances Kordick, Influences on Membership in Professional Nursing Associations (PhD Thesis, George Mason University, 2002) 52.

4. METHODOLOGY

The vital question driving this research is how can professional regulation ensure the trustworthiness of professional services, and what part should associations play in that regulation? More specifically, what core features and strategies will associations need to play their part effectively? And how can they manage these along with the other dimensions of their role?

In this Report, the authors conducted a literature review of all relevant studies on professional associations' activities and value. To better understand the intricacies suggested in the theoretical and contextual discussions above, we also conducted an in-depth interview study of the Law Society of New South Wales, the association for NSW lawyers.

A. Literature review

We first located the professional and academic documents related to associations and any attempts to evaluate or measure associations' benefits. These findings have been synthesised and presented thematically to complement our interview findings; rather than presenting a standalone literature review, the literature findings are interspersed where relevant. Despite this format, we were careful to supply enough detail of the studies so that readers can assess them for their transferability to other associational contexts.

Our analytical method is described in subsection C, below and further detail on the literature review itself can be found in Appendix 2.

B. In-depth interview-study

The second major part of this research is an in-depth interview study of the Law Society of New South Wales (the 'Law Society').

i. The Law Society as case study

The Law Society was informally established in the 1840s in response to the 'problem of rogue practitioners'¹¹⁷ and ongoing attacks from the media and the government.¹¹⁸ From a membership of 33 in 1860,¹¹⁹ the Law Society gradually established its reputation and accrued

statutory powers, including in 1935 the powers to inspect trust accounts,¹²⁰ enforce 'character' requirements,¹²¹ and discipline solicitors – whether members or not.¹²² These powers were reconfigured but largely reinforced throughout the middle of the 20th century; in the 1990s power began to shift. First, the legal profession lost its monopoly over conveyancing,¹²³ and by the end of the 20th century complaints handling and ombudsmen had been 'patched onto the traditional self-regulatory disciplinary processes of all jurisdictions'; the Office of the Legal Services Commissioner ('OLSC') assumed the primary disciplinary role in NSW.¹²⁴ In 2004, membership of the Law Society was no longer mandatory.¹²⁵ Nonetheless, as at June 2017, the Law Society had around 29 000 members¹²⁶ – some 90% of all solicitors in NSW.¹²⁷

The Law Society was selected for our study as an instrumental case for a number of reasons. First, its elaborate committee and governance structures¹²⁸ (and sheer size) suggest that it has significant resources and capacity to provide a great deal of value to its members (and others). Further, its high membership rate would suggest that it has the capacity to influence professional norms, and to be a particularly diverse and broadly representative association. Finally, we anticipated that its long history – and the longstanding acceptance of law as a 'profession' – would enable research participants to form views based on incremental change and well-established contexts and relationships between the association and its members, the profession, the government, and the public.

ii. Interview methodology

A qualitative study emphasises the world as lived, felt and interpreted by people acting in their social contexts. The task of the researcher is to understand the multiple meanings and forms of knowledge that drive this reality.¹²⁹ An interview study allowed us to discern from the association: which beliefs about and experiences of professionalism, the association's purpose, and the current context are driving the association's activities. From the other side, the members: which attitudes about and experiences of associational value and what perceptions of the sources and sites of professionalism are likely influencing their behaviour.

117 Michael Pelly, 'Convicts, Press Wars and Australia's First Lawyers: A History of the Law Society of New South Wales' (2015) 12 Law Society of New South Wales Journal 34, 34.

118 *Ibid* 36.

119 *Ibid*.

120 Legal Practitioners (Amendment) Act 1935 (NSW) s 65.

121 *Ibid* s 71.

122 *Ibid* s 75(1).

123 Professional Regulation Task Force, 'Report to President' (Law Society of New South Wales, May 1997) [16]–[20] <<https://web.archive.org/web/19980422142053/http://lawsocnsw.asn.au:80/about/papers/regulns/reglins.html>>.

124 Parker, above n 93, 690. The OLSC was commenced operations in July 1994: Office of the Legal Services Commissioner, History (13 August 2018) <http://www.olsc.nsw.gov.au/Pages/lsc_aboutus/olsc_history.aspx>.

125 Gordon Salier, 'The Choice Is Yours' (2004) 42(3) Law Society Journal 56, 56.

126 Law Society of New South Wales, 'Annual Report 2017' (2017) 10 ('Annual Report 2017').

127 There were 32 055 admitted solicitors as at 30 June 2017: *ibid* 6.

128 For example, the Law Society currently has 28 committees: *ibid* 5; and there are 28 Regional and Suburban and Law Societies and one City Law Society recognised in New South Wales: Law Society of New South Wales, 'Memorandum and Articles of Association' (26 October 2017) art 12.3 <https://www.lawsociety.com.au/sites/default/files/2018-03/MOA%20LSNSW_0.pdf> ('Memorandum and Articles of Association').

129 Colin Robson, *Real World Research* (Wiley, 3rd ed, 2011) 24.

In-depth interview allowed for exploration of non-obvious issues that can be missed in surveys, for example. They also allowed for open, collaborative elements which is useful for policy research, for instance, for participants to come up with solutions to problems of associational effectiveness.¹³⁰

We conducted 24 semi-structured, in-depth interviews in person and over the phone. The interviews lasted between 50 minutes and 2.5 hours.¹³¹ Participants were asked about their perceptions of the benefits of their association, the validity of the Benton Model (explained above),¹³² and the influences of the wider political and practice contexts on the activities and impact of their association.

In brief, the interview schedule asked participants about the following:

- When and why they became and remain members of the Law Society;
- Any formal involvement with the Law Society;
- How they engage with the Law Society (as practitioners);
- Benefits from Law Society membership (or generally);
- Examples providing evidence of effectiveness;
- Attitudes towards the Law Society;
- Challenges for the Law Society and barriers to effectiveness;
- Improvement strategies and ideas for enhanced effectiveness;
- Other (non-Law Society) forms of support they receive as a professional; and
- How the Law Society fares compared to an ‘ideal’ association.¹³³

Though interviews began with this defined interview schedule, during the interview process questions were naturally changed or added to elicit responses to fill in gaps, elaborate upon, clarify, test, or corroborate participants’ statements and statements from previous interviewees.

iii. Sampling

Our study included 24 participants: the legal regulator, 10 Law Society leaders, and 13 regular Law Society members. The aim was to interview a group containing some representation of the main practice areas and organisational arrangements. The sample choice also

sought to glean a range of views; from those most involved, the association leaders, through to everyday practitioners with minimal engagement. A table in Appendix 2 outlines the demographics of the participants.

C. Data Analysis

Our first analytical step was completing the literature review and synthesis described in subsection A above.¹³⁴

Then, after all interviews were concluded, the interview data was analysed using an iterative process.¹³⁵ First, the researchers independently engaged in initial exploration of the interview transcripts and divided the data (or ‘coded’ it) according to major themes and subthemes that captured the categories of information shared, recognising that some comments may fall within several major themes and subthemes. For example, comments about complaints handling might come under the theme ‘regulatory role’, and under subthemes including ‘public benefits of associational regulation’ and ‘member experience of complaints handling’. After this initial independent analysis, the researchers then shared their coding to validate the analyses’ accuracy and credibility and to ensure that multiple perspectives were captured. This process was designed to gradually build an analytical framework capable of capturing a larger, consolidated picture of contemporary associational value, challenges, adaptations and areas for improvement.

Much of our literature findings and interview data was then analysed by reference to a framework derived from the Benton Model, discussed above.¹³⁶ The Professional Standards Councils (‘PSC’) uses this Model to assess the ‘resources, standards and organisational capacity’¹³⁷ of existing and aspirational associations who, among other things, seek the benefit of its limited liability scheme. It shares a streamlined version of the Model on its website as a reference for professions and for associations to self-assess their performance.¹³⁸ This version of the model is attached as an appendix.¹³⁹

¹³⁰ These solutions are presented as recommendations in Part VI: Conclusion and Recommendations, B: Recommendations, below.

¹³¹ With the exception of one interview that was only 30 minutes.

¹³² See Introduction, Section 3C(a), above.

¹³³ This question was framed in terms of the Benton Model. For a description of the Benton Model, see Introduction, Section 3C(a): Regulatory functions, above.

¹³⁴ See Introduction, Section 4A: Literature Review, above.

¹³⁵ John W Creswell, *Educational Research: Planning, Conducting, and Evaluating Quantitative and Qualitative Research* (Pearson, 4th ed, 2012) 237–8.

¹³⁶ See Introduction, Section 3C(a): Regulatory functions, above.

¹³⁷ Professional Standards Councils, *What Is a Profession? The Academic View* <<https://www.psc.gov.au/what-is-a-profession/academic-view>>.

¹³⁸ *Ibid*.

¹³⁹ See Appendix 1: Benton Model (Streamlined Version).

We have used the Model in our analysis in the following ways. As a foundation, we adopted the assumption that the indicators of associational excellence it contains are valid.¹⁴⁰ We then used the Model's categories and subheadings to analyse and present our data. Its categorisation formed the basis of the subheadings in our findings reported under 'Benefits', and also informed our analysis of findings in other Parts under other subheadings. In consulting these measures directly, we were effectively conducting an assessment of associations' performance. This assessment outcome applies in particular to the Law Society, by virtue of our interview focus (and interview questions explicitly asking participants to consult the Model), but extends also to the associations analysed among our literature sources. Finally, we also asked interview participants to comment on the Model itself, in doing so addressing the importance, feasibility, desirability and confidence of its measures much in the same way as the original study.

D. Limitations

i. Sampling

There are some limitations in our data sample. Though the studies contained in our literature review are geographically diverse, they skew Anglo-American; studies were found primarily from the US, the UK, and Australia (this effect perhaps compounded by the requirement that studies be in English). A range of professions was included, however most studies came from the legal, library services, and health professions.

Further, the Law Society of New South Wales may not be representative of all (approximately 200) associations in Australia.¹⁴¹ While we have pointed out the advantages of examining a well-institutionalised association,¹⁴² there are downsides, which beset studies of any powerful organisation or group.¹⁴³ These drawbacks might include that they can be more sophisticated and evasive in their public communications, including to researchers. They tend to display inflexibility in their processes and resistance to new thinking and practices. To obtain a more generalisable, comprehensive outcome, an ideal research design would involve a broad study of all Australian associations, and a deeper investigation of at least a few associations across the main professions and with different degrees of institutionalisation. This case study

of the Law Society would be strengthened by a follow-up study of newer or aspiring professional associations for comparison.

While we have attempted to capture as much information from interview participants and archival material as possible, we are unable to present an accurate, in-depth account of the Law Society's organisational structure and inner workings. Without an insider study, and more attention paid to executive functions, governance, and operations, a comprehensive account of an association of this size and complexity is impossible. Appendix 4 contains an Organizational Diagram of the Law Society that goes some way to clarifying relationships discussed in this paper.

Further, our interviews did not contain a representative sample (either of association members, of legal professionals, or of professionals in general), and therefore the interview findings are not generalisable. We spoke only to professional leaders and regular members, and despite our efforts we were not able to speak to non-members. Our difficulty in obtaining non-member interviewees can be partially explained by the low rate of non-membership among NSW solicitors.¹⁴⁴ Although some of the members we spoke to could be fairly characterised as disengaged with their association, this is not the same as capturing non-member perspectives.

Finally, our interviews do not include perspectives from outside the profession other than where expressed second-hand by participants. We are particularly mindful of the absence of a public voice, in both this research and in broader conversations about professional standards. It is unclear whether our particular research question and approach would be broadly transferable to users of professional services or other members of the public. It may be very difficult for non-insiders to validly assess professional associations' value as distinct from the value of professions themselves. Notwithstanding, it may be possible to design a research question and method capable of capturing sufficiently specific public views, and this is a further avenue for future research.

140 As an alternative, though less robustly-derived than Benton's model, the researchers of the UK Chartered Institute of Building report into associational benefits declared five benefits 'pertinent to policy makers today': productivity, social mobility, governance and ethical standards, internationalisation, and policy formation: CIOB Report, above n 14, 8–22.

141 See, eg. UNSW Sydney, Professional Associations (31 August 2017) <<https://student.unsw.edu.au/professional-associations>>, recording 189 professional associations; University of Sydney, Professional Associations, <<https://sydney.edu.au/careers/students/career-advice-and-development/professional-associations.html>>, recording 173 professional associations. The University of Sydney list is not simply a subset of the UNSW list.

142 See Introduction, Section 4(B)(i): The Law Society as Case Study, above.

143 George Moyser and Margaret Wagstaffe, 'Studying Elites: Theoretical and Methodological Issues' in George Moyser and Margaret Wagstaffe (eds), *Research Methods for Elite Studies* (Allen and Unwin, 1987) 1; Justine Rogers, 'Shadowing the Bar: Studying an English Professional Elite' (2010) 36(3) *Historical Reflections/Reflexions Historiques* 39.

144 See Introduction, Section 4(B)(i): The Law Society as Case Study, above. The Law Society's membership is around 90% of all NSW solicitors.

ii. Methods – and why not a dollar value?

While many of the pitfalls of self-reporting are reduced through the in-depth nature of the interviews we conducted, a fruitful path here would be to supplement this study or any on associations with some semi-participation observer elements. This would more sharply illuminate the internal operations of an association that are obscured by self-reporting: to understand how cultural phenomena, rotating leadership and committee dynamics, for instance, can enable and constrain associational effectiveness.

But, the gold standard of empirical research, especially for policy research, is the experiment or quasi-experiment. In this study of associational value, for us to ‘prove’ associational value, we would need to be able compare the same professional outcomes in legally and socially comparable jurisdictions, one with and one without associations. Ideally, again for policy research purposes, this value could be translated into an overall monetary figure. However, quantitative studies work well when the construct is controllable (generally physical and observable), and its definition agreed upon. What a professional association does cannot be entirely divided from what other institutions do, like universities, workplaces, and, as illustrated above, the government and the market. Also, the value of an association is not stable. Finally, the markers of professionalism vary and even those that are agreed upon are hard to locate.¹⁴⁵ The UK Chartered Institute of Building recently commissioned a report into associational benefits.¹⁴⁶ The researcher, Brian Green, explained why the report does not attempt to assign a dollar value to associations, summarising a number of these concerns:

“It would be both impractical and inevitably misleading to present a cash figure as an accurate indicator of the total net value provided by professional bodies, or a particular professional body, to society and the economy. It could only ever be imprecise. Any value stated would depend on the conditions of the day and would not hold true over time. In part this is because the challenges facing professional bodies change over time, sometimes rapidly. One of their great strengths is that they adjust to ever-changing conditions and tailor their efforts to suit the needs of the day. The value of a professional body therefore varies according to how successful it is in addressing specific needs at any given point in time. The true value of a professional body can in reality only ever be tested against the counterfactual statement: what if it didn’t exist?”

These comments are directly applicable to our research design, and their concerns underlie our decision to place emphasis on the qualitative comparison between associations and state and market regulation. Though we could not compare our findings to an alternative state without associations, we could continually look for indicators of whether or not that alternative was possible or preferable, and vice versa – and we have endeavoured to do so.

¹⁴⁵ For example, a study of paramedics found a range of dimensions indicating professionalism, including integrity, careful delivery of service; teamwork and neat appearance: Madeline Carter et al, ‘Measuring Professionalism as a Multi-Dimensional Construct: Professionalism and Conscientiousness in Healthcare (Professionals – Study 2)’ (Final report, Durham University and Newcastle University, October 2015). Having said that, the writers concluded, from a study of the beliefs of trainees and educators within three new professions, that professionalism is the ability to select appropriate behavioural and communication strategies in context: Bryan Burford et al, ‘Professionalism Education Should Reflect Reality: Findings from Three Health Professions’ (2014) 4 Medical Education 361, 372.
¹⁴⁶ CIOB Report, above n 14. We discuss the results of this report in our findings about public and government awareness of associations: see Part II: Findings: Regulatory Functions – Value and Challenges, Section 4A(4)(a): Specific challenges – Public and government awareness, below.

PART II: REGULATORY FUNCTIONS: VALUE AND CHALLENGES

1) RESPONSIBILITIES AND FUNCTIONS

A. STANDARDS AND EDUCATION

1. SUMMARY AND INDICATORS

A highly-performing regulatory body will ensure that 'educational programmes are aligned with the competences required by registrants for fitness to practice', and will develop required professional competencies collaboratively with other stakeholders including employers and the public.¹⁴⁷

2. ASSOCIATION ACTIVITIES

A. Continuing Professional Development

NSW solicitors are required to complete 10 Continuing Professional Development ('CPD') units per year, including a mandatory unit in each of 'ethics and professional responsibility'; 'practice management and business skills'; 'professional skills' and 'substantive law'.¹⁴⁸ CPD points can be accumulated through formal programs – like lectures, seminars, postgraduate study and online programs – and through other activities – like writing articles and attending committees.¹⁴⁹ Committees within the Law Society hold CPD events in particular areas (for example, in alternative dispute resolution,¹⁵⁰ business law,¹⁵¹ ethics,¹⁵² and elder abuse).¹⁵³ The Law Society operates LawInform, an online Learner Management System that enables all Law Society members (and others) to enrol in and access discounts on courses, track their CPD points, complete online courses (including access to 'webinars') and receive notifications and reminders.¹⁵⁴

Insurance-related education is also available through the Law Society's wholly owned, independent subsidiary LawCover, which delivers 'presentations and workshops in risk management education and by regularly publishing journal articles about the claims made against solicitors, their outcomes and the lessons to be learnt from them'.¹⁵⁵

B. Travelling programs

While many resources are available online, the Law Society also takes various in-person CPD programs from the city out into suburbs and regions. For example, the Law Society's Costs Unit (which educates solicitors – regardless of their membership in the Law Society – about their costs obligations under legislation), in 2016–17, travelled to nine suburban and regional areas to provide CPD seminars.¹⁵⁶

the Regulatory Compliance Support Unit travelled to nine regional areas to provide seminars on topics including legal writing skills, marketing, supervision of legal services, and other compliance issues.¹⁵⁷

C. Initiatives addressing changes in practice and technology

The Law Society's 'Thought Leadership' program includes regular events like panel discussions and symposia to address pressing professional issues –¹⁵⁷ including its ongoing Future of Law and Innovation in the Profession¹⁵⁸ ('FLIP') project, which has already generated a report and recommendations, in implementation, for responses to emerging challenges associated with change in the legal profession.¹⁵⁹ FLIP is now a 5-year research partnership with UNSW Law.¹⁶⁰

D. Publications

Educational material is also included in Law Society publications. In February to December each year, the Law Society publishes the Law Society Journal, a magazine format publication (also accessible online) containing – among other things – information about developments in the law and legal practice.¹⁶¹ The Law Society also operates a number of newsletters that provide practice updates and other educational material: 'Monday Briefs', a weekly e-newsletter with industry news and events; 'Public Record', a monthly e-newsletter including legal guides aimed at public sector practitioners; 'In The House', a monthly e-newsletter for in-house practitioners; and 'Smalltalk', a monthly e-newsletter with legal updates and how-to guides for solo and small-firm practitioners.¹⁶²

147 Benton, González-Jurado and Beneit-Montesinos, above n 82, 308.

148 Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015 (NSW) r 6.

149 *Ibid* r 8.

150 Law Society of New South Wales, 'Annual Report of Committees 2017' (2017) 2 ('Annual Report of Committees 2017').

151 *Ibid* 3.

152 *Ibid* 13.

153 *Ibid* 10.

154 Law Society of New South Wales, 'Why Choose Us?' (2018) LawInform <<https://www.lawinform.com.au/mod/page/view.php?id=2617>>.

155 LawCover, Practice Support Services (2015) <<https://lawcover.com.au/practice-support-services-objectives>>.

156 Professional Standards Department, Law Society of New South Wales, 'Professional Standards 2017 Annual Report' (2017) 30 ('Professional Standards 2017 Annual Report').

157 *Ibid* 32.

158 Annual Report 2017, above n 126, 3.

159 *Ibid* 11.

160 Law Society of New South Wales, Future of Law and Innovation in the Profession <<https://www.lawsociety.com.au/advocacy-and-resources/advocacy/flip>>.

161 Law Society of New South Wales, Subscribe to LSJ <<https://www.lawsociety.com.au/advocacy-and-resources/publications-and-resources/ljs/subscribe>>.

162 Law Society of New South Wales, E-Newsletters <<https://www.lawsociety.com.au/advocacy-and-resources/publications-and-resources/newsletters>>.

3. INTERVIEW AND LITERATURE FINDINGS: ACTIVITIES AND VALUE

A. Formal education: valuable to members and the profession

Formal education programs foster a profession's knowledge, skill-set and expertise,¹⁶³ and at the same time strengthen practitioners' professional values, beliefs, and identities.¹⁶⁴ Associations can be pivotal in this dual role: Faulconbridge, in a semi-structured interview study of 58 members of advertisers' and lawyers' associations,¹⁶⁵ found that, through their formal education and conference programs, professional associations played a 'critical' role in enabling collective learning.¹⁶⁶ In a study comparing indicators of quality of care in 4220 nursing homes with association members as administrators to 12 322 homes with non-member administrators,¹⁶⁷ Castle and Fogel concluded that association education was one 'resource' linked to greater success in nursing homes administrated by association members.¹⁶⁸

FORMAL EDUCATION PROGRAMS FOSTER A PROFESSION'S KNOWLEDGE, SKILL-SET AND EXPERTISE, AND AT THE SAME TIME STRENGTHEN PRACTITIONERS' PROFESSIONAL VALUES, BELIEFS, AND IDENTITIES.

In our interviews, a number of participants discussed how the Law Society's continuing education programs (referred to as 'CPD' – continuing professional development, or 'CLE' – continuing legal education) have maintained and improved their quality over time, and how they continue to be updated and adapted to changing circumstances. Many interviewees cited the Law Society's CPD as a key benefit they derived from the Law Society. A number of participants explicitly noted that the Law Society's CPD programs were high-quality, diverse, and effective:

I haven't really measured them against the other service providers, but ... we get bombarded ... with different offerings from different service providers. The fact that some of our staff are still taking up the invitations to Law Society CLEs would seem to suggest that in a competitive market they're still offering something that's worthwhile.

Another felt that the Law Society's training was, because of the Law Society's connections to professional knowledge, particularly authoritative – 'straight from the horse's mouth'.

Participants also felt that the Law Society's CPD was particularly useful for those without other options – small-firm and solo practitioners, others without in-house CPD programs and regional members. Though many members received CPD from their workplaces, they did note that the Law Society's programs were 'complementary' to their organisation's offerings and that in-house programs may be formulated by reference to the Law Society's materials:

As part of preparing for a staff-briefing part of our internal CPD stuff, I had cause to review a lot of the changes that were made for the Legal Profession Uniform Law [the new practice and conduct rules that governs most lawyers in Australia] ... I had actually utilised a lot of Law Society resources to do that... even the things like the little fact sheets that are published by the Law Society, things that I've used ... if there is some question of formalities or something very practical, then I'll certainly prioritise what the Law Society has to say on that issue as opposed to someone else.

AN INTERVIEW PARTICIPANT FELT THAT THE LAW SOCIETY'S TRAINING WAS, BECAUSE OF THE LAW SOCIETY'S CONNECTIONS TO PROFESSIONAL KNOWLEDGE, PARTICULARLY AUTHORITATIVE – 'STRAIGHT FROM THE HORSE'S MOUTH'.

163 A Carol Rusaw, 'Learning by Association: Professional Associations as Learning Agents' (1995) 6 Human Resource Development Quarterly 215, 219.

164 Kordick, above n 116, 49–50.

165 James R Faulconbridge, 'Exploring the Role of Professional Associations in Collective Learning in London and New York's Advertising and Law Professional-Service-Firm Clusters' (2007) 39 Environment and Planning A: Economy and Space 965, 970.

166 Ibid 973.

167 Nicholas G Castle and Barry S Fogel, 'Professional Association Membership by Nursing Facility Administrators and Quality of Care' (2002) 27(2) Health Care Management Review 7, 12.

168 Ibid 15.

i. Professional 'insider' education

A number of our interview participants noted how the Law Society has worked to strengthen the scope of its CPD offering – for example by making certain topics, including ethics, compulsory each year. Many participants noted the quality and value of the mandatory ethics CPD provided by the Law Society. One participant, a Law Society leader, also discussed how the regulatory and educative arms of the Law Society are seeking better 'internal integration'. By sharing information across departments about complaints received and other general 'knowledge about how the profession is working', the Law Society can provide education with greater 'practical' relevance for members and regulatory impact for the public. Associations can also provide valuable education that extends beyond an academic or professional knowledge emphasis: two interview participants, one regular member and one leader, discussed the benefits of the Law Society's LawCover seminars for educating members about insurance issues in practice.

'THE IDEA [OF FLIP] BEING THAT WE WANT THE LAW SOCIETY TO BE AT THE FOREFRONT OF CHANGES AND DEVELOPMENTS TO BETTER INFORM MEMBERS OF THE PROFESSION; IT'S ALMOST TRYING TO PEER OVER THE HORIZON ...' - LAW SOCIETY LEADER

ii. Technological advances

Many participants mentioned the Law Society's efforts to modernise its CPD delivery, making many more services available online – including via 'LawInform' and by making more CPD available as webinars. A number of interview participants discussed the increasing provision of CPD via webinars – one described this service, for regional practitioners who might struggle to attend CPD in person, as 'amazing'. Finally, a number of participants valued the Law Society's efforts to educate members about technological change relevant to the legal profession broadly, including through its 'Thought Leadership' program and the FLIP report it has produced. Two Law Society leaders commented:

We've seen massive changes in how people communicate, in how people work, how technology can help us in terms of the tool to provide more efficient service to clients ... I think technology is the biggest change that we're seeing, and the [Law Society's] Future of the Law and Innovation in the Profession project last year – really informed us well on how to adapt for the future.

The idea [of FLIP] being that we want the Law Society to be at the forefront of changes and developments to better inform members of the profession; it's almost trying to peer over the horizon ... And we used it as an educational tool ... we see that as very important, because if you are not prepared for change then the change is going to come out of left field, and it could have a dramatic impact.

'THEY DO COME UP, AND THEY ALWAYS MAKE AN EFFORT TO INVOLVE THE REGIONS. THEY GO OUT AND DO ROADSHOWS WHEN THERE'S NEW LEGISLATION AND ALL THAT IS VERY BENEFICIAL. IT'S TERRIFIC ACTUALLY, AS A REGIONAL MEMBER.'

- LAW SOCIETY MEMBER

iii. Travelling education

Though they may increasingly use technology, associations can also provide valuable 'travelling' education for regional members. In our interviews, a number of regional participants described the value of the Law Society increasingly arranging for visits to the regions, or 'roadshows'; events providing practical benefits like educational practice updates, as well as connection between metropolitan and regional members.

They do come up, and they always make an effort to involve the regions. They go out and do roadshows when there's new legislation and all that is very beneficial. It's terrific actually, as a regional member.

B. Benefits of formal education for other stakeholders

i. The public

The public has an interest in a competent and technologically-ready profession. In our interviews, one participant, a regional leader, noted more specifically that the Law Society trains and supports lawyers for provision of Legal Aid and pro bono work, both areas of public interest.

ii. The government

One interview participant, a regular member, made the interesting point that, as the government employs professionals (perhaps particularly relevant in this discussion of the legal profession), it stands to benefit directly from the education of those professionals – the participant noted in particular the educative role played by associations.

C. Publications: additional means of education

Associations can also help members maintain and improve their professional knowledge, and provide ‘informational incentives’ for members to engage¹⁶⁹ through publications like weekly newsletters and journals. In our interviews, a number of participants spoke about the value of the Law Society’s publications (like the ‘Monday Briefs’ weekly newsletter, and the Law Society Journal) for updating professional knowledge. One participant, a regional practitioner, said:

I have always read Monday Briefs, which is a very important part of regional practice because it keeps us up to speed – well, I think all lawyers in New South Wales. The Law Society Journal is something that I’ve always read cover to cover, and always will.

Similar findings arose in the literature. In a poll of 242 members of the Association of Mental Health Administrators, Weil and Kirk found that the ‘most important attraction of this professional association was a desire to stay abreast of changes’.¹⁷⁰ Levin, after interviewing 41 lawyers in the New York City metropolitan area,¹⁷¹ found that ‘generalist’ lawyers ‘relied heavily on written materials distributed by bar associations’ to stay up to date with the law,¹⁷² with most of the participants saying they regularly read association publications.¹⁷³

Swan, Newell and Robertson conducted a study including 93 semi-structured interviews and 1846 surveys from association members and executives across the UK, France, Sweden and the Netherlands.¹⁷⁴ Their study participants felt associations were able to communicate information about new technologies to members in a way that was ‘more comprehensive and impartial’ than direct information from technology suppliers,¹⁷⁵ providing a meaningful form of assistance to members and firms in the process of adaptation to modernisation and progress.¹⁷⁶ We discuss this mediator of change role in detail later in the Report as a profession and members’ adaptation function.¹⁷⁷ In Castle and Fogel’s study, comparing indicators of quality of care in 4220 nursing homes with administrators who were association members to 12 322 homes with administrators who were not,¹⁷⁸ the authors concluded that publications and other educational materials were a ‘resource’ that led to greater success in nursing homes with professional association members as administrators.¹⁷⁹

4. SPECIFIC CHALLENGES

A. Maintaining the quality of educational programs

Associations must maintain the standards of knowledge and expertise in their profession, and yet it appears that they sometimes fail to fully realise the potential benefits of their educational programs and other materials, like publications.

In our interviews, some participants were disappointed in the quality of the Law Society’s CPD. One regular member participant felt that the quality of education on offer was poor generally; another said that the programs were non-specific, and lacked emphasis on the ‘reality’ of practice. Finally, another participant felt that while they are generally of good quality, the Law Society’s CPD programs are repetitive and have not changed: ‘the same old thing is trotted out’.

SWAN ET AL'S STUDY PARTICIPANTS FELT ASSOCIATIONS WERE ABLE TO COMMUNICATE INFORMATION ABOUT NEW TECHNOLOGIES TO MEMBERS IN A WAY THAT WAS ‘MORE COMPREHENSIVE AND IMPARTIAL’ THAN DIRECT INFORMATION FROM TECHNOLOGY SUPPLIERS, PROVIDING A MEANINGFUL FORM OF ASSISTANCE TO MEMBERS AND FIRMS IN THE PROCESS OF ADAPTATION TO MODERNISATION AND PROGRESS.

169 Hager, above n 96, 435, citing David Knoke, ‘Incentives in Collective Action Organizations’ (1988) 53 *American Sociological Review* 311.

170 Peter Weil and Weir Richard Kirk, ‘What AMHA Does and What AMHA Should Do: Results from the 1985 Affiliate Poll’ (1985) 12(2) *Journal of Mental Health Administration* 32, 33.

171 Levin, ‘The Ethical World’, above n 10, 316.

172 *Ibid* 332.

173 *Ibid* 333.

174 Jacky Swan, Sue Newell and Maxine Robertson, ‘National Differences in the Diffusion and Design of Technological Innovation: The Role of Inter-organizational Networks’ (1999) 10(S1) *British Journal of Management* 545, 548.

175 *Ibid* 551.

176 See also David J Rothman et al, ‘Professional Medical Associations and Their Relationships with Industry: A Proposal for Controlling Conflict of Interest’ (2009) 301 *Journal of the American Medical Association* 1367.

177 See Part III: Findings: Representative, Community and Membership Functions – Value and Challenges, Section 2A: Mediator of Change, below.

178 Castle and Fogel, above n 167, 12.

179 *Ibid* 15.

CASTLE AND FOGEL CONCLUDED THAT PUBLICATIONS AND OTHER EDUCATIONAL MATERIALS WERE A ‘RESOURCE’ THAT LED TO GREATER SUCCESS IN NURSING HOMES WITH PROFESSIONAL ASSOCIATION MEMBERS AS ADMINISTRATORS.

In the literature, a number of studies suggested that associations’ views of their educational roles can be short-sighted –associations sometimes fail to appreciate the need to conduct profession-leading research, and to maintain educational standards in line with best industry practices. Van Achterberg et al interviewed board members of 43 professional nurses’ associations,¹⁸⁰ to determine whether these associations were promoting evidence-based practice (‘the conscientious, explicit and judicious use of current best practice in making decisions about the care for individual patients’), a practice deemed critically important to the integrity of nursing.¹⁸¹ The interview findings were then validated by reference to the associations’ publications and reports from the previous two years. The authors first note that the role of associations may be in researching and providing evidence in ways that individuals may not be capable of, ‘for instance in retrieving and summarizing evidence and communicating evidence to their members.’¹⁸³ [with the aim of] guarding and improving the quality of care as delivered by their members’. Disappointingly, the study found that ‘relatively few [professional associations] believed that they had a role in generating and implementing evidence. Most seemed to believe that they themselves could not perform scientific research, whereas the actual implementation of evidence was perceived as beyond the control of the [association].’¹⁸⁴

The associations appeared to be aware of the issues surrounding evidence-based practice and the importance of its implementation,¹⁸⁵ but surprisingly reticent when a proactive approach was necessary.

Borah and Aguiniga’s study, examining 20 associations’ websites for their ‘online research dissemination practices’, found that only one quarter of the associations studied made research easily accessible on their websites, and that they ‘scored poorly’ in other online research dissemination measures. Fisher examined archival data documenting the activities of four prominent United States library associations, and while finding that the associations conducted research for the profession, Fisher questioned (albeit could not answer without further research) whether the research and its publicisation was sufficient – and whether, without cooperation across the profession and cross-dissemination, associations’ research generated real value.¹⁹¹

B. Maintaining the relevance of educational programs: rise of technology

The internet and the availability of information may make practitioners feel that professional knowledge is so easy to access that an association’s input is unnecessary.¹⁹² In our interviews, one participant, a regional leader, spoke of how younger, inexperienced practitioners in particular may value associations less because of the ease of ‘Googling’ and the confidence it can engender:

They’re young ... They don’t have the same experience, or they don’t put as much of a value on professional membership because they can Google it ... Like they believe they’re unbreakable, just ask them.

ASSOCIATIONS SOMETIMES FAIL TO APPRECIATE THE NEED TO CONDUCT PROFESSION-LEADING RESEARCH, AND TO MAINTAIN EDUCATIONAL STANDARDS IN LINE WITH BEST INDUSTRY PRACTICES.

180 Van Achterberg et al, above n 92, 607.

181 Ibid 606.

182 Ibid 608.

183 Ibid 606–7.

184 Ibid 610.

185 Ibid 611.

186 Elisa Vinson Borah and Donna M Aguiniga, ‘Online Dissemination of Research: Are Professional Associations Making the Grade?’ (2013) 49 Journal of Social Work Education 506.

187 Ibid 507.

188 Ibid 511.

189 Ibid 512.

190 William Fisher, ‘The Value of Professional Associations’ (1997) 46 Library Trends 320, 323–4.

191 Ibid 328–9.

192 See, eg, Henczel, ‘The Impact of Library Associations: Preliminary Findings’, above n 54, 123–4.

VAN ACHTERBERG ET AL FOUND ASSOCIATIONS APPEARED TO BE AWARE OF THE ISSUES SURROUNDING EVIDENCE-BASED PRACTICE AND THE IMPORTANCE OF ITS IMPLEMENTATION, BUT SURPRISINGLY RETICENT WHEN A PROACTIVE APPROACH WAS NECESSARY.

Participants also discussed how technology-enabled sharing means that associational knowledge is no longer 'exclusive' – members can share educational (and other) benefits derived from membership (particularly associations' practice updates and other publications) with colleagues freely and easily via email.

At the same time, technological change may create opportunities for associations to re-assert their relevance to members. In our interviews, some leader and regular member participants felt that the Law Society could be more proactive about its efforts to prepare and educate members for the increasing technological change facing the legal profession. One regular member who expressed this view:

Well my perception of the Law Society is that it's well behind the times. So, it ran last year some sort of investigation on technology in the legal profession – one would have to think that was at least 20 years overdue. And if they'd started it 20 years ago, they would have realised they have to do it every year. But then you have to ask yourself... people are using technology [for] ultimately finding business advantages, against the other lawyers. So, is it really something that the Law Society should be at the front end of the curve on? And the answer probably is 'no'...

'THEY'RE YOUNG ... THEY DON'T HAVE THE SAME EXPERIENCE, OR THEY DON'T PUT AS MUCH OF A VALUE ON PROFESSIONAL MEMBERSHIP BECAUSE THEY CAN GOOGLE IT ... LIKE THEY BELIEVE THEY'RE UNBREAKABLE, JUST ASK THEM.'

- REGIONAL LAW SOCIETY LEADER

The Law Society's FLIP project that followed the report is a five-year research program, but this perspective reveals that even when an association pursues ambitious initiatives there remains the additional challenge in convincing their membership that it is worthwhile. In this case, emphasis on technology in professional education may be seen as conflicting with associations' 'professional' ideals.

TECHNOLOGICAL CHANGE MAY CREATE OPPORTUNITIES FOR ASSOCIATIONS TO RE-ASSERT THEIR RELEVANCE TO MEMBERS.

C. Maintaining the relevance of educational programs: changing work requirements and pressures

Some of our interviewees described their surprise, upon entering the profession, at the ways in which professional practice entails and requires business structures and skills. One participant, a family law practitioner, felt that the balance had tipped toward new 'logics':

Being a lawyer going to court is the least I do now. I seem to be going out to PR functions, getting clients, engaging with them and getting referrals.

But while it is clear that organisational influences and requirements are generally significant, our interviews also reminded us that the experience of each association member is different, and individual requirements for (and experiences of) managerial- and business-skills training will vary. Though one participant – a Law Society leader – said that the Law Society's professional education was helping practitioners to understand the tensions between business and professional obligations, a number of others felt that the Law Society's education programs didn't acknowledge these competing ends. Others noted that this led members, wanting to understand and exploit these new 'logics', to teach themselves – including by forming their own communities of practice that span their own specialty area, and even into other industries. Some are relying on additional memberships in specialist associations and are bringing what they learn back to their workplaces. One interviewee said that whatever its precise source, '[this interaction and training] absolutely doesn't come from the Law Society'.

On the other hand, some feel that managerial logics and their driving values have no place in professions. In our interviews, one participant, a regional leader, did not support the Law Society having a role in business-skills training – he felt that a ‘business’ concern is, if not incompatible with professional ideals, at least not the proper focus of the Law Society’s educational mandate.

We are a profession and I think that if you talked about a client as a consumer, then he’s just a bloody consumer, and not a client ... They are not just a commodity to make money, to do a transaction ... there are fiduciary duties which are critical [to] the trust in accomplishing everything we do.

However, associations that do not take responsibility for education in management and business risk leaving members ill-equipped for work. In Noordegraaf’s study of the medical professions in the UK and the Netherlands, medical students interviewed indicated that while the students were aware of the need to understand the healthcare system and administration, they ‘consider themselves doctors-in-the-making and organisational matters are considered to be “not really interesting”’.¹⁹³ The students did not engage with subjects teaching management skills and considered non-substantive subjects ‘marginal’.¹⁹⁴ Though Noordegraaf found evidence that medical schools were incorporating these courses,¹⁹⁵ the students’ comments indicated that they were only ‘marginally prepared for organisational roles’ by their education.¹⁹⁶ Further, the associations studied seemed to be reinforcing this hierarchy – they considered organisations and organisational values secondary to achieving their ‘professional’ ends, and adapted to changing conditions by doubling down on efforts to improve professional skills.¹⁹⁷ To put it simply, Noordegraaf concludes that the schools’ and associations’ decisions to simply ‘reinforce’ professional values means medical students and professionals are unprepared for changing organisational circumstances and the realities of practice.¹⁹⁸

ASSOCIATIONS THAT DO NOT TAKE RESPONSIBILITY FOR EDUCATION IN MANAGEMENT AND BUSINESS RISK LEAVING MEMBERS ILL-EQUIPPED FOR WORK.

193 Mirko Noordegraaf, ‘Remaking Professionals? How Associations and Professional Education Connect Professionalism and Organizations’ (2011) 59 *Current Sociology* 465, 479.
194 *Ibid.*
195 *Ibid.* 480.
196 *Ibid.* 482.
197 *Ibid.* 481.
198 *Ibid.* 482.

B. ETHICS: CODES OF ETHICS AND CONDUCT

1. SUMMARY AND INDICATORS

A highly-performing regulatory body ‘develops and promotes sound ethical and conduct codes’,¹⁹⁹ which ideally ‘exceed or expand on minimum legal requirements’.²⁰⁰

2. ASSOCIATION ACTIVITIES

A. Codes

Rules governing solicitors’ conduct and obligations are contained in the Legal Profession Uniform Law Australian Solicitors’ Conduct Rules 2015 (NSW) and the Legal Profession Uniform Legal Practice (Solicitors) Rules 2015 (NSW). Conduct standards – for disciplinary purposes – are defined in the Legal Profession Uniform Law 2014 (NSW). Standards for lawyers’ fitness and propriety for practice are defined in the Legal Profession Uniform Admission Rules 2015 (NSW).

It is worth highlighting that the Uniform Law also allows for the OLSC (only) to conduct compliance audits of law practices with reasonable cause.²⁰¹

3. INTERVIEW AND LITERATURE FINDINGS: ACTIVITIES AND VALUE

A. Formal codes of conduct and ethics shape members’ attitudes and practice

Henzel’s preliminary interview study of 52 library association members included findings that professional associations’ codes of ethics were important as a means of changing members’ attitudes toward ethical issues in the profession.²⁰² The participants felt that the ‘ethics documents developed by the association ... [provided] a framework for the development of attitudes and behaviours related to professionalism and for shaping professional identity ... [by promoting] inclusivity, fairness, equity and diversity’.²⁰³ Participants also felt that the ‘standards produced by professional associations, particularly those that related to behaviour, were ... pivotal to the development and maintenance of attitudes and behaviours in the workplace within the profession’.²⁰⁴

HENZEL FOUND THAT PROFESSIONAL ASSOCIATIONS’ CODES OF ETHICS WERE IMPORTANT AS A MEANS OF CHANGING MEMBERS’ ATTITUDES TOWARD ETHICAL ISSUES.

Bowman conducted two survey studies of members of the American Society for Public Administration.²⁰⁵ In 1989, 58% of the 441 practitioner members surveyed were ‘familiar’ with the association’s code of ethics; by 1996, this number had risen to 79% of 446 surveyed members. By 1996, 80% of members²⁰⁶ surveyed reported ‘often’ using the code or its principles in their practice, up from 69% in 1989.²⁰⁷ In our interviews, a number of participants also cited the practical benefits of professional values embodied in codified form, saying that they often referred to the codes in their daily practice, either to guide their own behaviour or to cite as immovable standards when dealing with clients or opponents.

4. SPECIFIC CHALLENGES

A. Associations may lack – or lose – control over the content of their professions’ codes of ethics and conduct

In our interviews, one participant, a Law Society leader, noted how the definitions of ‘professional misconduct’ and ‘unsatisfactory professional conduct’ (contained in the Legal Profession Uniform Law)²⁰⁸ are derived from the common law (enunciated by the judiciary), but said that ultimately control ‘belongs’ to the legislature:

We also have to deal with what the courts have laid down as being what is ‘professional misconduct’, what is ‘unsatisfactory professional conduct’... [The Law Society is] a player in the system – but people need to understand, we are not the system ... at the end of the day government owns the system. Government can change the legal profession at any time it wants. It can change the definition of professional conduct by legislating. So we work within the common law and ‘the axe’.

199 Benton, González-Jurado and Beneit-Montesinos, above n 82, 308.

200 Professional Standards Councils, ‘40 Elements of Professionalisation’ (Adapted from D C Benton, M A González-Jurado and J V Beneit-Montesinos, ‘Defining Nursing Regulation and Regulatory Body Performance: A Policy Delphi Study’ (2013) 60 International Nursing Review 303, 308) <<https://www.psc.gov.au/sites/default/files/App%204%20Elements.pdf>> (‘Benton Model (Streamlined Version)’) The model is reproduced in Appendix 1: Benton Model (Streamlined Version).

201 Legal Profession Uniform Law 2014 (NSW) s 256 (‘LPUL’).

202 Henzel, ‘The Impact of Library Associations: Preliminary Findings: Preliminary Findings’, above n 54, 131.

203 *Ibid* 141.

204 *Ibid*.

205 James S Bowman, ‘Towards a Professional Ethos: From Regulatory to Reflective Codes’ (2000) 66 International Review of Administrative Sciences 673, 678.

206 *Ibid* 679.

207 *Ibid*.

208 Part 5.4 of the LPUL applies to disciplinary matters: s 296 defines ‘unsatisfactory professional conduct’ and s 297 defines ‘professional misconduct’.

This participant felt that the legislature's understanding of who should be entitled to practice did not align with the Law Society's higher standards:

*I think government need to sit down and talk with us about some of the issues in relation to what we regard as being 'fit and proper' ...*²⁰⁹

Many participants seemed to feel that the legislature acted on political whims, legislating standards that are not necessarily reflective of what constitutes actual 'fitness and propriety' in practice. These comments highlight an inherent challenge that arises when associations might wish to enforce more stringent standards than the legislature and courts support. Associations must ensure high standards in order to protect the profession's (and their own) reputation and retain the public's trust, but may undermine their own authority if their approach conflicts with that taken by the government. Watkins notes that where associations' internally developed codes of conduct and qualifications standards are inconsistent with externally imposed requirements (such as legislated codes and standards), associations may hold their industry back by making the double-standards scheme difficult for practitioners to decipher.²¹⁰

'I THINK GOVERNMENT NEED TO SIT DOWN AND TALK WITH US ABOUT SOME OF THE ISSUES IN RELATION TO WHAT WE REGARD AS BEING "FIT AND PROPER" ...' - LAW SOCIETY LEADER

B. Codes alone are not guarantees

In the literature we found evidence that while professional codes of conduct and ethics have obvious practical utility, their ability to sufficiently specify aspirational or general obligations (for example, 'to serve the public interest') can be limited, leaving practitioners unsure of the precise standards required.²¹¹ Even though associations may be particularly adept at codifying professional values,²¹² it may be that further guidance is still needed. Maes, Jeffery and Smith contacted 500 advertising executives and received 129 responses, and 65.5% of these responders were association members.²¹³ The authors found that although 'ethical codes of conduct are an attempt to initiate thinking about standards, awareness of a professional code does not guarantee that the code will affect individual decisions'.²¹⁴ In Levin's interviews of 41 New York City lawyers, many 'maintained the attitude that they need not consult [codes of ethics] because they considered themselves ethical or they "know what to do"'.²¹⁵ Others felt that the codes were irrelevant to certain areas of practice and were 'unapologetic about not following certain formal bar rules'.²¹⁶

In our interviews, one participant, a regular member, described her own experience and perception of the codes' poor utility as ethical guides:

[When I started out, I] didn't really know that solicitors 'borrow' money from their clients [in trust accounts] ... I know it now, but nobody ever told me. Maybe it's our mistake, not reading the rules, but I don't expect every solicitor to read the rules ... I would presume that a lot of lawyers out there, they wouldn't know.

209 Under LPUL s 297, a lawyer may be guilty of professional misconduct if their conduct – whether during practice or otherwise – would 'justify a finding that the law is not a fit and proper person to engage in legal practice'. Fitness and propriety are determined taking into account the matters in the Legal Profession Uniform Admission Rules 2015 (NSW) r 10.

210 Jeff Watkins, 'Educating Professionals: The Changing Role of UK Professional Associations' (1999) 12 Journal of Education and Work 37, 48.

211 Askary and Olynk, above n 104, 53.

212 See, eg, Nancy D Berkman, Matthew K Wynia and Larry R Churchill, 'Gaps, Conflicts, and Consensus in the Ethics Statements of Professional Associations, Medical Groups, and Health Plans' (2004) 30 Journal of Medical Ethics 395, 399. Cf Wallace Koehler, 'National Library Associations as Reflected in their Codes of Ethics: Four Codes Examined' (2006) 27 Library Management 83.

213 Jeanne D Maes, Arthur Jeffery and Tommy V Smith, 'The American Association of Advertising Agencies (4As) Standards of Practice: How Far Does This Professional Association's Code of Ethics Influence Reach?' (1998) 17 Journal of Business Ethics 1155.

214 Ibid 1160. See also Bowman, above n 205, 681–2.

215 Levin, 'The Ethical World', above n 10, 369.

216 Ibid 370.

C. Entity-regulation

This Report devotes an entire section to the challenge of organisational authority to the association.²¹⁷ To note here, associations and their co-regulators have struggled with the task of regulating entities as distinct from or in conjunction with their individual members.²¹⁸ The regulator stated that the OLSC conducts ‘about 10 to 15 [law practice compliance audits] per year, which is more than before’. However, while recognising that large law firms²¹⁹ escaped scrutiny, he explained that it was difficult to find the rationale for more active, potentially onerous, regulation of firms, since there are ‘very few complaints about lawyers in big firms’ – ‘big firms have a different service, they’re very corporate. In this context, it is all about retaining business, so clients leave or threaten to leave if the firm is unprofessional’. This audit role is exclusively the regulator’s and not shared with the associations. The regulator explained that this non-delegation is so that the associations can effectively perform their advisory and educative functions for practices free of any conflict with their disciplinary role.

²¹⁷ See Part III: Findings: Representative, Community and Membership Functions – Value and Challenges, Core Challenge: Influences from Workplace Organisations, below.

²¹⁸ Rogers, Kingsford Smith and Chellew, above n 21.

²¹⁹ For instance, introducing the now-defunct system for ILPs of requiring yearly self-assessment.

C. PROFESSIONAL BEHAVIOUR: PROMOTING INDIVIDUALS' SELF-REGULATORY BEHAVIOUR

1. SUMMARY AND INDICATORS

A highly-performing regulatory²²⁰ body will promote practitioners' behaviour that is 'reflective and self-regulatory'. This may occur through associations' formal services and programs (like guidance and wellbeing services) and through incidentally providing members with opportunities for development and growth.

2. ASSOCIATION ACTIVITIES

A. Communications

The Law Society maintains social media accounts, providing general interest updates, photos and content about its activities and general interest issues, and links to its other resources – on Facebook,²²¹ Twitter,²²² and LinkedIn.²²³

B. Publications

The Law Society Journal, described above,²²⁴ includes information about the Law Society's activities, profiles of lawyers and people in niche legal roles, and general interest and lifestyle articles.²²⁵ The Law Society also operates a number of newsletters that may broaden practitioners' views: 'Monday Briefs', a weekly e-newsletter with industry news and events; 'Public Record', a monthly e-newsletter including career, health and wellbeing information aimed at public sector practitioners; 'In The House', a monthly e-newsletter for in-house practitioners; 'Smalltalk', a monthly e-newsletter for solo and small-firm practitioners; and 'The Big Picture', a monthly career, health and wellbeing e-newsletter for all lawyers.²²⁶

C. Guidance

The Law Society's Ethics Unit, staffed by 'a team of experienced ethics solicitors', provides an 'ethics assistance line', offering 'practical and confidential guidance to resolve ethical dilemmas and to help avoid complaints from clients and colleagues'.²²⁷ The service is free to all solicitors and operates via email and phone from 9am to 5pm, Monday to Friday.²²⁸

D. Wellbeing

Apart from providing referrals to external wellbeing programs and providers,²²⁹ the Law Society has also partnered with Lifeline²³⁰ to offer 'Lifeline for Lawyers', an initiative to provide help specific to lawyers' psychological needs. The Law Society – alongside NSW Young Lawyers and the Australian National University – has also produced 'Being Well in the Law', a free self-help guide (available online and as a book)²³² for lawyers' mental health and wellbeing.²³³ A number of other Law Society activities directly and indirectly address members' wellbeing – for example, the integration of wellbeing programs into CPD,²³⁴ and initiatives like 'Just Music and Just Art' to foster the 'creative interests' of the legal community.²³⁵

E. Networking

The Law Society, including through its Committees, runs a wide variety of events, conferences and programs providing networking opportunities for members,²³⁶ including special events for particular practice areas (like new practitioners working in public law and government)²³⁷ and groups (like women practitioners and accredited specialists).²³⁸

A HIGHLY-PERFORMING REGULATORY BODY WILL PROMOTE PRACTITIONERS' BEHAVIOUR THAT IS 'REFLECTIVE AND SELF-REGULATORY'.

220 See Appendix 1: Benton Model (Streamlined Version).

221 See <<https://www.facebook.com/lawsocietyofnsw>>.

222 See <<https://twitter.com/lawsocietynsw>>.

223 See <<https://www.linkedin.com/company/law-society-of-nsw>>.

224 See Part II: Findings: Regulatory Functions – Value and Challenges, Section 1A(2)(d): Publications, above.

225 Law Society of New South Wales, Subscribe to LSJ <<https://www.lawsociety.com.au/advocacy-and-resources/publications-and-resources/ljsj/subscribe>>.

226 Law Society of New South Wales, E-Newsletters <<https://www.lawsociety.com.au/advocacy-and-resources/publications-and-resources/newsletters>>.

227 Law Society of New South Wales, About the Ethics Unit <<https://www.lawsociety.com.au/practising-law-in-nsw/ethics-and-compliance/ethics/about>>.

228 Ibid.

229 Law Society of New South Wales, Seeking Mental Wellbeing Help and Support <<https://www.lawsociety.com.au/advocacy-and-resources/mental-health-and-wellbeing/seeking-support>>.

230 Lifeline is a charity providing 24-hour 'crisis support' online and via the phone: see Lifeline <<https://www.lifeline.org.au>>.

231 Annual Report 2017, above n 126, 12.

232 Law Society of New South Wales, Being Well in the Law: A Guide for Lawyers <<https://www.lawsociety.com.au/being-well-law>>.

233 Annual Report 2017, above n 126, 12.

234 Ibid 11.

235 Ibid 2.

236 Law Society of New South Wales, Events and Conferences <<https://www.lawsociety.com.au/become-a-member/events-and-conferences>>.

237 Law Society of New South Wales, Public Law and Government <<https://www.lawsociety.com.au/legal-communities/NSW-young-lawyers/committees/public-law-and-government>>.

F. Mentoring

The Law Society runs mentoring programs, including for specific practitioner groups, for example: its Women's Mentoring Program;²³⁹ mentoring programs for Indigenous practitioners,²⁴⁰ and, via NSW Young Lawyers, a Young Lawyers Mentoring Program.²⁴¹

3. INTERVIEW AND LITERATURE FINDINGS: ACTIVITIES AND VALUE

A. Communications

In the literature, we found evidence that modern modes of communicating with members can provide new opportunities for associations to influence self-regulatory behaviour on a casual, daily basis. Levin examined posts on the New York State Trial Lawyers Association's online 'listserv' (or forum) between 2000 and 2004,²⁴² and concluded that through hosting online forums, associations have the potential to foster non-traditional means for socialising and educating professionals, promoting 'feelings of community' and creating 'supportive work networks, especially for [those] who cannot find or develop mentors and advice networks in "real life"'.²⁴³

In a rare example of in-depth analysis of the content of associations' communications, Zhang, Sheu and Zhang studied US professional library service associations' uses of Twitter to communicate with members and the public at large.²⁴⁴ The authors obtained tweets daily or every second day from the Twitter accounts of five library associations over a period of two months, collecting 15 518 tweets in total.²⁴⁵ These tweets, when analysed, showed that the associations used Twitter to provide a 'valuable information source for professional development', by tweeting about topics ranging from 'educational opportunities and conferences, to self-paced instructional materials for individualised learning and networking'; conveying 'the latest news and events' and allowing members to acquire 'new knowledge and skills' and 'awareness of issues related to [the profession]'.²⁴⁶ Further, the ability to re-tweet 'popular and reputable professional experts' provided opportunities for members

to 'rapidly build professional networks in the Twitter space',²⁴⁷ by effectively generating a new platform for professional reputation. The associations also used Twitter to 'broadcast employment opportunities, market new products and services and display risk management methods from which institutions could benefit', providing job information and allowing recruitment throughout their "large and relevant user base" by employers and candidates.²⁴⁸ Finally, the authors find that the associations' Twitter accounts were 'an effective, real-time collaborative platform to broadcast and monitor ongoing events and assess developing problems in the [professional] community'.²⁴⁹

In our interviews, two participants noted the Law Society's online presence. One discussed how the Law Society has sought to maintain members' engagement (and thereby increase the association's influence over their behaviour) by utilising social media for not only re-configuration of its traditional communications (such as providing law reform information to members), but for the sharing of more general interest material:

I have been following along on Twitter, Facebook and LinkedIn. Facebook is a good tool. I found that they are trying to mix up their content with not only what the Law Society is advocating, but also sharing articles ... I found it a useful engagement tool that keeps me up to date. Then the President of the Law Society has their own Twitter account ... it's engagement as well.

239 Ibid 4.

240 Ibid 9.

241 Ibid 18.

242 Leslie C Levin, 'Lawyers in Cyberspace: The Impact of Legal Listservs on the Professional Development and Ethical Decisionmaking of Lawyers' (2005) 37 Arizona State Law Journal 589, 591–2.

243 Ibid 623.

244 Min Zhang, Feng-Ru Sheu and Yin Zhang, 'Understanding Twitter Use by Major LIS Professional Organisations in the United States' (2018) 44 Journal of Information Science 165.

245 Ibid 168.

246 Ibid 181.

247 Ibid.

248 Ibid.

249 Ibid.

B. Publications

Associations can, through their publications (like the Law Society's weekly 'Monday Briefs' e-newsletter) promote self-regulatory professional behaviour, by giving their members a broader view of the profession than they might be exposed to through their work alone.²⁵⁰

In Henczel's interview study of 55 library association members, participants considered the associations' journals useful and informative, particularly for providing information about broader issues in the profession.²⁵¹

A number of our interviewees said that the Law Society, through its publications ('Monday Briefs' and the Law Society Journal), gave them access and exposure to the wider professional community. These quotes from regular members were representative:

I find it interesting and beneficial – the little letters that come in from other practitioners, so you can share in their sorts of experiences, and not feel that you're on your own, and you get some sort of sense of joint experience from it.

[In the Law Society Journal] they have sort of showcased like people from all different walks of life doing interesting things in the law – I think that is kind of important as well, to have that reinforced ... it's nice also to have a Society that is meant to be representing all of us, reflecting that diversity, and not just being about, you know, one black- or grey-suited way.

'IT'S JUST CONFIDENCE KNOWING THAT THERE ARE PEOPLE THERE THAT YOU CAN TALK TO WHO KNOW WHERE YOU ARE COMING FROM.'

- LAW SOCIETY MEMBER

C. Guidance

In our interviews, many participants discussed the Law Society's ethics guidance and education services. A majority of participants considered the Law Society's ethics services – in particular the ethics hotline – to be of great value, with one Law Society leader noting that these services are accessible by non-members as well. This is a tangible demonstration of the associations' production of public benefit. Some, both leaders and regular members,

felt that the Law Society's ethics hotline was of particularly high quality, as it is equipped by members of the legal community with experience in the matters at issue:

If I ever needed to speak to somebody about either ethical or wellbeing issues, there's someone there who I know has possibly even dealt with a situation similar to this before, rather than calling a non-specific hotline ... It's just confidence knowing that there are people there that you can talk to who know where you are coming from.

Many interviewees said that the ethics hotline service was of special importance to small practitioners and those in regional areas, who may have no other sources of guidance. However, others felt that the service was still valuable to those in larger firms, particularly as a confidential option when talking to colleagues was not viable. One regular member felt the hotline was in itself sufficient reason to be a Law Society member:

I found [the ethics hotline] pretty useful on a couple of occasions, where you know, in the course of practice, you are presented with some kind of ethical issue and have just wanted to sort of bounce it off somebody external ... sometimes there might be impediments to you openly raising those things with the people you work with, you know, either because there might be some sort of conflict ... or some other hurdle ... [or] people might just be super busy ... and I think that they're pretty important issues, and so if I were only to use [the Law Society] for [the ethics hotline], I think it would be worthwhile maintaining membership.

One Law Society leader spoke about how, in response to its members' often urgent needs for assistance, the Law Society has been pushed to make its guidance not only more 'responsive', but also more accessible:

We can't hide behind anything ... we need to be very responsive because they need the answer and they need it now.

²⁵⁰ See, eg, Rusaw, above n 163, 221.

²⁵¹ Susan Margaret Henczel, *The Impact of National Library Associations on Their Members, Employing Organisations and the Profession* (PhD Thesis, RMIT University, 2016) 178.

In particular, the participant discussed how Law Society's Ethics Unit has realised the utility of technological advances in its operations; it can now enact a policy that all solicitor inquiries to the ethics assistance line are dealt with on the day:

For example, twelve years ago the internet and the website, and email, were not used as frequently as today in seeking information and guidance. It was more by ordinary letter, which took longer ... [Now we] have a policy of all matters are at least dealt with on the day... we've shortened the time required to provide that assistance.

D. Wellbeing

A majority of interviewees regarded the Law Society's wellbeing services as valuable and improved in recent years. Many participants felt that wellbeing services were particularly important to young practitioners, who, as one regular member said, can be 'not at all resilient, not able to cope with failing, and not willing to be mentored'. Another participant, a regular member, elaborated on the pressures they face:

[The Law Society has] also now changed – they're actually now more concerned about mental health and wellbeing too, which is good. It's been an area where the profession struggles, and I think we hid it well. But now [we have] a lot more open discussion about those sorts of issues, which hopefully will fix some of the problems with 'breaking' young lawyers ... Every client who walks through the door wants you to fix a problem – [Interviewer: You get a real 'secondary stress,' and -] Definitely do, and sometimes it's hard to let go.

Another participant, a Law Society leader, also discussed how important associations' wellbeing programs are to practitioners in high-stress situations and the Law Society's role in assisting:

There's a lot of transferred trauma, especially in certain areas of law, like criminal law, family law, childcare and protection ... lawyers in prosecutions – people like that suffer from transferred trauma too, from the sorts of matters that they have to deal with. So [the Law Society does] a fair bit on making sure that lawyers keep their mental health in control, and we offer a lot of services to help people when they're finding the stress is getting too much.

One participant, a regular member, said that they viewed the Law Society's wellbeing services as a backup to those provided by their workplace. Another regular member was not aware of the Law Society's particular offerings,²⁵² but felt that firms were not necessarily capable of maintaining employees' wellbeing themselves, and that associations' work in this area would be especially needed and valuable:

In terms of support – wellbeing – that's probably an area where there is, I would say, greater scope for someone like the Law Society to help with that, because as much as we are really conscious of it as an employer or [as] lawyers, we're not particularly good at looking after the wellbeing of partners ... [or] of our staff. To the extent that the Law Society was offering – and they probably do this; that I'm not aware of – but to the extent of their offering kind of meaningful assistance to lawyers ... that's a useful role for a members' organisation to play.

Another regular member participant noted that in many cases the Law Society may be a practitioner's only formal source of support:

I know that [wellbeing support is] available from the Law Society, and I think it's a wonderful service ... There's no other formal channels that are available to me. It would be speaking to other practitioners. [The Law Society offers] a formal version of a friendly practitioner who might've seen some difficult situations before and has a calm word of advice. So, to know that it's there, if I can't contact another practitioner or didn't feel that I wanted to disclose that sense of ill-being ... it's good to know that that's there.

Associations can also foster wellbeing otherwise than through explicit 'wellbeing' services. Forty-one of Henczel's 55 interview participants felt that association membership affected their 'individual well-being', particularly by providing a 'safe' space for members to test ideas and discuss professional issues outside of work.²⁵³

'IN TERMS OF SUPPORT – WELLBEING – THAT'S PROBABLY AN AREA WHERE THERE IS, I WOULD SAY, GREATER SCOPE FOR SOMEONE LIKE THE LAW SOCIETY TO HELP!' - LAW SOCIETY MEMBER

²⁵² This lack of awareness may also pose a challenge to associations: see Part V: Findings, Core Challenge: Members' Lack of Awareness and Engagement, below.
²⁵³ Henczel, *The Impact of National Library Associations*, above n 251, 129, 190.

E. Networking

In a poll of 242 members of the Association of Mental Health Administrators, Weil and Kirk found that members considered networking opportunities a significant reason to join the association.²⁵⁴

While networking would seem to be most relevant to community building, as we will see later,²⁵⁵ some of our interview participants also spoke of how networking via the association benefits practitioners' wellbeing:

Networking's really important with other colleagues so you can talk about issues affecting you in practice, that you don't want to talk to your employer about ... Sometimes you feel that if you confide in your employer about something that's bugging you, it can affect your career prospects. So, having those networks to discuss things, in a confidential way, is really important.

F. Mentoring

In our interviews, a number of participants cited mentoring as a valuable Law Society offering. One regular member participant – whose engagement with the Law Society otherwise was minimal – noted how valuable the Women's Mentoring Program was to her. A Law Society leader explained the importance of mentoring and the Law Society's programs for new lawyers (through its Young Lawyers arm):

We've also got mentoring schemes within Young Lawyers, so that new lawyers ... where they don't have contacts in the profession already, can be paired with senior lawyers to help them through difficulties or help them with their career progression. So that they can mark out a path for themselves early, but they can do it carefully, with advice, so that they're maintaining ... ethical, high standards, but progressing in their careers.

In the literature, there is suggestion that associations are particularly well placed to provide mentoring services. Coppin and Fisher, following interviews of 15 professional podiatry association members,²⁵⁶ found that group mentoring programs run by associations can provide

a valuable forum for networking, exposure to broader viewpoints, and idea sharing.²⁵⁷ Zabel, through an open-ended interview study of 21 leaders from 15 library associations,²⁵⁸ found evidence of a variety of mentoring activities performed by associations, ranging from new-member-specific programs²⁵⁹ and formalised programs (including one pilot program that offered participants travel support, free association membership and conference attendance, and committee appointments),²⁶⁰ to some associations without any mentoring (despite acknowledging its benefits).²⁶¹ Zabel concluded that, despite many associations' lack of attention to 'marketing mentoring as a benefit', associations²⁶² 'play an important role in facilitating mentoring', and offering mentoring (with sufficient marketing) may be a means of promoting membership in associations. Frank's focus group participants also valued mentoring as an associational benefit.²⁶³

4. SPECIFIC CHALLENGES

A. Disproportionate reliance

Differences in practitioners' demographics, practice areas, workplaces, and geographical locations can mean that associations' services are disproportionately relied upon – or ignored – by certain groups. In our interviews, one regional leader noted that certain areas of law – particularly wills – give rise to greater numbers of ethical concerns (often arising out of lawyers' professional relationships with multiple members of the same family), and that the ethics services were particularly useful for practitioners in those areas; but another participant, a Law Society leader, made the point that in-house practitioners (primarily concerned with a single client – their employer) are less likely to need the association's ethics assistance.

'SOMETIMES YOU FEEL THAT IF YOU CONFIDE IN YOUR EMPLOYER ABOUT SOMETHING THAT'S BUGGING YOU, IT CAN AFFECT YOUR CAREER PROSPECTS. SO, HAVING THOSE NETWORKS TO DISCUSS THINGS, IN A CONFIDENTIAL WAY, IS REALLY IMPORTANT!' - LAW SOCIETY MEMBER

²⁵⁴ Weil and Kirk, above n 170, 33.

²⁵⁵ See Part III: Findings: Representative and Community Functions – Value and Challenges, Section 1B(3)(a)(iii): Networking, below.

²⁵⁶ Rosalie Coppin and Greg Fisher, 'Professional Association Group Mentoring for Allied Health Professionals' (2016) 11 Qualitative Research in Organization and Management 2, 7.

²⁵⁷ *Ibid* 10.

²⁵⁸ Diane Zabel, 'The Mentoring Role of Professional Associations' (2008) 13 Journal of Business and Finance Librarianship 349, 353.

²⁵⁹ *Ibid*.

²⁶⁰ *Ibid* 354.

²⁶¹ *Ibid* 356–7.

²⁶² *Ibid* 359–60.

²⁶³ Donald G Frank, 'Activity in Professional Associations: The Positive Difference in a Librarian's Career' (1997) 46 Library Trends 307, 313.

D. COMPETENCE AND CONDUCT

1. SUMMARY AND INDICATORS

A highly-performing regulatory body should have procedures in place to: continually assess members' competence; maintain its independence and impartiality when handling and resolving complaints against practitioners; ensure that the public has access to clear and accessible information about complaints procedures; and to impose meaningful, public sanctions for non-compliance or non-observance of standards.²⁶⁴

2. ASSOCIATION ACTIVITIES

A. Complaints handling

In NSW, complaints about solicitors are made to the Office of the Legal Services Commissioner ('OLSC'), which may then refer certain complaints (typically those involving 'more complex conduct issues') to the Law Society's Professional Standards Department.²⁶⁵ The Law Society may also initiate its own complaints,²⁶⁶ including matters relating to failure to comply with legislated accounting and practising certificate requirements.²⁶⁷ In 2016–17, the Law Society was tasked with slightly less than one quarter of all complaints received.²⁶⁸

After the Professional Standards Department makes a report, the Law Society's Professional²⁶⁸ Conduct Committee (comprising Law Society councillors, solicitors, and lay members)²⁶⁹ meets to consider the matter and determine whether the NSW Civil and Administrative Tribunal (the 'Tribunal') would find that the practitioner concerned had engaged in 'unsatisfactory professional conduct' or 'professional misconduct';²⁷⁰ terms defined in legislation.²⁷¹ After its determination the Professional Conduct Committee is empowered²⁷² to take certain disciplinary actions or, particularly if 'professional misconduct' is likely to be found, to refer the matter to the Tribunal.²⁷³

If either the OLSC or the Law Society determines that a practitioner has engaged in 'unsatisfactory professional conduct' and makes a disciplinary order,²⁷⁴ the practitioner may appeal to the Tribunal.²⁷⁵ If the Tribunal makes civil penalty orders (including cautions, reprimands, apology orders and fines)²⁷⁶ in respect of any disciplinary matter, its decision can be appealed to the NSW Supreme Court.²⁷⁷

Finally, the NSW Supreme Court maintains the Roll of Australian lawyers²⁷⁸ and has inherent jurisdiction to discipline solicitors.²⁷⁹ The Law Society may exercise an additional, limited regulatory capacity by applying to the Court in its inherent jurisdiction to remove a solicitor's name from the Roll.²⁸⁰

A flowchart of the Law Society's role in the complaints-handling process is appended to this Report.²⁸¹

A HIGHLY-PERFORMING REGULATORY BODY SHOULD HAVE PROCEDURES IN PLACE TO: CONTINUALLY ASSESS MEMBERS' COMPETENCE; MAINTAIN ITS INDEPENDENCE AND IMPARTIALITY WHEN HANDLING AND RESOLVING COMPLAINTS AGAINST PRACTITIONERS; ENSURE THAT THE PUBLIC HAS ACCESS TO CLEAR AND ACCESSIBLE INFORMATION ABOUT COMPLAINTS PROCEDURES; AND TO IMPOSE MEANINGFUL, PUBLIC SANCTIONS FOR NON-COMPLIANCE OR NON-OBSERVANCE OF STANDARDS.

²⁶⁴ Benton, González-Jurado and Beneit-Montesinos, above n 82, 308; Benton Model (Streamlined Version), above n 200. See Appendix 1: Benton Model (Streamlined Version).

²⁶⁵ Professional Standards 2017 Annual Report, above n 156, 9.

²⁶⁶ LPUL s 266.

²⁶⁷ Professional Standards 2017 Annual Report, above n 156, 9.

²⁶⁸ 600 of 2579 complaints in total: *ibid*

²⁶⁹ In 2016–17 there were 6 councillors, 16 solicitors and 6 lay members on the Committee: Professional Standards 2017 Annual Report, above n 156, 16.

²⁷⁰ *Ibid*.

²⁷¹ LPUL ss 296–8.

²⁷² *Ibid* s 299.

²⁷³ *Ibid* s 300. See also Professional Standards 2017 Annual Report, above n 156, 16. See LPUL ch 5; Office of the Legal Services Commissioner, Disciplinary Action <http://www.olsc.nsw.gov.au/Pages/lsc_complaint/lsc_disciplinaryaction.aspx> for complete rules and a detailed description of dispute resolution and disciplinary process.

²⁷⁴ These include cautions, reprimands, apology orders, reduced or waived fees for work, order to undergo training, fines, and conditions placed on practising certificates: LPUL s 299.

²⁷⁵ *Ibid* s 314.

²⁷⁶ See above n 274 and accompanying text.

²⁷⁷ Civil and Administrative Tribunal Act 2013 (NSW) ss 82 (1)(c), 82(3)(a), 83. See also LPUL s 314(3).

²⁷⁸ LPUL s 22.

²⁷⁹ *Ibid* s 264.

²⁸⁰ This occurred twice in 2016–7: Professional Standards 2017 Annual Report, above n 156, 24.

²⁸¹ See Appendix 3: Discipline Flowchart.

B. Publicised disciplinary decisions

The Law Society provides the public with links to databases of disciplinary decisions concerning solicitors, the OLSC, and the Law Society – including the OLSC Register of Disciplinary Action.²⁸² Within the OLSC Register, disciplinary decisions made by the OLSC and Law Society, and references to tribunal decisions, can be viewed chronologically or searched by name or by disciplinary action.²⁸³ The Law Society also publishes the outcomes of disciplinary decisions in its ‘Professional Standards Annual Report’,²⁸⁴ as well as – for members – in its weekly e-newsletter, ‘Monday Briefs’.²⁸⁵

3. INTERVIEW AND LITERATURE FINDINGS: ACTIVITIES AND VALUE

A. Independence and impartiality

A number of our interviewees said that complaints against solicitors appeared to be handled efficiently, with care and expertise. The complaints-handling process was discussed by some of the Law Society leaders, who detailed how expertise and deliberation are significant features:

[In investigating complaints,] usually a large volume of material is provided to a reporting member and that reporting member ... will speak to the committee about this particular investigation, then the committee decides on what the appropriate finding is. The practice has been to allocate those complaints to members of the committee who are experienced in that area. So, if it's a family law matter you would allocate it to somebody in the family law practice ... and so on.

There's a huge number of people who read the material [relevant to a complaint made], there's significant debate, and they really hash out the issues. So, it's not just a matter of everyone saying, "Oh yeah, we think he did this, so send him to the Tribunal."

Many of interview participants also noted the Law Society's independence and impartiality in disciplining members:

I'm very confident that those two arms – the regulation arm, and the membership arm, for want of a better term – are kept separate enough for there to be proper accountability by lawyers to the regulator. I don't think there's any bias.

Some felt that the complaints-handling system as a whole guarantees that independence – noting that disciplinary decisions made by the Law Society can be overturned by the Tribunal,²⁸⁶ including where the Law Society has been overly harsh, and that any potential conflict or bias (for example, if a member of the committee knows the subject of the complaint) is avoided by recusing committee members if necessary.

I think we're really tough ... Sometimes we lose in the Tribunal because we've been too tough, so sometimes where we've referred something to the Tribunal, we don't succeed. So, I think those sorts of outcomes indicate that we're not being overly lenient, and government trusts us in that.

A number of interviewees said that the Law Society set standards higher than other regulators (the OLSC, and the Supreme Court) and so was ‘harsher’ in disciplining its members. One Law Society leader said:

I've heard from the inside [of the profession], of course, that [the Law Society is] actually harder and tougher and more rigorous than say the OLSC or other [regulators] ...

'I THINK WE'RE REALLY TOUGH ... SOMETIMES WE LOSE IN THE TRIBUNAL BECAUSE WE'VE BEEN TOO TOUGH, SO SOMETIMES WHERE WE'VE REFERRED SOMETHING TO THE TRIBUNAL, WE DON'T SUCCEED. SO, I THINK THOSE SORTS OF OUTCOMES INDICATE THAT WE'RE NOT BEING OVERLY LENIENT, AND GOVERNMENT TRUSTS US IN THAT!' - LAW SOCIETY LEADER

²⁸² Law Society of New South Wales, Disciplinary Decisions <<https://www.lawsociety.com.au/practising-law-in-nsw/discipline-and-disqualification/disciplinary-decisions>>.

²⁸³ Office of the Legal Services Commissioner, OLSC Register of Disciplinary Action: Most Recent Listings <<http://www.lawlink.nsw.gov.au/olsc/nswdr.nsf/webview?OpenView>>.

²⁸⁴ See, eg, Professional Standards 2017 Annual Report, above n 156, 42–4.

²⁸⁵ See Part II: Findings: Regulatory Functions – Value and Challenges, Section 1A(2)(d): Publications, above.

²⁸⁶ LPUL s 314.

B. Supportive regulation

In our interviews there was some evidence from regular member participants that the Law Society's approach to preliminary regulatory action is mediative, supportive and helpful. One participant, the CEO of an Incorporated Legal Practice, said that his dealings with the Law Society in its routine trust account audit were 'handled very well' and that the overall experience was positive and helpful:

It focuses our mind and ensures we're on top of everything that we need to be – and they are also very helpful and supportive, you know appreciating that the law firm is just getting started and that there was a learning curve involved.

The participant acknowledged that after the Law Society's initial involvement, the auditing requirements are 'just part of the legislation',²⁸⁷ but felt that the Law Society actively helps get practices on their way. Some interviewees also noted that although the Law Society was 'harsh', it was still supportive of members at the same time. One described the Law Society's regulatory role as being akin to a 'parent disciplining a child':

[The] Law Society ... what's the best way to put it? ... It's like a 'parent' feeling; in a way you want to discipline your child but be protective as well ... but if somebody else, like a stranger or neighbour, [was] coming in to say 'I am coming in to deal with your affairs' – that's different.

C. Facilitating public engagement through lay participation

A number of interview participants felt that public interests were able to be served directly by presence of lay members on the conduct committee. One Law Society leader explained:

[When considering complaints there's] a lot of care and attention, and work put into making sure the correct decision is made ... there are lay-members on the committee as well, so that balances out – that sort of gives the community perspective ... I think it's a good system, and it's a good way of protecting the community as well, because obviously a major consideration is the public interest.

D. Accessible, publicised disciplinary decisions

Associations' disciplinary roles are reinforced when decisions are made public – maintaining transparency, while at the same time subtly informing members of standards and norms in practice. As noted above, disciplinary decisions about NSW solicitors are publicly accessible online.²⁸⁸ Many interview participants also explicitly mentioned reading about disciplinary decisions (and other topics) in the Law Society's member-only 'Monday Briefs' weekly newsletter:

You're always reading about practitioners being reprimanded for breaches of professional standards. Sometimes I do not [read about the disciplinary decisions] ... but sometimes I am interested in knowing why people fail ... I think that's good to know.

One participant, a Law Society leader, described how penalties are made more severe, and publicising of disciplinary decisions serves as regulation in itself, due to the practitioners' added loss of reputation and peer approval:

All our decisions are, they are promulgated ... They're all there, and that's why I think that when it comes to penalty ... the penalty is severe, because of the shame and the obloquy of just being named ... I mean, I would die if I, if they put my name in Monday Briefs if I did something wrong ... It hurts a lot.

'SOMETIMES I AM INTERESTED IN KNOWING WHY PEOPLE FAIL ... I THINK THAT'S GOOD TO KNOW!'

- LAW SOCIETY MEMBER

²⁸⁷ Ibid s 155 (on requirement for yearly external examination of trust records).

²⁸⁸ See Part II: Findings: Regulatory Functions – Value and Challenges, Section 1D(2)(b): Publicised disciplinary decisions, above.

E. Responsive regulation

Associations can adapt their disciplinary approaches to changing needs and circumstances. In our interviews, there was some evidence that the Law Society is increasingly conscious of the potentially competing pressures placed on members by workplaces. One participant, a Law Society leader, described how the Law Society is now taking a more collaborative approach to regulating firms' practices – working with organisations to develop their policies and approaches, rather than attempting to outright control them:

We work with the firms. We don't knock down what they're saying, we build on that. . . We would like to foster and enhance our links with large, small and medium firms and government departments – which we are doing. That's been part of our very active program in the last few years . . .

Another participant, a Law Society leader, discussed how the Law Society incorporates findings about complaints received in order to develop its processes as members face new challenges in practice:

[The Law Society has] developed in tandem with what the profession needed . . . [For example, it would adapt its educational programs and guidance] if there was something of a particular area that was becoming a bit of spike in complaints. We also keep statistics that give us an indication of where there is a need to address an issue . . .

F. Harmonisation with other regulatory requirements and regulators

Some participants saw the Law Society as 'supporting' courts in regulating solicitors. One participant discussed how courts determine the content and application of ethical codes, and how the Law Society's role is to ensure that the profession supports courts in their regulatory capacity:

It's very important to remember that [our] ethical rules are not what government sets, they are not what's in these codes – they are these broad principles that the court enforces. So, in a sense it's always the courts protecting our system of justice . . . we're not dealing with governmental intervention . . . what we're dealing with are principles that have been around for so long, they don't change. . . [The Law Society is] part of a system that upholds these rules . . . The courts are the monitor and the guard of that, and we

assist that by making sure the profession is a very integral part of upholding that as well.

As we discuss below,²⁸⁹ a number of participants also mentioned the efficiency in the Law Society's co-regulatory role alongside the OLSC. One participant, a Law Society leader, explained:

So, the Legal Services Commissioner can accept complaints, and we can accept complaints directly. Often the Legal Services Commissioner will deal with consumer complaints; anything more complex tends to be referred to us for investigation via our voluntary committees . . . it's a very positive relationship, we work really well together.

289 See Part II: Findings: Regulatory Functions – Value and Challenges, Section 3B(3)(a): Alignment with other systems and procedures, below, and Part IV: Findings: Positive attitudes and beliefs about associations, Section 4: Co-regulatory arrangements, below.

4. SPECIFIC CHALLENGES

A. Self-regulation and self-interest

In Levin's interviews of 41 New York City lawyers, some participants felt – with 'bitterness' – that practitioners in solo practice or in small firms were more likely to get disciplined.²⁹⁰

In our interviews, one participant – a Law Society leader – shared this concern, and felt that discipline was disproportionately likely to affect small-firm or solo practitioners as their clients were most likely to make complaints.

A few interview participants also felt that the Law Society was not capable of impartial, effective, or efficient regulation of its members – that is, that it had failed to overcome tensions between its own or individual members' interests and the regulation of the profession in the public interest. One participant, a regular member and government lawyer, felt that the Law Society's complaints-handling was 'selective or 'harsher for some' and 'dependent on who you know'. She also felt that the OLSC's and the Law Society's (and the Bar Association's) disciplinary approach was slow and ineffective. There are plenty of cases where there is an abundance of rumours or intel-type gossip on serious and systemic conduct issues – everyone knows who is dodgy, but these are never looked at by the Law Society or the Office of the Legal Services Commissioner, who only act with a complaint. But in areas of sexual misconduct, for instance, complainants may be reluctant to come forward.

B. Lack of consistency with other regulators

In our interviews, in contrast to some comments above about the 'supportive' relationship between the Law Society and the courts, a number of participants felt there was too great a discrepancy between the Law Society's standards and those that the Supreme Court, when determining disciplinary decisions on appeal from Law Society or OLSC decisions, enforces. Many said that the Supreme Court is less tough on 'rogue lawyers' than the Law Society was, or would be, in the same case. This is a tension inherent in associations' disciplinary role. Associations have a strong interest in upholding professional standards more strictly than other regulators, as they must also maintain their own – and their profession's – reputation. Where appeal bodies can and do dial back associations' disciplinary decisions, this risks undermining the legitimacy of the association's disciplinary role.

**IN LEVIN'S INTERVIEW STUDY,
SOME PARTICIPANTS FELT – WITH
'BITTERNESS' – THAT PRACTITIONERS
IN SOLO PRACTICE OR IN SMALL
FIRMS WERE MORE LIKELY TO GET
DISCIPLINED.**

²⁹⁰ Levin, 'The Ethical World', above n 10, 372.

E. REGISTRATION AND CERTIFICATION

1. SUMMARY AND INDICATORS

A highly-performing professional association will maintain an accurate, accessible register of practitioners; ensure that only qualified applicants are approved for registration; enable efficient renewal of registration for members; and ensure that renewal is only permissible for members meeting standards of competence.²⁹¹

2. ASSOCIATION ACTIVITIES

A. Registration and re-registration

The Law Society's Licensing Committee – among other things – monitors members' compliance with statutory conditions and licensing requirements, considers applications for variation of practising certificates, and CPD compliance requirements.²⁹²

B. Particular certifications

As a condition of NSW practising certificates, to practise as the principal of a legal practice, solicitors must undertake a Practice Management Course.²⁹³ The Licensing Committee also assesses practitioners' compliance with the requirements of Practice Management Courses.²⁹⁴

C. Accreditation

The Law Society offers 'Specialist Accreditation' programs to 'enable practitioners to gain recognition as an expert in their chosen area of practice'.²⁹⁵ Programs are available in a number of practice areas, and each program requires assessment on competencies relevant to that area.²⁹⁶ Accreditations must be renewed annually, which requires compliance with specific CPD requirements.²⁹⁷ Practitioners are then entitled to 'promote' their Specialist Accreditations for public and peer recognition of their certified skills.²⁹⁸

D. Registry

The Law Society maintains a publicly accessible register – 'Find a Lawyer' – of solicitors, practices and mediators in NSW.²⁹⁹ It also operates a database of private firms in its Solicitor Referral Service, to assist members of the

public looking for legal assistance in a particular area or with additional requirements (like language, after-hours availability, and gender).³⁰⁰

3. INTERVIEW AND LITERATURE FINDINGS: ACTIVITIES AND VALUE

A. Maintaining an accurate, accessible register: for members and the public

In our interviews, a number of members cited the usefulness of the Law Society's 'Find a Lawyer' database of registered members. Some believed that the database was easily accessible by, and therefore of direct benefit to, the public. One member in particular noted that the Law Society's certification and registration function assisted firms who might receive false resumes from job applicants. Another participant pointed out that the registration requirement appears to be effectively enforced: 'I haven't found any unregistered lawyers yet'.

A HIGHLY-PERFORMING PROFESSIONAL ASSOCIATION WILL MAINTAIN AN ACCURATE, ACCESSIBLE REGISTER OF PRACTITIONERS; ENSURE THAT ONLY QUALIFIED APPLICANTS ARE APPROVED FOR REGISTRATION; ENABLE EFFICIENT RENEWAL OF REGISTRATION FOR MEMBERS; AND ENSURE THAT RENEWAL IS ONLY PERMISSIBLE FOR MEMBERS MEETING STANDARDS OF COMPETENCE.

291 Benton Model (Streamlined Version), above n 200. See Appendix 1: Benton Model (Streamlined Version).

292 Annual Report of Committees 2017, above n 150, 25.

293 LPUL s 53; Legal Profession Uniform General Rules 2015 (NSW) r 16(b)(ii); Law Society of New South Wales, Practising Certificate Conditions <<https://www.lawsociety.com.au/practising-law-in-nsw/working-as-a-solicitor-in-nsw/your-practising-certificate/conditions>>.

294 Annual Report of Committees 2017, above n 150, 25.

295 Law Society of New South Wales, About the Program <<https://www.lawsociety.com.au/learning-and-events/specialist-accreditation/about>>.

296 Law Society of New South Wales, Assessment Information <<https://www.lawsociety.com.au/learning-and-events/specialist-accreditation/assessment-information>>.

297 Law Society of New South Wales, Renew Your Specialist Accreditation <<https://www.lawsociety.com.au/learning-and-events/specialist-accreditation/renewals>>.

298 Law Society of New South Wales, 'Promoting your Specialist Accreditation: Brand Guidelines' (November 2016) <<https://www.lawsociety.com.au/sites/default/files/2018-03/Promoting%20your%20Specialist%20Accreditation.pdf>>. The legal conduct rules also stipulate that it is illegal to advertise oneself as an 'accredited specialist' without the Law Society's certification: Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (NSW) r 36.2.

299 Law Society of New South Wales, Find a Lawyer <<https://www.lawsociety.com.au/for-the-public/find-a-lawyer>>

300 Law Society of New South Wales, Solicitor Referral Service <<https://www.lawsociety.com.au/for-the-public/going-court-and-working-with-lawyers/solicitor-referral-service>>.

B. The value of registration, certification and accreditation: for members

In the literature we found empirical evidence that certification and accreditation by associations is a key benefit for members.

In Weil and Kirk's survey of 242 members of the Association of Mental Health Administrators, 80% of respondents believed the association's certification was 'meaningful' – particularly those respondents who were certified.³⁰¹ In a large survey study analysing 13 299 responses from members of 18 professional associations,³⁰² Ki and Wang found that professional certification offered by associations was 'strongly connected with membership renewal and recommendation'.³⁰³

A similar conclusion was reached by Markova et al, who, through analysis of 1980 completed online surveys of members of large international professional associations,³⁰⁴ found that members who were made more aware of associations' certification offerings were more likely to renew their membership.³⁰⁵ In Henczel's preliminary interview study of 52 library association members,³⁰⁶ participants felt that associations' certifications 'gave them an edge while job hunting' and demonstrated their commitment to the profession.³⁰⁷ In Henczel's final interview study of 55 library association members, some participants considered the registration function a primary reason to join the association and remain a member.³⁰⁸

Specialist accreditation programs provide an additional, optional means for members to improve and publicise their skills. In Henczel's interview study of 55 library association members, some participants deemed the specialist certification (or 'chartership') functions of the association to be particularly valuable for their professional skills, and regarded this as an incentive to join and participate.³⁰⁹

In our interviews, many participants discussed the Law Society's Specialist Accreditations – where members may undertake particular training programs and obtain certification of particular specialised knowledge in a given

area. These participants felt that the accreditations were beneficial for both the training itself, and the subsequent certification of their particular expertise:

[The Law Society] offers specialist accreditation for those practitioners who qualify by experience and undertaking an exam ... it's not mandatory, it's just a way of allowing those who do get specialist accreditation to differentiate themselves within what is a heavily populated industry.

You know when you've got a big profession like we do, differentiating yourself in the marketplace can be really important, but at the same time [specialist accreditation] serves in ensuring excellence in service provision by our professional members.

C. The value of certification and accreditation: for employers

The special training required by associations' accreditation and sometimes certification programs can be beneficial for members' employers as well. Castle and Fogel compared indicators of quality of care in 4220 nursing homes with administrators who were association members to 12 322 homes with administrators who were not.³¹⁰

After analysing a variety of measures, the authors concluded that membership of an association provided important 'resources' to nursing home administrators, which correlated with the greater success of these administrators' nursing home facilities.³¹¹

Though they could not argue that membership in an association alone secured the success of a facility,³¹² the authors identified 'certification, which requires documented administrative experience and the passing of an examination' as an association-supplied factor correlating with greater facility success.³¹³

KI AND WANG FOUND THAT PROFESSIONAL CERTIFICATION OFFERED BY ASSOCIATIONS WAS 'STRONGLY CONNECTED WITH MEMBERSHIP RENEWAL AND RECOMMENDATION'.

301 Weil and Kirk, above n 170, 33.

302 Eyun-Jung Ki and Yuan Wang, 'Membership Benefits Matter: Exploring the Factors Influencing Members' Behavioral Intentions in Professional Associations' (2016) 27 Nonprofit Management and Leadership 199, 205–6.

303 Ibid 213–4.

304 Markova et al, above n 4, 499.

305 Ibid 505.

306 Henczel, 'The Impact of Library Associations: Preliminary Findings', above n 54, 127–8.

307 Ibid 129–30.

308 Henczel, 'The Impact of National Library Associations', above n 251, 175.

309 Ibid 176.

310 Castle and Fogel, above n 167, 12.

311 Ibid 15.

312 Ibid.

313 Ibid 8.

THE SPECIAL TRAINING REQUIRED BY ASSOCIATIONS' ACCREDITATION AND SOMETIMES CERTIFICATION PROGRAMS CAN BE BENEFICIAL FOR MEMBERS' EMPLOYERS AS WELL.

4. SPECIFIC CHALLENGES

A. Arbitrariness

In our interviews, when discussing renewal of registration, one regular member participant felt that there was no rigorous checking of whether mandatory continuing professional development requirements had been met:

I have the distinct impression that there was no review done of the evidence that I submitted in support of my [claimed hours of CPD completed] ... and it doesn't bother me, because I know I did them, but it did give me some cause for pause ... what's the point in doing all of [the educational requirements] if you're not going to have a least a sort of preliminary review ...

Another participant, a regional Law Society leader, felt that the education requirements themselves were not particularly meaningful, impliedly impugning the legitimacy of re-registration based on those requirements:

I think, the standard of them – there's not too much oversight with what you can [say you have done], what is required for a CLE ...

B. Maintaining meaningful certification and specialist accreditation standards

In the literature and interviews, we found some evidence that different parts of the profession may use – or feel they need – accreditation and its necessary training to differing degrees.

In Greenwood, Suddaby and Hinings' interview studies of 25 Canadian professional business association leaders and members,³¹⁴ the authors found that practitioners from large firms were least likely to use or need the associations' training and certification services, but that these services were disproportionately relied upon by members of smaller firms.³¹⁵

Negative perceptions – that accreditation and training programs are unnecessary – may mean practitioners generally do not perceive the programs as of valuable, general application. In our interviews, one regular member participant felt that the Law Society's specialist accreditation programs lacked real meaning, and offered little indication of a practitioner's expertise:

I had an opponent from another law firm, he is an accredited specialist in doing litigation ... [I] observed how he worked, and then felt [that he was] not very 'specialist'...

In our interviews, one participant, a regular member from a large firm, felt that the Law Society's Practice Management training was not valuable or relevant to practitioners in large firms. Practice Management training is a mandatory requirement of entitlement to practice as a principal,³¹⁶ described by the participant as educating trainees on the 'commercial business aspects of being a partner'. This participant recognised that the course was 'an understandable requirement' to ensure that partners generally are equipped. However, he felt that large firms' interests in training partners and commercial viability mean that promotion and career progression incentives are sufficient to encourage their employees' education in these areas. The participant felt that because large firms are already effectively making it a condition of promotion that partners have sufficient practice management skills, the Law Society's training programs in this area are not needed:

You know, it was a bit of a waste of time for someone coming from a big firm, where they don't make that promotion [to partner] without themselves making sure that you are fully aware of what the responsibilities are when you make that step, and that you are capable of making that step.

NEGATIVE PERCEPTIONS - THAT ACCREDITATION AND TRAINING PROGRAMS ARE UNNECESSARY - MAY MEAN PRACTITIONERS GENERALLY DO NOT PERCEIVE THE PROGRAMS AS OF VALUABLE, GENERAL APPLICATION.

³¹⁴ Greenwood, Suddaby and Hinings, above n 31, 66.

³¹⁵ Ibid 73.

³¹⁶ See Part II: Findings: Regulatory Functions – Value and Challenges, Section 1E(2)(b): Particular certifications, above.

BROADY-PRESTON AND COSSHAM'S FINDINGS SUGGEST IT CAN BE DIFFICULT FOR ASSOCIATIONS TO RESPOND TO CRITICISM WITHOUT BECOMING OVERLY 'PRESCRIPTIVE' OR IMPOSING ONEROUS, 'TIME-CONSUMING' EDUCATIONAL DEMANDS ON MEMBERS.

C. Certification burden

Broady-Preston and Cossham studied the establishment of mandatory compulsory education by two professional associations – the Chartered Institute of Library and Information Professionals in the UK, and the Library and Information Association of New Zealand Aotearoa ('LIANZA').³¹⁷ Of particular relevance, the authors describe how the LIANZA established a taskforce to address a number of concerns about the state of qualification, accreditation, registration and formalisation of information professionals in New Zealand.³¹⁸ The authors' findings suggest that when responding to concerns about professionals' qualifications and educational integrity, it can be difficult for associations to respond to criticism without becoming overly 'prescriptive' or imposing onerous, 'time-consuming' educational demands on members; if their approach is overly zealous it may require 'too much too soon' and be difficult for practitioners to manage.³¹⁹

317 Judith Broady-Preston and Amanda Cossham, 'Keeping the Information Profession Up to Date: Are Compulsory Schemes the Answer?' (2011) 37 IFLA Journal 28, 28.

318 Ibid 31.

319 Ibid 31–2.

2) LEGISLATION ADVOCACY AND RESPONSIVENESS

A. INTERPRETING LEGISLATION

1. SUMMARY AND INDICATORS

A highly-performing professional association will interpret legislation 'to facilitate changing public protection needs'.³²⁰

2. ASSOCIATION ACTIVITIES

A. Information for members

As stated above, the Law Society produces weekly and monthly newsletters that provide law updates for members.³²¹ Resources on the Law Society website (and in hard copy) are also available for guidance in particular areas. For example, to assist practitioners in maintaining legal billing practices under changing legislation, the Law Society's Costs Committee has, since 1994, produced an up-to-date 'Costs Guidebook'.³²² Guides containing information about the operation of legislation are also available on other topics, including family law³²³ and civil litigation.³²⁴

B. Information for the public

On its website, the Law Society provides resources to inform the public about the operation of law – including 'Know Your Rights' guides about particular legal problems and how to solve them.³²⁵ Additional resources – including guidebooks and brochures – are provided about particular legal issues – including the solicitors' disciplinary complaints process,³²⁶ medico-legal examinations, and animal law.³²⁸

LEVIN'S INTERVIEW PARTICIPANTS 'RELIED HEAVILY' ON ASSOCIATIONS' LEGISLATION UPDATES, PARTICULARLY THOSE MEMBERS WHO WERE 'GENERALISTS' WORKING IN SMALL PRACTICE WITHOUT THE TIME OR RESOURCES TO RESEARCH BROADLY THEMSELVES.

A HIGHLY-PERFORMING PROFESSIONAL ASSOCIATION WILL INTERPRET LEGISLATION 'TO FACILITATE CHANGING PUBLIC PROTECTION NEEDS'.

320 Benton Model (Streamlined Version), above n 200. See Appendix 1: Benton Model (Streamlined Version).

321 Law Society of New South Wales, E-Newsletters <<https://www.lawsociety.com.au/advocacy-and-resources/publications-and-resources/newsletters>>. See Part II: Findings: Regulatory Functions – Value and Challenges, Section 1A(2)(d): Publications, above.

322 Law Society of New South Wales, Costs Guidebook <<https://www.lawsociety.com.au/practising-law-in-nsw/ethics-and-compliance/costs/costs-guidebook>>.

323 Law Society of New South Wales, The Practitioner's Guide to Family Law – 5th Edition, eShop <<https://eshop.lawsociety.com.au/products/practitioners-guide-family-law-5th-edition>>.

324 Law Society of New South Wales, The Practitioner's Guide to Civil Litigation – 4th Edition, eShop <<https://eshop.lawsociety.com.au/products/practitioners-guide-civil-litigation-4th-edition>>.

325 Law Society of New South Wales, Know Your Rights <<https://www.lawsociety.com.au/for-the-public/know-your-rights>>.

326 Professional Standards Department, Law Society of New South Wales,

'Complaints Process Information' (Information Brochure, 2018) <<https://www.lawsociety.com.au/sites/default/files/2018-04/COMPLAINTS%20PROCESS%20INFORMATION.pdf>>.

327 Law Society of New South Wales and Australian Medical Association, 'Understanding Medico-Legal Examinations' (Information Brochure, 2011) <<https://www.lawsociety.com.au/sites/default/files/2018-04/580835.pdf>>.

328 New South Wales Young Lawyers Animal Law Committee, 'What about Me? Your Pets and Your Will' (Information Brochure, 2008) <<https://www.lawsociety.com.au/sites/default/files/2018-04/What%20about%20me.pdf>>; Law Society of New South Wales, Companion Animal Law Guide New South Wales – 2nd Edition, eShop <<https://eshop.lawsociety.com.au/products/companion-animal-law-guide-new-south-wales-2nd-edition>>.

3. INTERVIEW AND LITERATURE FINDINGS: ACTIVITIES AND VALUE

A. Interpretations benefit members

Levin, through interviews of 41 New York City lawyers, found that participants ‘relied heavily’ on associations’ legislation updates, particularly those members who were ‘generalists’ working in small practice without the time or resources to research broadly themselves.³²⁹

Many of our interviewees valued the Law Society’s provision of updates about changing legislation, which can assist members in applying legislation in practice, and may be particularly useful in updating members on areas outside their normal practice:

If there is a change in legislation, then that’s communicated out to the members straight away ... for example, the practice note that is immediately sent out to members so that they know what’s going on, and so it’s rare for them to be caught short.

I think as I’ve become a bit more senior, and as I moved into in-house roles, I have probably leaned on [the Law Society] in terms of keeping me updated on developments in the law, particularly developments over a sort of broad cross-section of areas ... I think the Law Society’s newsletters in particular, and CLE programs and things like that, as well as the Journal that they disseminate, has been useful from that perspective, particularly in an in-house role.

Updates provided by the Law Society are useful for members with little time to read detailed updates. One participant, a regular member, explained that even just the ability to read a brief heading is valuable:

We get regular communications from the Law Society ... I think even reading [just] the heading sometimes – it is more about, you know, that it’s valuable in itself ... it keeps you aware of what’s going on, even if you don’t necessarily have the time to read it and think about it in any detail.

One regular member participant felt that the Law Society was more authoritative than other sources of information to guide practitioners in implementing legislation. Another, a Law Society leader, felt that the Law Society was proactive in its responses to legislative change, for instance in strengthening its emphasis on the importance of ethics after the enactment of the Uniform Law in 2014.³³⁰

'IF THERE IS A CHANGE IN LEGISLATION, THEN THAT’S COMMUNICATED OUT TO THE MEMBERS STRAIGHT AWAY ... FOR EXAMPLE, THE PRACTICE NOTE THAT IS IMMEDIATELY SENT OUT TO MEMBERS SO THAT THEY KNOW WHAT’S GOING ON, AND SO IT’S RARE FOR THEM TO BE CAUGHT SHORT!'

- LAW SOCIETY LEADER

³²⁹ Levin, ‘The Ethical World’, above n 10, 332.

³³⁰ The Uniform Law comprises a set of laws and regulations governing the legal profession, outlined here: Law Society of New South Wales, Legislation and Rules <<https://www.lawsociety.com.au/practising-law-in-nsw/rules-and-legislation/rules>>.

B. Interpretations benefit the government

In our interviews, one participant – a criminal prosecutor, and regular Law Society member – made the point that the Law Society’s information about legislation and the operation of laws generally is available to government agencies (for example, the Tax Office, and the Federal Police) which allows them to ‘benefit from [the Law Society’s] increased knowledge’ in those areas of law. A regional leader described how government ministers and public servants will contact individuals within the Law Society to ask for help ‘rolling out’ new pieces of legislation, by educating their lawyer-members whose clients and work will be affected on its content and operation. Sometimes the Law Society will create opportunities for government officials to have public audiences with lawyers:

This is efficient sharing of knowledge that the government couldn’t easily get without us. The government wants the profession to be familiar with the Act and procedures. They don’t want their time wasted from people not understanding it [so they use the association’s network to educate lawyers who will then educate members of the public].

C. Interpretations benefit the public

Legal professional associations are particularly well suited to interpretation and implementation of legislation. Active associations can protect core democratic values by monitoring existing laws and participating in advocacy for reform,³³¹ using their influence to promote legislation that ‘enshrines’ and ‘safeguards’ fundamental principles.³³² The association then interprets the legislation, before producing and disseminating relevant educational materials to its members and the public, in pursuit of a publicly interested implementation of the law.³³³

In our interviews, a few participants mentioned that the Law Society provides material in brochures and on its website to inform the public about the law and how their interests are affected by its operation.

4. SPECIFIC CHALLENGES

A. Conflicts of interest

Associations can face a particular tension when required to interpret and implement legislation that is not fully aligned with their own – or their profession’s – interests. Dwyer and Alon analysed the rhetorical content of a large US accounting association’s responses to legislative change that would cause the association to lose significant regulatory power. The authors’ analysis uncovered an ‘almost non-existent reference to the interests of any broader public’, suggesting ‘professional-level rejection of these responsibilities’ in light of the profession’s self-interest.³³⁵

ASSOCIATIONS CAN FACE A PARTICULAR TENSION WHEN REQUIRED TO INTERPRET AND IMPLEMENT LEGISLATION THAT IS NOT FULLY ALIGNED WITH THEIR OWN – OR THEIR PROFESSION’S – INTERESTS.

³³¹ Castle and Fogel, above n 167, 24.

³³² Ibid 25.

³³³ Ibid 21.

³³⁴ Peggy D Dwyer and Anna Alon, ‘In Whose Interests? An Examination of the Professional Ideology Revealed in the AICPA’s State Cascade Project’ (2008) 8 Accounting and the Public Interest 77.

³³⁵ Ibid 91.

B. ADVOCACY

HIGHLY PERFORMING REGULATORY BODIES WILL MAKE ADVOCACY A ‘ROUTINE’ PART OF THEIR OPERATIONS AND WILL USE THEIR POSITION TO PROMOTE RELEVANT PROFESSIONAL ISSUES CONGRUENT WITH THE PUBLIC INTEREST.

1. SUMMARY AND INDICATORS

Highly performing regulatory bodies will make advocacy a ‘routine’ part of their operations and will use their position to promote relevant professional issues congruent with the public interest.³³⁶

2. ASSOCIATION ACTIVITIES

A. Law Reform submissions

The Law Society reports its Committees³³⁷ having made 206 ‘major law reform submissions’ in the 2016–17 period.³³⁸ These included a number of submissions in areas particularly relevant to public interests in equality, fairness and liberty – with 31 submissions on criminal law reforms,³³⁹ nine submissions on human rights,³⁴⁰ and eight submissions on Indigenous issues. As part of its ‘2016–2019 Strategic Plan’, the Law Society’s advocacy objectives include to ‘promote and protect the rule of law’; to ‘preserve the integrity of the legal system’; to ‘initiate and lead law reform and legal policy’ and to ‘engage and inform the community on the law and legal issues.’³⁴¹

B. Advocacy objectives

As part of its ‘2016–2019 Strategic Plan’, the Law Society’s advocacy objectives include to ‘promote and protect the rule of law’; to ‘preserve the integrity of the legal system’; to ‘initiate and lead law reform and legal policy’ and to ‘engage and inform the community on the law and legal issues.’³⁴²

3. INTERVIEW AND LITERATURE FINDINGS: ACTIVITIES AND VALUE

A. Public interest and democratic principles

In our interviews, three participants felt that the Law Society’s input served to protect the public from the dangers of otherwise unexamined, or potentially unjust, legislation. One, a regional leader, explained:

[The Law Society is] constantly reviewing legislation ... errors are picked up ... the government might put out a particular legislation that clashes with something else, and it could be a very minute thing that could create serious problems ... [In the process] it’s not just the Law Society that’s consulted, it’s a joint effort, but if the legal profession didn’t have that voice, then things could be overlooked ...

Others felt that the necessity of the Law Society’s input – and the value of its contribution – stemmed from the fact that the government’s political concerns may not always allow its legislative position to align – in practice – with the best interests of citizens or the public as a whole:

Defending the rule of law – it’s really important, there’s always this attempt to erode the rule of law, and you have to have an organisation behind that defence. You can’t just be individual lawyers trying to do that, it wouldn’t work. [In the absence of an association, there] would be a big empty hole. That would be very bad. [The government doesn’t] have that particular interest, or bias towards the public – they have an interest in policy. (regular member)

I think the government’s got to look like they’re doing the right thing ... but from the perspective of the practitioners who are going to have to implement and work with these new initiatives, it’s not addressing the main issue ... Honestly, I think a lot of it is about keeping voters onside. (regional leader)

The example I’ll give is in particular relation to the terrorism legislation, and I could use the term ‘boiling the frog’ ... If you put a frog in cold water, the frog is happy – and the frog won’t actually wake up to the fact that the temperature is going up until they’ve boiled. And we’ve seen a whole raft of legislation coming in where individual rights have been abdicated in the name of protection of the community in relation to terrorism. (Law Society leader)

³³⁶ Benton Model (Streamlined Version), above n 200. See Appendix 1: Benton Model (Streamlined Version).

³³⁷ In the 2016–17 period, there were 28 Committees: Annual Report 2017, above n 126, 5.

³³⁸ *Ibid* 26–30.

³³⁹ *Ibid* 26–7.

³⁴⁰ *Ibid* 28.

³⁴¹ *Ibid*.

³⁴² *Ibid* 32.

B. 'Profession' experts

A number of interviewees discussed the Law Society's role in commenting on and making submissions to the government on legislation. Many felt that the Law Society's input was beneficial to – and valued by – the government in that the Law Society has expertise in law reform issues. Two participants – Law Society leaders – explained:

The administrative body within the Law Society, as well as the committees, are critical to [the legislative reform] enterprise ... saying to government, 'there's going to be a major issue here unless you fix it up'. We're the canary in the mine, essentially as an association that's our role.

Our relationship with the government's good - we're certainly seen as trusted advisors to government.

Several others also felt that the Law Society's input into legislation reform was necessary to represent the interests of the public because the Law Society has a unique appreciation of how legislation will operate to affect the public in practice. One participant, a regular member, said:

Well, because we're lawyers, we have at heart the best interest of the population when we're making decisions about what we should be telling governments ... or asking governments to do ... We're people and we have clients that are people, and we come – unlike politicians, who don't deal with people – we deal with people every day, and we know the real issues, and we address those issues, and we stand up for people. We know the reality behind the politics ... We help [the parliament] get it right.

'THE ADMINISTRATIVE BODY WITHIN THE LAW SOCIETY, AS WELL AS THE COMMITTEES, ARE CRITICAL TO [THE LEGISLATIVE REFORM] ENTERPRISE ... SAYING TO GOVERNMENT, 'THERE'S GOING TO BE A MAJOR ISSUE HERE UNLESS YOU FIX IT UP'. WE'RE THE CANARY IN THE MINE, ESSENTIALLY AS AN ASSOCIATION THAT'S OUR ROLE!'

- LAW SOCIETY LEADER

4. SPECIFIC CHALLENGES

A. Internal divisions

Many of our interviewees felt that while the Law Society had a duty to comment on important socio-legal issues, adopting a unified stance on divisive issues – like recent Marriage Equality reforms – was difficult:

[In] the Marriage Equality debate, where that was purely a public 'rule of law' or 'equality before the law' argument that was advocated about ... [the Law Society and its council were] facing criticism within the profession about that, because a segment of the profession argued, 'well, that's not to the benefit of members ... how can you present our view on that issue?'

[The Law Society] also [has] to be careful, I guess, about where their place is – because not all of their members necessarily agree with some of the change. So, they're in a difficult position.

This internal division may, if it thwarts progressive position-taking, contribute to the perception that associations are 'out of touch with the real world'³⁴³ and destroy an opportunity for the profession to earn public goodwill. On the other hand, if the association moves ahead without full member support, it risks alienating members who do not share the progressive view taken. There is also the possibility that some members would prefer no view be taken at all: Kamm's survey study of 116 library professionals found that while some considered political advocacy the 'most important reason' to join associations, others were actively put-off by any associational political activity.³⁴⁴

B. Limited responsibility and impact

One regional leader argued that the public itself needs to have a role in reforming the law and ensuring transparency from government. She felt that the Law Society's advocacy work could only go so far – that without direct input from the public, the government would not necessarily be moved on law reform issues:

I say to my clients, "You've just been told you've got to wait two years to get a hearing. You need to write to the local MP and share your story" ... the profession can only complain ... [or rather] comment, so much. I think the legwork also needs to be done by the people within the systems that are having problems ... People need to share their experiences, and it might have more traction with the government.

343 CIOB Report, above n 14, 29.

344 Sue Kamm, "To Join or Not to Join: How Librarians Make Membership Decisions about Their Associations" (1997) 46 Library Trend 295, 299.

C. RESPONSIVENESS

1. SUMMARY AND INDICATORS

Highly performing regulatory bodies respond to external circumstances and keep their practices – including their guidance, education, and standards-setting functions – ‘up to date’ with public expectations.³⁴⁵

2. ASSOCIATION ACTIVITIES

A. Consultation

In developing its policy and positions the Law Society collaborates and aligns its positions with other bodies – like the Law Council of Australia,³⁴⁶ the body representing all legal professional associations in Australia and, for example in its recent advocacy work, the Australian Lawyers Alliance³⁴⁷ and the NSW Bar Association.³⁴⁸

3. INTERVIEW AND LITERATURE FINDINGS: ACTIVITIES AND VALUE

A. Consultation

A number of our interview participants discussed how the Law Society works with external bodies – and other professions – to set and maintain its standards for solicitors. Of particular relevance to adaptation in response to ‘public expectations’, many spoke of the Law Society’s consultation with Legal Aid and external groups relevant to particular practice areas – like family law support agencies, medical practitioners and real estate professionals. Others mentioned the Law Society’s frequent interaction with other legal profession groups – including the Law Council of Australia, the NSW Bar Association, and international lawyers’ associations. One participant, a Law Society leader, spoke of how Law Society members in leadership roles consult with or are members of other associations and bodies, both locally and internationally, from which they then bring knowledge and experience back to the Law Society:

I joined the International Bar Association as a private member, became very active ... [and became] involved in many of the projects and guidelines that were being done by the Law Council of Australia and other Law Societies.

We initiated meetings ... with Law Societies from around Australia, for example, which has [helped] to build up a great deal of what you’d call a ‘corporate knowledge of the profession,’ coming from every state. And then we combined that with international conferences and presentations, where we found that there was in fact a very similar type of problem ... across the profession, no matter where you went. So, we tended to develop [the Law Society’s] programs according to that.

One participant, a regional leader, discussed how individual committee members bring external influences and experience – such as broader community involvement – to bear in their Law Society work. Committee members wear ‘dual hats’, one dedicated to the association and the other dedicated to community perspectives and broader social influences.

HIGHLY PERFORMING REGULATORY BODIES RESPOND TO EXTERNAL CIRCUMSTANCES AND KEEP THEIR PRACTICES – INCLUDING THEIR GUIDANCE, EDUCATION, AND STANDARDS-SETTING FUNCTIONS – ‘UP TO DATE’ WITH PUBLIC EXPECTATIONS.

³⁴⁵ Benton Model (Streamlined Version), above n 200. See Appendix 1: Benton Model (Streamlined Version).

³⁴⁶ Annual Report 2017, above n 126, 4.

³⁴⁷ A national body representing lawyers, academics and other professionals ‘dedicated to protecting and promoting justice, freedom and the rights of the individual’: Australian Lawyers Alliance, Who We Are <<https://www.lawyersalliance.com.au/about-us/who-we-are>>

³⁴⁸ Annual Report 2017, above n 126, 30.

4. SPECIFIC CHALLENGES

A. Narrow public consultation

Some participants felt that in practice the Law Society's collaboration with external stakeholders and other industry groups could be improved. One regular member felt that the Law Society lacked a 'cohesive' relationship with universities. Another participant, a regional leader, said that while the association consults with some 'stakeholders', these tend to be closely-related 'externals' – like the Law Council of Australia³⁴⁹ and other Law Societies – rather than community or consumer groups.

Identifying a problem for all professional regulation, the legal regulator reflected on there being no specific public body representing the public's interests in the regulation of lawyers and the legal profession that the Law Society and the OLSC (the co-regulatory body) could consult with.

The regulator added that 'responsiveness' or 'not moving quickly enough on an issue' generally can be a problem with professionals, especially lawyers who, and associated with their professional role, tend to be 'slow to consider change'.

349 A national representative body for the Australian legal profession, representing 65 000 Australian lawyers through their 'constituent bodies' (including state law societies and bar associations) 'on national and international issues', and working 'for the improvement of the law': Law Council of Australia, About Us <<https://www.lawcouncil.asn.au/about-us>>.

3) ASSOCIATIONS' INTERNAL GOVERNANCE

A. BOARD GOVERNANCE

1. SUMMARY AND INDICATORS

A highly performing regulatory body will subject its board to 'regular performance appraisal', will have clear selection criteria for board members and senior officials, and will have induction processes in place for new board members.³⁵⁰

2. ASSOCIATION ACTIVITIES

As a member association, rather than a purely regulatory body, the Law Society's internal governance is more complex than an assessment of its board structure and executive officers would capture. In the Law Society's case especially, its size, the scale and diversity of its activities, and the need to fulfil regulatory and non-regulatory functions simultaneously mean a detailed, stratified internal governance structure is needed. An overview of this structure is attached in Appendix 4. This diagram illustrates clearly that a highly institutionalised professional association is not merely an ad-hoc arrangement of members or committees. The association's interrelated regulatory, representative, membership, and governance concerns are formally connected to one another.

A HIGHLY PERFORMING REGULATORY BODY WILL SUBJECT ITS BOARD TO 'REGULAR PERFORMANCE APPRAISAL', WILL HAVE CLEAR SELECTION CRITERIA FOR BOARD MEMBERS AND SENIOR OFFICIALS, AND WILL HAVE INDUCTION PROCESSES IN PLACE FOR NEW BOARD MEMBERS.

A. Election and removal of Councillors

All Solicitor Members of the Law Society are entitled to be notified of, and vote in, elections of Law Society Councillors.³⁵¹ Procedures for the election of Council members – by vote of Solicitor Members – are prescribed by the Law Society's Memorandum and Articles of Association.³⁵² There are currently 21 elected Councillors taken from a cross-section of the profession.³⁵³ The Council 'guides the objectives and policies of the Law Society, monitors its performance and delegates its authority over various matters to a network of Committees'.³⁵⁴ Councillors are elected for a term of three years,³⁵⁵ however their office can be terminated in certain circumstances – including absence without leave from three consecutive Council meetings,³⁵⁶ or being connected to a contract with, or becoming employed by, the Law Society.³⁵⁷ Councillors may also be removed by an ordinary resolution at a general meeting³⁵⁸ in which Solicitor Members may each cast one vote by a show of hands or ballot.³⁵⁹

B. Knowledge handover

The Law Society has five Officer Bearers – a President, Senior and Junior Vice-Presidents, a Treasurer (who manages and reports on the Law Society's finances)³⁶⁰ and an Immediate Past President.³⁶¹ At a Council meeting the end of each year, Councillors are elected – by the Council itself – into the roles of Senior and Junior Vice-Presidents and Treasurer.⁶² After one calendar year, the Senior Vice-President becomes the President,³⁶³ and the President becomes the Immediate Past President.³⁶⁴

³⁵⁰ Benton Model (Streamlined Version), above n 200. See Appendix 1: Benton Model (Streamlined Version).

³⁵¹ Memorandum and Articles of Association, above n 128, art 3.2.1.

³⁵² *Ibid* art 8.3.

³⁵³ The Council comprises: 2 country councillors; 2 suburban councillors; 2 city councillors; 2 corporate councillors; 2 government councillors; 2 large firm councillors; 1 Young Lawyers councillor; and 8 councillors not elected to a specific reserved seat.

³⁵⁴ Law Society of New South Wales, Council <<https://www.lawsociety.com.au/about-us/organisation-and-structure/council>>.

³⁵⁵ Memorandum and Articles of Association, above n 128, art 8.4.

³⁵⁶ *Ibid* art 8.6.1(f).

³⁵⁷ *Ibid* art 8.6.1(g)-(h).

³⁵⁸ *Ibid* art 8.5.

³⁵⁹ *Ibid* arts 7.5-7.7.

³⁶⁰ *Ibid* art 9.7.3.

³⁶¹ *Ibid* art 9.1.

³⁶² *Ibid* art 9.3.

³⁶³ *Ibid* art 9.4.2.

³⁶⁴ *Ibid* art 9.4.3.

3. INTERVIEW AND LITERATURE FINDINGS: ACTIVITIES AND VALUE

A. Elections for board performance

In our interviews, three Law Society leaders and one regional leader discussed the election process for the Law Society's council members. Though the board is not 'subject to regular performance appraisals', Law Society leaders said that the election (and the potential election loss) of council members fulfils the same quality-control function:

[Reading from the interview prompt asking whether the board is subject to regular performance appraisals:] That's not the case with us – we don't operate in the same way as say a public company ... but the board, it is representative of the broader profession ... The councillors have a three-year term, so if they are not performing, then there is an opportunity for someone else to come along and stand against them.

The councillors are obviously elected by the profession, there for a term, there's no real performance review – if there's a re-election, you either get it or you don't. If the membership are not happy with [council] members, they speak.

B. Knowledge-handover

One interview participant, a Law Society leader, discussed how members gradually move through the ranks of the Law Society council, facilitating 'corporate knowledge handover' to ensure the consistency and integrity of the Law Society's management:

The whole idea is to make sure that we have a corporate knowledge handover ... If you're elected as the treasurer, you've got a two- or three-year learning curve, before you assume the role of president. [To be elected treasurer] you've got to be elected by council ... [which is itself] broadly representative of the composition of the profession.

C. Public scrutiny

Gazley argues that associations 'depend on the ability of their boards to succeed at governance', and that good governance practices – 'self-imposed expectations that ensure [boards'] duties of care, loyalty and obedience are met' – are linked to associations' better performance and their ability to maintain the trust of members and stakeholders.³⁶⁵ After analysing survey responses from 1036 US-based professional and trade association CEOs and executive directors,³⁶⁶ Gazley concludes that associations with 'stronger accountability expectations' (for example, expectations imposed by their geographic scope or tax status as charitable organisations) are more likely to respond to 'normative influences' and implement good governance practices.³⁶⁷ This inference suggests that associations adjust their governance procedures in line with the degree of public faith they must maintain.

**GOOD GOVERNANCE PRACTICES –
'SELF-IMPOSED EXPECTATIONS THAT
ENSURE [BOARDS'] DUTIES OF CARE,
LOYALTY AND OBEDIENCE ARE MET'
– ARE LINKED TO ASSOCIATIONS'
BETTER PERFORMANCE AND THEIR
ABILITY TO MAINTAIN THE TRUST OF
MEMBERS AND STAKEHOLDERS.**

365 Beth Gazley, 'Good Governance Practices in Professional Associations for Public Employees: Evidence of a Public Service Ethos?' (2014) 74 Public Administration Review 736, 738.
366 Ibid 740.
367 Ibid 745.

4. SPECIFIC CHALLENGES

A. Election participation: lack of engagement

Some of the participants said that if the voting process were easier they might engage more with the procedure. One described this as ‘form overload’ – that for busy members, the voting process was overly complicated and ‘not easy’ and becomes ‘just one extra thing’ that they will not prioritise.

A few participants reported that they are simply too engrossed in work to engage with voting in Law Society council elections. For some participants, the Law Society’s attempts to encourage their engagement were futile and self-defeating: emails prompting members to vote were considered spam and, to one participant, ‘infuriating’. One participant, a large firm lawyer, explained how effects of time-poorness and information-overload are compounding:

I get like 150 to 200 emails a day, so it’s not possible for me to read and digest things other than my strict day-to-day work stuff. It’s even a struggle for me to respond to emails from my wife so a not particularly targeted email or newsletter that’s pushed out to all lawyers is always going to go into the scrap paper I think.

B. Election participation: lack of awareness

Some of our interview participants discussed the increasing size of the profession³⁶⁸ and its simultaneous splintering into groups centred around practice areas, geographical regions and workplaces, linking these issues to low voting turnout in the association’s elections; members simply do not know the candidates. One participant also said that he knew very little about the candidates or whether current board members were performing well. Another described the ‘discord between those who get involved and those who don’t and they’re not sure what they’re even voted for’. One participant spoke about how voting rarely ‘sparked interest’ in a large portion of members.

C. ‘A class apart’

In his study, Francis makes the interesting point that associations’ council members are, within the association, ‘a class apart’ from non-council members.³⁶⁹ Council members ‘are united in their broad support’ of the association – while normal members have little incentive to be so involved.³⁷⁰ Councillors’ ‘commitment to the collective’ is then reinforced by their participation,³⁷¹ which only further differentiates them from non-participating members. Combined with the above findings about voting turnout, these findings suggest that associations’ boards are in practice only ‘appraised’ in effect by a self-selecting subset of association members³⁷² with existing interests in association governance.

³⁶⁸ This feeling is empirically sound. At 31 December 2017, there were 31 946 solicitors holding practising certificates: Law Society of New South Wales, Practising Solicitor Statistics (31 December 2017). This figure is more than double that of 20 years ago: in 1998, there were 13 871 admitted solicitors: Law Society of New South Wales, ‘NSW Profile of Solicitors 2016 – Final Report’ (2016) 3. For discussion of ‘fragmentation’, see also Introduction, Section 3A(b)(ii): Social and digital economy pressures, above.

³⁶⁹ Francis, ‘Out of Touch’, above n 7, 341.

³⁷⁰ Ibid.

³⁷¹ Ibid.

³⁷² Ibid 342.

B. BUSINESS PROCESSES

1. SUMMARY AND INDICATORS

A highly performing regulatory body requires sufficient resources at its disposal for the full discharge of its responsibilities. It should also collaborate with external bodies to maximise its efficiency, align its processes with related systems and government procedures, and ensure that its committees have clear, explicit terms of reference and are accountable to the board.³⁷³

2. ASSOCIATION ACTIVITIES

A. Resources

The Law Society's Council and Committees³⁷⁴ all work through the contributions of volunteers,³⁷⁵ aside from the President, no Council member is remunerated.³⁷⁶ The Law Society also receives financial resources including through its membership and practising certificate fees and revenue from the provision of legal training and member services, product sales, and property hire.³⁷⁷

B. Alignment with other bodies

In NSW, complaints-handling is undertaken in co-regulatory arrangement between the OLSC and the Law Society.³⁷⁸

3. INTERVIEW AND LITERATURE FINDINGS: ACTIVITIES AND VALUE

A. Alignment with other systems and procedures

One participant, a Law Society leader, discussed the Law Society's 'liaison' with the Legal Profession Admission Board and the NSW Supreme Court in setting standards of entry (and exit) for the profession.³⁷⁹ Others spoke of the cooperative, mutually beneficial co-regulatory arrangement between the Law Society and the OLSC and how the two bodies 'work really well together' as a complaints-handling system.

4. SPECIFIC CHALLENGES

A. Volunteerism as a resource

A number of participants noted that the Law Society relies on a significant amount of members' volunteer work – which forms a large portion of the Law Society's resources. While this resource is clearly low-cost, it is dependent on members' engagement with (and membership of) the association. And, as one participant noted, the work may be 'free' for the Law Society, but is costly to volunteers:

Can I say – it's all voluntary, nobody gets paid except for the President. So, people are spending a lot of time out of lucrative practices ...

A HIGHLY PERFORMING REGULATORY BODY REQUIRES SUFFICIENT RESOURCES AT ITS DISPOSAL FOR THE FULL DISCHARGE OF ITS RESPONSIBILITIES. IT SHOULD ALSO COLLABORATE WITH EXTERNAL BODIES TO MAXIMISE ITS EFFICIENCY, ALIGN ITS PROCESSES WITH RELATED SYSTEMS AND GOVERNMENT PROCEDURES, AND ENSURE THAT ITS COMMITTEES HAVE CLEAR, EXPLICIT TERMS OF REFERENCE AND ARE ACCOUNTABLE TO THE BOARD.

373 Benton Model (Streamlined Version), above n 200. See Appendix 1: Benton Model (Streamlined Version).

374 The Law Society currently has 28 Committees: Law Society of New South Wales, Current Committee List <<https://www.lawsociety.com.au/advocacy-and-resources/law-society-committees/current-committees-list>>.

375 Annual Report 2017, above n 126, 12.

376 Law Society of New South Wales, 'Annual Financial Report for the Year Ended 30 June 2017' (2017) 38 <<https://www.parliament.nsw.gov.au/papers/DBAssets/tailedpaper/webAttachments/72296/4a%20Law%20Society%20Full%20Financial%20Report%202017.pdf>>.

377 *Ibid* 24.

378 Professional Standards 2017 Annual Report, above n 156, 9. See

Part II: Findings: Regulatory Functions – Value and Challenges, Section 1D(2)(a): Complaints Handling, and related discussion, above.

379 The Legal Profession Admission Board, relevantly, determines whether a person seeking to be admitted as a lawyer, in NSW, is both eligible and suitable for admission. It is a statutory corporation under the Legal Profession Uniform Law Application Act 2014 (NSW): Legal Profession Admission Board, About Us <http://www.lpab.justice.nsw.gov.au/Pages/about-lpab/about-lpab.aspx>. See also Legal Profession Uniform Law Application Act 2014 (NSW) ss 19–21A. The NSW Supreme Court is the highest court in NSW: Supreme Court of NSW, About the Supreme Court <http://www.supremecourt.justice.nsw.gov.au/Pages/sco2_aboutus/sco2_aboutus.aspx>. It maintains a roll of Australian lawyers (LPUL s 22) and may order removal of names from that roll on its own motion or on the recommendation of regulatory authorities (LPUL s 23(1)).

4) EXTERNAL GOVERNANCE AND PUBLIC ACCOUNTABILITY

A. ACCOUNTABILITY AND TRANSPARENCY

1. SUMMARY AND INDICATORS

A. Accountability

A highly performing regulatory body will be held to account for its performance, and will perform its functions and develop its standards and codes without any 'inappropriate' external influence from government, the profession, or other stakeholders. It will also act so as to maintain the confidence of all stakeholders, and will be diligent in its regulatory role.³⁸⁰

B. Transparency

A highly performing regulatory body will have a clearly defined, publicly available set of operating procedures, and will make information about its operating procedures available to members and the public. Clear avenues of appeal should be available in case any decision made or action taken by the association is thought to be unsound.³⁸¹

2. ASSOCIATION ACTIVITIES

A. Maintaining members' confidence

Prior to 1998, membership of the Law Society was mandatory for NSW solicitors.³⁸² As described in the introduction, competition policy reforms to the legislation at the time³⁸³ led to voluntary membership and thus a new need for the Law Society to maintain its members' confidence and guarantee to deliver what then-President Gordon Salier described as the 'benefits of membership'.³⁸⁴

A HIGHLY PERFORMING REGULATORY BODY WILL BE HELD TO ACCOUNT FOR ITS PERFORMANCE, AND WILL PERFORM ITS FUNCTIONS AND DEVELOP ITS STANDARDS AND CODES WITHOUT ANY 'INAPPROPRIATE' EXTERNAL INFLUENCE FROM GOVERNMENT, THE PROFESSION, OR OTHER STAKEHOLDERS. IT WILL HAVE CLEARLY DEFINED, PUBLICLY AVAILABLE SET OF OPERATING PROCEDURES, AND WILL MAKE INFORMATION ABOUT ITS OPERATING PROCEDURES AVAILABLE TO MEMBERS AND THE PUBLIC.

B. Operating procedures

Information about the Law Society organisation and its structure is available on the Law Society website.³⁸⁵ The public and stakeholders can view the Law Society's Memorandum and Articles of Association,³⁸⁶ and information about the procedures and activities of the Law Society Council³⁸⁷ and Committees.³⁸⁸ Annual reports, available on the Law Society website, provide additional details about the activities of the Committees and Council.³⁸⁹

³⁸⁰ Benton Model (Streamlined Version), above n 200. See Appendix 1: Benton Model (Streamlined Version).

³⁸¹ *Ibid.*

³⁸² Law Society of New South Wales, History of the Law Society <<https://www.lawsociety.com.au/about-us/organisation-and-structure/history>>.

³⁸³ The Legal Profession Act 1987 (NSW).

³⁸⁴ Salier, above n 125, 58.

³⁸⁵ Law Society of New South Wales, Organisation and Structure <<https://www.lawsociety.com.au/about-us/organisation-and-structure>>.

³⁸⁶ Memorandum and Articles of Association, above n 128.

³⁸⁷ Law Society of New South Wales, Council <<https://www.lawsociety.com.au/about-us/organisation-and-structure/council>>.

³⁸⁸ Law Society of New South Wales, Law Society Committees <<https://www.lawsociety.com.au/advocacy-and-resources/law-society-committees>>.

³⁸⁹ Law Society of New South Wales, About Us <<https://www.lawsociety.com.au/about-us/>>.

3. INTERVIEW AND LITERATURE FINDINGS: ACTIVITIES AND VALUE

A. Accountability to members

One participant, a Law Society leader, said that the Law Society strives to ensure that its members know it works hard. Another participant, a regional leader, observed that the Law Society has become more proactive in addressing members' concerns now that it faces the additional challenge of voluntary membership; members can hold the association to account by simply leaving:

I think [voluntary membership] has definitely made them a little bit more responsive, and definitely a bit more on the front foot ...

Several participants felt that the Law Society's high voluntary membership rate among lawyers indicated that its performance was deemed by members to be good:

Membership used to be compulsory and now it's not. So, voluntary membership – the Law Society could've folded, or it could still be operational like it is now. So, I think that's probably a good sort of measure that there is obviously some value in what we're doing, because we're still getting the membership, we're still a functioning organisation, we're still financially on top.

B. Accountability to the public

In our interviews, one participant, a regular member, felt that the Law Society was seen as publicly accountable:

I do think that generally the perception is that we're publicly accountable. I think that's the perception – whether we are or not, I don't know.

C. Transparency

A few interview participants – both leaders and regular members – discussed the public availability of information about the Law Society and its operations on the Law Society website:

You can go to the Law Society website, and you can see exactly what legislation we operate under, you can see what our structure is and see what we stand for ... it's all there, anybody can go to the website and look at it. The stuff on the Law Society website is easy to understand to the public. Hopefully it strips away any sort of opacity that surrounds the profession and how it works, and the applicable rules.

Others mentioned the public's ability to contact the Law Society directly, and three participants noted that a 'website overhaul' was in process to improve information and contact for the public.

'I THINK [VOLUNTARY MEMBERSHIP] HAS DEFINITELY MADE THEM A LITTLE BIT MORE RESPONSIVE, AND DEFINITELY A BIT MORE ON THE FRONT FOOT ...!'

- REGIONAL LAW SOCIETY LEADER

4. SPECIFIC CHALLENGES

A. Public and government awareness

In our interviews, participants felt that there was a general lack of knowledge, understanding and appreciation of associations. Several interview participants felt that the public do not seem to understand the Law Society's role and importance, and that publicly available information about the Law Society was insufficient. The legal regulator said that, '[The Law Society] could improve here [in its transparency]; it's difficult for the public to find out exactly how the Law Society works and how it does things'. One of the regular member participants, despite having been quite active in the Law Society, still felt that it was too difficult to use the Law Society website to find information and contact the Law Society.³⁹⁰

Lack of knowledge about associations and their roles is not a localised phenomenon. In 2015, the UK Chartered Institute of Building ('CIOB') surveyed the general public and Ministers of Parliament ('MPs') as part of a 'self-assessment study'.³⁹¹ The surveys found that MPs were only moderately familiar with the purposes and workings of UK professional associations about which they were asked.³⁹² There was only 11–49% agreement by the MPs that the associations were effective in achieving any of the five benefits identified.³⁹³ Further, surveys of the general public found that while 80% of adults had heard of associations, only 41% thought they knew anything about them³⁹⁴ In the 18–24 age-group, only 70% of respondents had heard of the associations.³⁹⁵ Younger respondents held far less trust than older respondents in associations' abilities to achieve any of the five identified benefits, and those who had not heard of associations were least positive of all.³⁹⁶ Finally, 46% of respondents who had heard of associations and, perhaps unsurprisingly, 80% who had not, agreed that associations were 'out of touch with the real world'.³⁹⁷

'THE PUBLIC HAVE LOST SIGHT OF THE IMPORTANCE OF THE INDEPENDENCE OF THE PROFESSIONS, AND THE ROLE OF ASSOCIATIONS IN MAINTAINING THAT INDEPENDENCE.' - LEGAL REGULATOR

THE UK CIOB'S SURVEYS OF THE GENERAL PUBLIC FOUND THAT WHILE 80% OF ADULTS HAD HEARD OF ASSOCIATIONS, ONLY 41% THOUGHT THEY KNEW ANYTHING ABOUT THEM. 46% OF RESPONDENTS WHO HAD HEARD OF ASSOCIATIONS AND, PERHAPS UNSUPRISINGLY, 80% WHO HAD NOT AGREED THAT ASSOCIATIONS WERE 'OUT OF TOUCH WITH THE REAL WORLD'.

B. Negative perceptions of professions

A number of interviewees described what they perceived as hostile attitudes from the government toward professions, especially law. As one Law Society leader described, albeit in a self-consciously exaggerated fashion:

The government's wishes are the destruction of anyone called a lawyer. There is a bounty system on lawyers: that lawyers be kept in our place. If [lawyers] become profitable, we [the government] will bring in competitors or ways to reduce that, for instance, requiring you have further accreditation. Or if we can't bring in competitors, we'll just eradicate the work.

Several interviewees also described a perceived lack of public trust in professionals – for example, a few referred to research that showed that the public distrusts lawyers in general, despite expressing high levels of trust in and satisfaction with their own lawyers.³⁹⁸ One participant, the legal regulator, said that the public have lost sight of the importance of the independence of the professions, and the role of associations in maintaining that independence.

This perceived undercurrent of negative opinion, flowing from the government to the public, can also indirectly colour regular members' views of their association. For example, one participant wondered whether what he felt was politicians' and the journalists' disdain for all lawyers meant that the Law Society was keen to ensure that the government and the media regarded it as part of their 'anti-lawyer' group, ready to 'kick the boot in if anyone slips up'.³⁹⁹

³⁹⁰ The Law Society's website is currently being overhauled.

³⁹¹ CIOB Report, above n 14.

³⁹² *Ibid* 25.

³⁹³ *Ibid* 26–7. These benefits were under five "broad headings ... pertinent to policy makers today": productivity; social mobility; governance and ethical standards; internationalisation; and policy formation: *ibid* 9.

³⁹⁴ *Ibid* 28.

³⁹⁵ *Ibid*.

³⁹⁶ *Ibid* 28–9.

³⁹⁷ *Ibid* 29.

³⁹⁸ In Australia, a 2017 survey of 648 Australians over the age of 14 found that only 35% regarded lawyers as having 'high' or 'very high' ethics and honesty: Roy Morgan, 'Image of Professions Survey 2017' (Finding No 7244, 7 June 2017) <<http://www.roymorgan.com/findings/7244-roy-morgan-image-of-professions-may-2017-201706051543>>.

In the UK, the Legal Services Consumer Panel's 2017 Tracker Survey found that general public trust in lawyers was slightly higher, but still only at 45%: Legal Services Consumer Panel, 'Tracker Survey 2017 – Briefing Note: How Consumers are Choosing Legal Services' (2017) 1 <http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/How_consumers_are_choosing_Final_2017.pdf>. However, at the same time, 80% of consumers reported being satisfied with their own experience of legal services: *ibid*.

³⁹⁹ These comments are also relevant to our findings that participants felt that the Law Society was a 'tougher' regulator in order to uphold its own reputation: See Part II: Findings: Regulatory Functions – Value and Challenges, Section 1D(3)(a): Independence and impartiality, above.

PART III: FINDINGS - REPRESENTATIVE, COMMUNITY AND MEMBERSHIP FUNCTIONS – VALUE AND CHALLENGES

1) REPRESENTATIVE AND COMMUNITY FUNCTIONS:

A. REPRESENTATION

1. SUMMARY AND INDICATORS

Where individuals might struggle to ‘change or even recognise’ problems facing their profession and practice, professional associations may ‘adopt a politically active stance’ in reliance on their group-derived collective action advantages.⁴⁰⁰ Associations ‘must operate within the mores and laws of their society, but can lobby the state, and publicise issues’ for the benefit of members and the profession.⁴⁰¹

2. ASSOCIATION ACTIVITIES

A. Representation

Among the Law Society’s 206 ‘major law reform submissions’ in the 2016–17 period⁴⁰² were a number of submissions on issues relevant to the interests of the legal profession and community, including submissions on the *Legal Profession Uniform Law* and a number of submissions relating to court processes and procedures.⁴⁰³ As part of its ‘2016–2019 Strategic Plan’, the Law Society aims to ‘engage and empower the legal profession in the development of the law’.⁴⁰⁴

B. Equality and diversity

The Law Society’s Charter for the Advancement of Women represents the interests of women in the legal profession, urging ‘law firms to affirm their commitment to equal opportunity in legal practice’.⁴⁰⁵ The Law Society has also expanded the scope of its work to ‘boost the representation of Indigenous people in the legal profession’, including by providing funding, online resources, and mentoring.⁴⁰⁶

ASSOCIATIONS’ ADVOCACY HAS OFTEN BEEN REPORTED AS A KEY MEMBERSHIP INCENTIVE, ACROSS A VARIETY OF PROFESSIONS’ ASSOCIATIONS.

3. INTERVIEW AND LITERATURE FINDINGS: ACTIVITIES AND VALUE

A. Lobbying and advocating for members

Associations’ advocacy has often been reported as a key membership incentive, across a variety of professions’ associations. In Bowman’s 1996 survey of 446 members of the American Society for Public Administration,⁴⁰⁷ 57.2% of the respondents felt the association ‘should serve as an advocate’ to promote the profession (to improve both its ethical standards and its reputation), including by ‘drafting ethics legislation, offering training, and/or speaking out when officials act (un)ethically’.⁴⁰⁸ Weil and Kirk found that 80% of the 242 members of the Association of Mental Health Administrators who responded to their poll believed the association should act as a spokesperson for the profession and its members, including by contacting legislators at the federal and state levels.⁴⁰⁹ Peterson, Hautamaki and Hershenson, in surveys of 287 members of the American Rehabilitation Counseling Association,⁴¹⁰ also found that members rated lobbying highly as a benefit provided by the association.⁴¹¹

ASSOCIATIONS ‘MUST OPERATE WITHIN THE MORES AND LAWS OF THEIR SOCIETY, BUT CAN LOBBY THE STATE, AND PUBLICISE ISSUES’ FOR THE BENEFIT OF MEMBERS AND THE PROFESSION.

400 Margaret Mahlin, ‘Individual Patient Advocacy, Collective Responsibility and Activism within Professional Nursing Associations’ (2010) 17 *Nursing Ethics* 247, 253.

401 Oppenheim and Pollecutt, above n 108, 197.

402 Annual Report 2017, above n 126, 26–30.

403 *Ibid* 9.

404 *Ibid* 32.

405 *Ibid* 4.

406 *Ibid* 2.

407 Bowman, above n 205, 678.

408 *Ibid* 681.

409 Weil and Kirk, above n 170, 36.

410 David B Peterson, Julie B Hautamaki and David B Hershenson, ‘Reflections on Our Past and Prospects for Our Future: A Survey of the Members of the American Rehabilitation Counseling Association (ARCA)’ (2006) 50 *Rehabilitation Counseling Bulletin* 4, 4.

411 *Ibid* 11.

HENCZEL'S STUDY FOUND THAT ASSOCIATIONS SUPPORTED PRESERVATION OF THEIR OWN 'CULTURAL HERITAGE' THROUGH ADVOCACY AND LOBBYING, AMONG OTHER THINGS.

B. Reputation and collective action advantages

In our interviews, a number of participants discussed ways in which the Law Society's submissions and legislative oversight were beneficial to the profession – including non-members. They argued that, unlike individual members, the Law Society can use its collective action and reputational advantages to successfully 'champion' the profession's values – while at the same time promoting the public interest.⁴¹² Two participants, the first, a regular member, and the second, a Law Society leader, said:

[The Law Society] has an ear, because it has – because there are contact. So, there's a bit of in-road that as a person you're never going to get. The organisation, the Law Society, is respected.

The Law Society is a complicated beast; it's an advocacy body on behalf of lawyers, for lawyers, but not just for lawyers; because we're a profession, we have an overriding duty beyond ourselves – to the betterment of society. So, it has that advocacy role for lawyers and their jobs – like a union in a sense – but it's also got the job of advocating for a better society, through the law. So, we do that.

Two participants, one a Law Society leader and the other a regular member, commented that members' opinions on the Law Society's positions are actively sought and incorporated, even if indirectly, via the Committees' consultation processes.

In Henczel's preliminary interview study of 52 library association members found that associations supported preservation of their own 'cultural heritage' through advocacy and lobbying, among other things.⁴¹³ Participants felt that associations were uniquely situated to present a 'single, united and strong voice that is truly representative of the profession', which was deemed necessary to the efficacy of advocacy in the interests of the profession and the public.⁴¹⁴

C. Equality and diversity in the profession

Participants, both regular members and leaders, also noted that the Law Society uses its representative role to promote diversity and equality, including the advancement of women, in the legal profession. Two Law Society leaders explained:

I think that as a professional organisation, we need to be speaking out on all those broader public issues, and giving a voice to that ... if it was left just to a regulatory body, or something like that, we wouldn't have the freedom to be able to advance those causes that we've seen as being important.

The Law Society is the vanguard of making, you know – we [all] talk about equality in the community, but we do the same in our own backyard.

4.SPECIFIC CHALLENGES

A. Representation of the whole membership

Participants in Henczel's study of 55 library association members were concerned that the association represented only a small proportion of the profession and could not represent the whole range of views.⁴¹⁵ They felt that the profession was 'disconnected', and that its segments were presented to outsiders as specialisations rather than a cohesive professional unit.⁴¹⁶

In our interviews, a number of participants discussed how the Law Society struggles to truly 'represent' its members, and advocate in the interest of 'the profession' broadly, when members' views diverge on important issues. When asked how the Law Society takes members' diverse views into account when formulating policy positions, one participant replied –

It doesn't ... there's too many of us ... You'd have ... however many lawyers there are in New South Wales,⁴¹⁷ every single one of them would have a different view.

412 See Part II: Findings: Regulatory Functions – Value and Challenges, Section 2B(3)(a): Public interest and democratic principles, above.

413 Henczel, 'The Impact of Library Associations: Preliminary Findings', above n 54, 139.

414 Ibid 140. See also Henczel, 'The Impact of National Library Associations', above n 251, 140.

415 Henczel, 'The Impact of National Library Associations', above n 251, 146.

416 Ibid 150.

417 See above n 368 and accompanying text.

One participant felt that the representation problem was exacerbated because the Law Society cannot always consult with members on the positions it takes – in particular where its consultations with the government are confidential:

Most committee work, because of its very nature, has to be confidential, so it's really hard to be transparent on the one hand about what we're doing, and on the other hand to maintain the confidence that means the government ... asks us for our opinion in the first place. If it came to committees and then it was spread all over the place, they just wouldn't ask us ... They wouldn't let us have a look at it. So it's a bit hard.

There was a sense among many participants that they wanted their association to be stronger, more confident and assertive, and more responsive when interacting with 'external stakeholders' – specifically the government and the public. One participant felt that sometimes the Law Society's lack of advocacy integrity and effectiveness stemmed from its lack of consideration of and attention to members' concerns, particularly in less-represented demographics:

How effective [at advocacy is the Law Society]? Some issues I think we're very effective ... Well, basically they tell us they're very effective. Others, I think they're a toothless tiger [and it's] too little, too late.

Finally, one regular member participant from a city practice objected to what he perceived was the Law Society's political stance, feeling that the Law Society in its publications primarily focused on supporting 'gay and indigenous' practitioners, and that the Society's position generally skewed toward 'left-wing politics'.

B. Tension between representation and regulation

Flood argues that in cases where associations' interests (for example, in retaining their regulatory functions or mandatory membership) may conflict with the operation of legislation, the responsibility for representing the profession's interests should be relegated to a 'separate body such as [a] union', and that associations' uncompromised ability to advocate in the public interest should prevail.⁴¹⁸

Echoing Flood, one of our interview participants felt that the Law Society's 'mission' would be 'clearer' if its advocacy role – or, as others described, its 'union'-like role – were separate from its regulatory role; that is, that associations should represent members without being required to confront the tension of simultaneously regulating them. Others spoke of how losing its regulatory function would diminish both its motivation and legitimacy. Explaining the superiority of a co-regulatory model over an association losing its regulatory power, the legal regulator said, 'Associations [who maintain a regulatory function] are more committed to and have a stake in the professionalism of their profession.'

418 Colleen Flood, 'Conflicts between Professional Interests, the Public Interest, and Patients' Interests in an Era of Reform: Nova Scotia Registered Nurses' (1997) 5 Health Law Journal 27, 42. See also Hugh Willmott, 'Organising the Profession: A Theoretical and Historical Examination of the Development of the Major Accountancy Bodies in the UK' (1986) 11 Accounting, Organizations and Society 555, 560.

B. COLLECTIVE IDENTITY, INCLUSIVITY AND SYMBOLIC COMMUNITY

1. SUMMARY AND INDICATORS

By providing ‘a collegial forum for professional discussion, debate and peer review’,⁴¹⁹ and facilitating ‘informal information exchange’,⁴²⁰ associations form a ‘site of socialization’.⁴²¹ There, professionals can ‘learn the rules and norms of practice’ through not only ‘direct instruction’ but also ‘through conversations they overhear, and from observations of the [professionals] around them’.⁴²² Rusaw terms this associations’ ‘socializing’ function, which can in turn enable their members to be personally and professionally equipped for work in managerial organisations.⁴²³

Through this community, members are supported and promoted in their profession, and the public benefits from the profession’s cohesion and collective work. However, the main beneficiary of this community role is the profession itself, which achieves public recognition for its contributions and self-sustains through its services and benefits for members.

BY PROVIDING ‘A COLLEGIAL FORUM FOR PROFESSIONAL DISCUSSION, DEBATE AND PEER REVIEW’, AND FACILITATING ‘INFORMAL INFORMATION EXCHANGE’, ASSOCIATIONS FORM A ‘SITE OF SOCIALIZATION’.

2. ASSOCIATION ACTIVITIES

A. Community

The Law Society facilitates the formation of a community through many of its activities – in particular, by facilitating practitioners’ networking. Networking events are run under the auspices of the Law Society itself (for example, a Specialist Accreditation conference providing a ‘unique networking opportunity’).⁴²⁴ Networking is also promoted by Law Society Committees – including, for example, the Corporate Lawyers Committee,⁴²⁵ the Diversity and Inclusion Committee,⁴²⁶ and NSW Young Lawyers.⁴²⁷

B. Inclusivity and Diversity

The Law Society’s ‘2016–2019 Strategic Plan’ includes an aim to ‘develop and enhance legal communities across private, corporate, government and regional practice’.⁴²⁸ The Law Society’s Government Solicitors and Corporate Lawyers Committees now have ‘Segment Managers’, who are permanent attendees at committee meetings and are tasked with guiding the committees and working with them in pursuit their segments’ ‘priority issues’.⁴²⁹ And in representing regional interests, the Law Society also has a ‘Regional Co-Ordinator’.⁴³⁰

As mentioned, the Law Society also operates a number of programs and advocates for the interests of women and Indigenous practitioners in the legal profession.⁴³¹

419 Dollinger, above n 103, 30.

420 Mather and Levin, above n 99, 16.

421 Ibid 15.

422 Ibid.

423 Rusaw, above n 163, 223.

424 Annual Report 2017, above n 126, 10.

425 Annual Report of Committees 2017, above n 150, 5.

426 Ibid 9.

427 Annual Report 2017, above n 126, 11.

428 Ibid 33.

429 Annual Report of Committees 2017, above n 150, 5, 18.

430 Law Society of New South Wales, Regional Solicitors <<https://www.lawsociety.com.au/legal-communities/regional-solicitors>>.

431 See Part III: Findings: Representative, Community and Membership Functions – Value and Challenges, Section 1A(2)(b): Equality and diversity, above.

3. INTERVIEW AND LITERATURE FINDINGS: ACTIVITIES AND VALUE

A. Collective identity and community

i. Associations are crucial

Yeager, Rabin and Vocino surveyed government workers – 787 professional association members and 176 non-members – in an attempt to design a predictive model of ‘who will or will not join a professional association.’⁴³² They found that an individual’s level of education – participants were asked to ‘indicate their highest earned degree’ –⁴³³ was the best predictor of whether they would become a member of an association. However, ‘the belief that professionals should participate in professional associations’ was the second best predictor.⁴³⁴ In Peterson, Hautamaki and Hershenson’s survey study of 287 members of the American Rehabilitation Counseling Association,⁴³⁵ ‘professional identity’ was the most highly-cited reason for academic members’ joining the professional association.⁴³⁶

In our interviews, the Law Society was cited by many regular members and leaders as a general source of support for the profession’s collective identity, by providing members with a sense of belonging and collegiality, and unifying them in pursuit of common goals. As one regular member put it:

As a lawyer, [membership of the Law Society is] good ... [it’s] like a family feeling to have, that I belong to an association. This is my profession. That kind of feeling.

Another regular member also felt that it was also important for there to be a state-sized body to maintain the profession’s unity:

[It] brings everyone together who would because we wouldn’t be very unified if we all had our own discrete bodies... There wouldn’t be one unified place where people are measured on a similar standard.

ii. Community contributes to personal development

In Henczel’s interview study of library association⁴³⁷ members, 35 of the 55 interview participants felt that the professional values embodied by the association and the feeling of belonging to a professional community⁴³⁸ had improved their ‘attitude and behaviour’. This was achieved by improving their self-confidence,⁴³⁹ and increasing their independence and motivation,⁴⁴⁰ which then improved their ‘professional performance and overall competence’.⁴⁴¹

iii. Networking

Faulconbridge, in a semi-structured interview study of 58 members of advertisers’ and lawyers’ associations,⁴⁴² found that, through their formal education and conference programs, associations were ‘critical’ to ‘bringing individuals with ‘shared practice’ together’ to seed ‘communities of practice’.⁴⁴³

THE LAW SOCIETY WAS CITED BY MANY REGULAR MEMBERS AND LEADERS AS A GENERAL SOURCE OF SUPPORT FOR THE PROFESSION’S COLLECTIVE IDENTITY, BY PROVIDING MEMBERS WITH A SENSE OF BELONGING AND COLLEGIALITY, AND UNIFYING THEM IN PURSUIT OF COMMON GOALS.

432 Samuel J Yeager, Jack Rabin and Thomas Vocino, ‘Who Joins Professional Associations: A Predictive Model’ (1985) 9 Public Administration Quarterly 4, 5.

433 *Ibid* 7.

434 *Ibid* 9.

435 Peterson, Hautamaki and Hershenson, above n 412, 4.

436 *Ibid* 11.

437 Including codes of ethics and conduct: Henczel, *The Impact of National Library Associations*, above n 251, 126.

438 *Ibid* 125.

439 *Ibid* 168.

440 *Ibid* 124–5.

441 *Ibid* 168.

442 Faulconbridge, above n 165, 970.

443 *Ibid* 973.

In Henczel's interview study of library association members, 42 of the 55 interview participants discussed how networking in associations, and the personal connections that networking forms, can lead to career benefits.⁴⁴⁴ Participants felt that networking contributed to their career success by facilitating relationships with potential employers⁴⁴⁵ and employees and with potential collaborators,⁴⁴⁶ and by enabling members to learn from each other – particularly from members in different parts of the profession.⁴⁴⁷ Finally, networking broadened participants' exposure to others outside their normal circles,⁴⁴⁸ helping participants build a community through the association's 'uniquely diverse environment' as distinct from the normally homogenous workplace.⁴⁴⁹

A number of our interview participants – both regular members and Law Society leaders – spoke specifically about the value of networking, via the association, for broadening their professional communities. Some cited informal networking (that is, meeting people via other Law Society events and functions like committee work), but many also noted specific 'networking' initiatives. One Law Society leader described Law Society networking events designed to introduce solicitors to barristers (non-members), allowing them to socialise, build work contacts, and learn about 'the other side' of the profession. Another regular member, employed in government, described a networking event bringing female practitioners from across the practice area together with barristers:

That was very good ... it was women from all different [roles within the practice area]... some of whom I'd already met but some I hadn't ... If there's another one [I'll go again] ... I thought it was very good, it was well attended and really excellent.

THANKS TO TECHNOLOGICAL PROGRESS, PROFESSIONAL COMMUNITIES THAT MAY ONCE HAVE BEEN LOCALISED AND INSULAR ARE NOW INCREASINGLY 'GLOBAL'.

iv. National and international community

Thanks to technological progress, professional communities that may once have been localised and insular are now increasingly 'global'. In our interviews, one participant, a Law Society leader, noted that these changes have pushed associations to adopt broader perspectives:

We went from an inward-looking state-based system to really a national and an international-looking organisation.

Another participant, a Law Society leader, described how the Law Society is forging and maintaining relationships with other national and international associations – working to position itself as a hub of engagement, or a conduit through which members can connect to the wider professional community:

What we try to do is make everyone feel like they are part of the whole professional body of New South Wales, and Australia,⁴⁵⁰ and the region, and internationally – through the ways that we feed into and have relationships with the Law Council of Australia, LAWASIA,⁴⁵¹ and international bodies like the International Bar Association,⁴⁵² the Union Internationale des Avocats⁴⁵³ ... those are some of the bodies that we're engaged with, and our members can become actively involved through us.

Another participant, a Law Society leader, felt that international integration of the legal professional community makes sense – lawyers' personalities and values are relatively homogenous worldwide. Globalisation provides opportunities to evolve the profession and its practices consistently across jurisdictions, which is in turn beneficial for international practice:

From personal experience, lawyers around the world are a very generic group... the very nature of a very rigid teaching of intellectual rigor makes lawyers think in a very critical manner ... And if you look at our concept of ethics, our core areas, [Australian] ethics and international ethics are very similar. Often the same phrases are used, so they're almost becoming universal tenets of the profession ... There is common ground, particularly in international cross-border transactions; we can adopt certain conduct rules, certain standards. And of course that facilitates the way legal business is being done today ...

444 Henczel, *The Impact of National Library Associations*, above n 251, 127

445 *Ibid* 185–6.

446 *Ibid* 187.

447 *Ibid* 128.

448 *Ibid* 166, 169–70.

449 *Ibid* 170.

450 A sort of 'parent association' of Australian Law Societies and Bar Associations: see Law Council of Australia <<https://lawcouncil.asn.au>>.

451 The Law Association for Asia and the Pacific: see LAWASIA <www.lawasia.asn.au>.

452 A London-based international association for legal practitioners, Bar Associations and Law Societies: see International Bar Association <www.ibanet.org>.

453 A Paris-based international NGO whose motto is, in English, 'Bringing Together the World's Lawyers': see International Association of Lawyers <www.uanet.org/en>.

B. Inclusivity

i. Women

A number of our interview participants – members and leaders – noted ways in which the Law Society has supported women in the legal profession, including through its ‘Advancement of Women Charter’ and its Women’s Mentoring Program (which one described as ‘absolutely terrific’). One participant, a leader in the Law Society, acknowledged that any work toward the advancement of women was an ongoing process:

We can see that just over half of the profession nationally is female now ... [Law graduates have] for a long time been quite a big majority female ... So, you know we know that. So, there’s quite senior women in the profession – yet they’re not reflected at the top still. They’re there in big numbers in the junior and mid-level, but not at the top. So, we think it’s really important to fit women with appropriate mentors, so we’ve got mentoring schemes for women.

ii. Practice areas

Some participants felt that the Law Society was targeting benefits to segments of practice that are typically workplace-centred, where practitioners’ identities are attached more to organisations than to the association or a broader notion of professionalism. One participant, a Law Society leader, spoke about the Law Society’s increased attention to the in-house and government sectors and their improved membership uptake as a result:

We try to help [the government and in-house lawyers] feel connected to the whole profession through us, instead of feeling like they’re a silo within the profession that doesn’t quite fit ... [Membership in these sectors] is a little bit lower. They feel more connected to their company or their department. But we actually feel it’s important for them to be encouraged to feel part of the broader profession, and I think we’ve actually been working quite hard on that and doing well with it. We’re seeing our numbers even improve in those segments.

One of the government lawyer interviewees confirmed, unprompted, that she had noticed that the Law Society was actively reaching out to government lawyers – noting the value of the new ‘Government Solicitors’ Segment Manager’ role – indicating that these efforts are also noticed by existing members.

iii. Regions

Increasing integration of Regional Law Societies is a key feature of the Law Society's attempts to integrate its members into a broader notion of professional community. One participant – the leader of a regional Law Society – described the various means by which regional Law Societies communicate and coordinate with one another and with the state Law Society. There are a number of formal meetings each year,⁴⁵⁴ during which the Law Society updates regional Presidents on relevant issues so that their responses can be coordinated and 'unified':

Regional Presidents meet in Sydney four or five times a year. So, we'll have a briefing day, basically the key staff members and the heads of each department in the Law Society come and give us an update. So, for example, the Media Officer will give us a report on all the media articles that have been published by the Law Society and Regional Law Societies and if there are key issues ... we can have discussions surrounding what each region is doing, what the Law Society is doing, and what approach people are taking. So, we just have more of a unified approach to getting things done.

Continuously throughout the year, the regional Societies are in contact with the Law Society's regional coordinator:

[Then] if I receive information from the Regional Coordinator at the Law Society, and I think it's relevant to our region, I can disperse that to my region and see if there's interest from the local practitioners...

Finally, these connections are strengthened by individual connections formed in 'councillor pairs' between the regions and with the Law Society executive:

We [also] have a 'councillor pair' for each region [to] be a connection between the regions, and the council, and the Law Society, and hopefully strengthen that relationship between the regions and the Law Society.

These arrangements aim to harmonise the efforts of regional Societies – who, as another regional leader noted, tend to face the same kind of practical and professional issues – and also provide them with direct channels of communication to the state Society's executive. Participants felt that by paying attention to regional members' needs and harmonising operations with and between regional Law Societies, the state Law Society is fostering connections, boosting the profession's morale, and keeping the association from becoming 'big-city centric'.

454 The Law Society's Memorandum and Articles of Association requires two Regional Law Society conventions to be held per year: art 12.6.1. In the President's Report of Central West Law Society, the President, Tricia Arden, refers to having attended five Regional Presidents' Meetings in 2017: Tricia Arden, Central West Law Society, 'President's Report' (10 November 2017) 1 <<https://www.lawsociety.com.au/sites/default/files/2018-04/CENTRAL%20WEST%20president%27s%20report.pdf>>. She also refers to the usefulness of the 'Councillor Pair' role: at 3

4. SPECIFIC CHALLENGES

A. Divergent motivations, needs, and attitudes

As we discussed in the Introduction, professions are not the ‘homogenous communities’ they once were; practitioners’ demographics, locations, backgrounds and interests are expanding with the size of the profession.⁴⁵⁵

In our interviews, a Law Society leader discussed how maintaining a small profession and homogeneity of members promotes a valuable sense of collegiality; practitioners have shared standards, experience ‘shared problems’, and can rely on the existence of relevant ‘collective wisdom’ to solve them.⁴⁵⁶ To reiterate the ‘fragmentation’ discussion in the Introduction, with a growing profession, it seems, the ability to maintain this collegiality and unity is in danger.

Many interview participants discussed the differences in attitudes and priorities between city and country practitioners. These concerns reflect the different economic and social conditions in regional areas. Regional professionals in general may be relatively more concerned with maintaining a work jurisdiction (and the ability to guarantee income) than metropolitan practitioners. One interviewee described how regional area practitioners tend to be particularly affected by lawyers’ lost monopolies over certain areas (like conveyancing),⁴⁵⁷ previously a reliable source of consistent income. The same participant felt that regional practitioners are also especially concerned with the need to find someone to take over their practice so they can retire, because there aren’t many young lawyers willing to come to – and stay in – the country. Again, these concerns likely affect all professionals working in comparatively less ‘popular’ regional areas. Another participant elaborated on how geography causes members’ concerns to diverge:

A rural practitioner does not care about refugees, social ills, charity.⁴⁵⁸ We’re more mercenary. We want to cover staff holiday pay or get matters on in crowded courts, or stop a Magistrate bullying a junior. These are very grounded issues, not high-flying things. The Law Society spends money on things that are esoteric, like charity or to fight apparent sex discrimination, but in [rural areas], we are more likely to brief women than men, so we don’t need [the]

“equity in briefing” [initiative]. We are interested in tackling the drug and alcohol issues and their link to DV [Domestic Violence].

One interview participant, a regional lawyer, also pointed to increasingly different law school backgrounds of lawyers (as the number of law schools increases) as a ‘threat to [the profession’s] collegial spirit’. This participant felt that modernising services, like providing online learning opportunities, by moving away from associations’ traditional offerings, would further ‘compound’ threats to collegiality.

One of the government lawyers pointed out that while she had noticed the Law Society’s increased attention towards government lawyers, the latter was ‘a broad church’; even working together as a committee (the Public Law and Government Committee) was difficult because of the ‘broad mix of people’ from different areas of work, from crime and various government departments, to policy.

In her preliminary interview study of 52 library association members, Henczel found that associations were ‘missing out on a number of opportunities to maximise their impact’ by providing social inclusion and networking opportunities to members.⁴⁵⁹

Participants ‘mentioned the perception that many professionals are excluded from accessing association products and services because of geographic location, the lack of technology and the affordability of membership’.⁴⁶⁰ Somewhat paradoxically, however, Henczel found that members also mourned the loss of face-to-face connection due to the increasing use of online participation in association events and services.⁴⁶¹ Further, members felt that the lack of communication between associations and the profession more broadly would ‘devalue’ the association ‘in terms of its potential impact on the profession’.⁴⁶² Overall, associations appeared to be ineffectual in countering the fragmentation of the profession ‘into sectors and geographic regions’ and smaller, isolated sub-groups.⁴⁶³

⁴⁵⁵ For discussion of ‘fragmentation’, see also Introduction, Section 3A(b)(ii): Social and digital economy pressures, above.

⁴⁵⁶ See also Francis, ‘Legal Ethics’, above n 43, 173.

⁴⁵⁷ The concerns surrounding loss of monopoly are relevant to the legal profession as a whole and were reported to be of broad significance by Francis in his empirical study: Francis, ‘Out of Touch’, above n 7, 335.

⁴⁵⁸ Later, this participant clarified: ‘I suspect we care, but must relegate that care to more pressing issues, like meeting this week’s payroll for staff, the forthcoming LawCover premium etc. because otherwise we’d go broke.’

⁴⁵⁹ Henczel, ‘The Impact of Library Associations: Preliminary Findings’, above n 54, 136.

⁴⁶⁰ Ibid.

⁴⁶¹ Ibid.

⁴⁶² Ibid 137.

⁴⁶³ Ibid.

IN HER PRELIMINARY INTERVIEW STUDY OF 52 LIBRARY ASSOCIATION MEMBERS, HENCZEL FOUND THAT ASSOCIATIONS WERE ‘MISSING OUT ON A NUMBER OF OPPORTUNITIES TO MAXIMISE THEIR IMPACT’ BY PROVIDING SOCIAL INCLUSION AND NETWORKING OPPORTUNITIES TO MEMBERS.

B. Lack of attention to regions

Though many noted the Law Society’s recent improvements, an area of particular concern to some participants was the Law Society’s ability to serve members – and so to carry out its functions – in regional areas. One participant felt that regional Law Societies are sometimes ‘ad hoc’ arrangements and that their operations are not always integrated into those of the state Law Society. Others felt that the state Law Society’s presence in regional areas was not strong – meaning that regional members’ views and concerns were not taken into account, potentially leading to poor outcomes for residents in those areas. One regional leader also noted that sometimes leaders of regional Societies are unable or unwilling to participate in collaborations with other regional Societies and the state Society.

These concerns may be connected to those discussed above⁴⁶⁴ regarding regional professionals’ particular motivations, needs and attitudes. Professionals in regional areas may need to dedicate more time and energy to practice issues that are comparatively unimportant to metropolitan practitioners – like securing work, and succession planning – and may have less time to engage with state associations or maintain regional associations. These findings also link to issues of member engagement and time, discussed below.⁴⁶⁵

C. Intra-professional competition

Though large-firm and city lawyers are concerned with these ‘grounded’ workflow issues too, the sources of pressure they cited were less ‘the state’, and more ‘competition’ with other firms and service providers (including off-shore providers). Indeed, one city lawyer interviewee emphasised that city lawyers are by no means ‘united’ – since the competition reforms of the mid-1990s,⁴⁶⁶ he said, ‘we don’t operate as a group’. As an example, and recognising that it was an outrageous practice, he reported that lawyers do not set fees among themselves anymore – and that this seems to be outside the association’s consciousness:

We’re not a group, we’re vicious competitors in this highly competitive market ... and too many people fail to understand that and particularly people in the Law Society to my observation.

However, for another city practitioner, this intra-professional competition in fact supported the ongoing need for an association. As was also found by Francis,⁴⁶⁷ the participant said that firms are increasingly unlikely to share resources for competitive reasons. To this participant, associations play an important ‘Switzerland neutrality role’, and contribute to making law practices in each area less inward and homogeneous.

464 See Part III: Findings: Representative, Community and Membership Functions – Value and Challenges, Section 1B(4)(a): Specific challenges: Divergent motivations, needs and attitudes, above.

465 See Part V: Findings: Negative attitudes and beliefs about associations, Core Challenge: Members’ Lack of Awareness and Engagement, below.

466 For an overview of these changes, see Shinnick, Bruinsma and Parker, above n 36, 242–6.

467 Francis, ‘Out of Touch’, above n 7, 337.

2) COMMUNITY AND MEMBER FUNCTION

A. MEDIATOR OF CHANGE

1. SUMMARY AND INDICATORS

The literature recognises associations' special ability to act as 'intermediaries' for their professions in the midst of social progress and change. Greenwood, Suddaby and Hinings discuss how associations act as a mediating and regulating influence between their profession and changes brought on by external forces.⁴⁶⁸ Associations can facilitate debate and discourse within the profession, 'reframe [the] professional identities' that are presented to outsiders, and 'reconstitute' those identities in adaptation.⁴⁶⁹ Through these processes the association may succeed in changing what it means to be a member of a given profession, and what it is that professionals do, enabling the profession to maintain or gain external trust despite significant reconstitutions and reconfigurations brought on by change.⁴⁷⁰

2. ASSOCIATION ACTIVITIES

A. Future preparation

The Law Society's 'Thought Leadership' program includes regular events like panel discussions and symposia to address pressing professional issues.⁴⁷¹ Part of the Law Society's '2016–2019 Strategic Plan' includes to 'anticipate and adapt to future and developing trends confronting the legal profession'.⁴⁷² Its FLIP project, launched in March 2017, was designed as a 'comprehensive analysis of disruption in the legal sector', and produced 19 recommendations, some of which the Law Society is already implementing – including, as mentioned, a sustained research program on the future of innovation and technology as well as initiatives to integrate wellbeing training into CPD, and to run an annual 'hackathon' for community legal assistance.⁴⁷³

THE LITERATURE RECOGNISES ASSOCIATIONS' SPECIAL ABILITY TO ACT AS 'INTERMEDIARIES' FOR THEIR PROFESSIONS IN THE MIDST OF SOCIAL PROGRESS AND CHANGE.

3. INTERVIEW AND LITERATURE FINDINGS: ACTIVITIES AND VALUE

A. Authoritative, trustworthy, and progressive

In our interviews, one regular member participant described how the Law Society establishes its role in the current, complicated political environment, as an intermediary between the profession, the public, the judiciary, and the government. It does so by applying legislation, enforcing its own standards, and maintaining relationships with these external parties:

There's confidence that [the Law Society is] able to formulate policies and enforce compliance with the rules that it sets and with the applicable legislation, and that it continues to foster a positive a trusting relationship with both, between the profession and the public as well as the profession and the bench, and government. And, they seem to be doing ... a very good job at that.

Another participant, a Law Society leader, explained how important associations are in the subsequent process of preparing members for changes in professional practice:

Part of our responsibility as an organisation, as a professional association, is to make sure that our members are fit for the future, and that they can adapt and survive as trusted advisors to people in the community.

A few of the interview participants noted specific ways in which the Law Society prepares members for change. Two main examples given were its 'Thought Leadership' program and the FLIP project. One participant felt that this project was 'an enormous initiative ... to try to equip lawyers for the future', and that it is beneficial not only to the profession and its members but that the research will also be of use to the government. One leader participant summarised the Law Society's approach embodied in these initiatives:

The idea being that we want the Law Society to be at the forefront of changes and developments to better inform members of the profession, to peer over the horizon to make sure that whatever is coming the impact of it, so the dramatic impact of it, is tempered as best one can.

468 Greenwood, Suddaby and Hinings, above n 31, 58.

469 Ibid 59.

470 Ibid 76.

471 Annual Report 2017, above n 126, 3.

472 Ibid 33.

473 Ibid 11. See also Law Society of New South Wales Commission of Inquiry, 'FLIP: The Future of Law and Innovation in the Profession' (Report, 2017) 25. 'Hackathons' are events promoting 'collaboration of people with a variety of skills, usually including computer programmers' and focus on solving (or 'hacking') particular problems (in these cases, a legal problem) in a fast-paced, perhaps competitive event program: at 80.

3) MEMBERSHIP FUNCTIONS AND PERKS:

A. INDIVIDUAL IDENTITY AND PERSONAL NEEDS

1. SUMMARY AND INDICATORS

A. Individual professional identity

Membership of an profession entails not only the externally-visible 'formal social label' of a professional (for example, 'doctor' or 'lawyer'), but also a component of 'self-definition' – how each practitioner identifies with and within the professional group.⁴⁷⁴ This identity is facilitated by a feeling of unity or 'belonging' to a certain group as opposed to others, and a feeling of shared 'values, beliefs and norms' with the group.⁴⁷⁵ Associations may have many roles in members' 'professional identity' formation: they can define an 'ingroup' (association members) and 'outgroup' (non-members), increasing members' identification with one another; they can shape members' professional identities (for example, through education and socialisation, and by providing support generally); they can grant qualifications to provide evidence of professionalism (including specialisation); they are the arena for interaction between members, which reinforces professional identities and entrenches ethical norms; and they can draw members together through the prestige of membership itself.⁴⁷⁶

ASSOCIATIONS CAN ALSO PROVIDE TANGIBLE 'PERKS', FINANCIAL, AND SOCIAL SERVICES AS 'INDUCEMENTS' TO MEMBERSHIP.

B. Professional reputation

By 'articulating' the profession's standards and values, associations can generate 'public credibility [that] supports not only the association's members, but also all members of the profession', improving trust in professionals.⁴⁷⁷

C. Commercial benefits

Associations can also provide tangible 'perks', financial, and social services as 'inducements' to membership.⁴⁷⁸

MEMBERSHIP OF AN PROFESSION ENTAILS NOT ONLY THE EXTERNALLY-VISIBLE 'FORMAL SOCIAL LABEL' OF A PROFESSIONAL (FOR EXAMPLE, 'DOCTOR' OR 'LAWYER'), BUT ALSO A COMPONENT OF 'SELF-DEFINITION' – HOW EACH PRACTITIONER IDENTIFIES WITH AND WITHIN THE PROFESSIONAL GROUP.

474 Markova et al, above n 4, 494.

475 Ibid.

476 Ibid 495, citing Blake E Ashforth and Fred Mael, 'Social Identity Theory and the Organization' (1989) 14 Academy of Management Review 20; Nicholas McClaren, Stewart Adam and Andrea Vocino, 'Investigating Socialization,

Work-Related Norms, and the Ethical Perceptions of Marketing Practitioners' (2010) 96 Journal of Business Ethics 95; Jerry Hallier and Thomas Forbes, 'The Role of Social Identity in Doctors' Experiences of Clinical Managing' (2005) 27 Employee Relations 47; Michael D Johnson et al, 'Multiple Professional Identities' (2006) 91 Journal of Applied Psychology 498.

477 Dollinger, above n 103, 30.

478 See, eg, Kordick, above n 116, 52.

2. ASSOCIATION ACTIVITIES

A. Identity benefits

Part of the Law Society's '2016–2019 Strategic Plan' is to provide specialised services and benefits for particular practice areas and demographics within its membership: to 'understand and prioritise the diverse needs⁴⁷⁹ of the profession' and 'adapt and evolve [its] services to changing member needs'. In pursuit of these ends the Law Society is utilising and developing its structure. The Law Society has committees covering a range of practice- and special interest-areas,⁴⁸⁰ and city and regional Law Society branches.⁴⁸¹

B. Private and promotional benefits

The Law Society, through its 'Member Connexions' scheme, offers a number of commercial and consumer benefits to members – including special rates on insurance, health club membership, childcare, hotels, car rentals, various online shopping offers, and Qantas airfares.⁴⁸²

At the Law Society's premises in the Sydney CBD, members can hire rooms as venues for mediation and arbitration, as well as networking and training purposes,⁴⁸³ and access the Law Society's library collection (including online subscriptions).⁴⁸⁴ The Law Society also wholly owns LawCover, an independent subsidiary, the 'only 'profession owned' licensed and APRA-regulated insurer of the legal profession'.⁴⁸⁵

3. INTERVIEW AND LITERATURE FINDINGS: ACTIVITIES AND VALUE

A. Members as individuals among the group

In our interviews, one participant, a regional leader, said that the Law Society had improved its attention to members' individual needs, having 'worked out that they're actually a member-driven association, not just there to keep [their premises at] Philip Street'. Another participant – a leader in the state Law Society – said that through its efforts to serve all members equally, the Law Society's value goes beyond that in the stereotypical view of an association as merely 'providing free pens and pencils'.

One participant described how the Law Society's Regional Co-ordinator works to disseminate the state Law Society's materials – sending out relevant information to each of the regional Law Societies' Presidents, who then forward it to their local members to see, as one Regional President said, 'if there's interest, and if [the regional members] want to push a certain perspective on something'.

One participant, a leader in the Law Society, explained how the Law Society has adapted its approaches in order to address the variety of needs of members:

Every section [of the profession] needs to be communicated to in a different way, and we do that as a professional association. So, we will talk to the large law firms about how we can best deliver services to their members. We also have quarterly meetings with the Regional Presidents so that we can serve those people.

B. Identity matters

By catering to members as individuals, associations can help shape practitioners' unique identities into 'professional' identities. In the literature we found evidence that association members value professional identities – and their personal sense of professional identity correlates with association membership. Associations then have a valuable role in building identities further, and in ensuring that their underlying values and standards are understood by outsiders.

In Henczel's interview study of 55 library association members, participants spoke of the association's key influence over their 'professional values' and attitudes toward the profession,⁴⁸⁶ and some saw association participation as an essential part of 'being a professional'.⁴⁸⁷ Philips and Leahy conducted a survey study of registered rehabilitation counsellors (association members, former members, and non-members), utilising 1257 responses in the final sample.⁴⁸⁸ The authors set out to determine what factors would predict association membership, and found that 'professional identity salience was the strongest alterable factor in predicting current membership from never holding membership'.⁴⁸⁹

479 Annual Report 2017, above n 126, 33.

480 At present, the Law Society has 28 Committees: Law Society of New South Wales, Current Committee List <<https://www.lawsociety.com.au/advocacy-and-resources/law-society-committees/current-committees-list>>.

481 There are 28 Regional and Suburban and Law Societies and one City Law Society recognised in New South Wales: Memorandum and Articles of Association, above n 128, art 12.3.

482 Law Society of New South Wales, Member Connexions <<https://www.lawsociety.com.au/become-a-member/member-connexions>>.

483 Law Society of New South Wales, State-of-the-Art Facilities <<https://www.lawsociety.com.au/about-us/state-of-the-art-facilities>>.

484 Law Society of New South Wales, Law Society Library and Shop <<https://www.lawsociety.com.au/about-us/library-and-shop>>.

485 Law Society of New South Wales, LawCover <<https://www.lawsociety.com.au/about-us/organisation-and-structure/lawcover>>.

486 Henczel, The Impact of National Library Associations, above n 251, 179.

487 Ibid 183–4.

488 Brian N Phillips and Michael J Leahy, 'Prediction of Membership in Rehabilitation Counseling Professional Associations' (2012) 55 Rehabilitation Counseling Bulletin 207, 210.

489 Ibid 214.

In our interviews, a sense of ‘professional identity’, supported by the Law Society, was referred to by a number of participants – both regular members and Law Society leaders – as being the source of their personal ethics. One regular member participant felt that the Law Society was unique in its ability to foster members’ positive professional identities because of its in-built relationship with them, arising out of its role in establishing and protecting the profession’s monopoly over its knowledge base.

In Henczel’s interview study, participants felt that their associations’ advocacy and lobbying roles were crucial to ensuring that outsiders understood the work of members.⁴⁹⁰ Associations were needed to ensure that the public saw librarians as professionals, ‘beyond the customer service role’.⁴⁹¹

HENCZEL'S INTERVIEW PARTICIPANTS FELT THAT THEIR ASSOCIATION PROMOTED THEIR INDIVIDUAL WELLBEING BY FOSTERING AN ATMOSPHERE OF SAFETY AND COMFORT, THROUGH GROUP ACTIVITIES AND THE SHARING OF IDEAS AND INFORMATION, ALLOWING MEMBERS TO FORM MEANINGFUL CONTACTS AND CONNECTIONS, AND DEVELOPING A SENSE OF PROFESSIONAL AND PERSONAL BELONGING AND COMMUNITY.

C. Support and comfort

Henczel’s preliminary interview study of 52 association members included findings that members felt that their association promoted their individual wellbeing by fostering an atmosphere of safety and comfort, through group activities and the sharing of ideas and information, allowing members to form meaningful contacts and connections, and developing a sense of professional and personal belonging and community.⁴⁹² Henczel’s respondents cited ‘social cohesion’ in the profession –

including the ‘strengthening [of] connections between people and groups’ – as a ‘key impact’ of associations’ activities.⁴⁹³

A number of participants expressed positive feelings about the Law Society’s presence; even if a ‘background’ influence, members felt it was ‘good to know they’re there’. One leader said:

Having a professional organisation to me is really important because you’ve got that sense that ... you’ve got someone who has got your back in reality.

One Law Society leader discussed the association’s role supporting members in the face of ‘powerful’ governments and clients:

When you’ve got very powerful clients and they’re asking you to do something that you should not do ... we’re supporting [members] to push back against the power ... There’s always been powerful companies around, there’s always been powerful governments and it’s [the lawyers’] role as solicitors to give the right legal advice and it’s [the Law Society’s] role to support them and to give them the ethical backbone to do that ...

Some leaders of the Law Society also felt that their role was particularly valuable for members as they brought expertise – as professionals – to their work, and so could support members on a deeper level than would otherwise be possible. As one explained:

We feel that as the Law Society we stand for solicitors, we’re part of the group who’s ringing us up, and so they don’t see us as in any way against them – they see us as for them. Which is such an important part of the way we interact with people, is that they’re coming to us as a friend, as the support, as the person who will help them to do the right thing and the right job.

Finally, one participant, a regional leader, felt that the ‘support’ given by an association was essential to professionals’ ability to serve their communities:

If we’re not supporting our own, then we can’t support the community. So, if you cut that resource off ...

490 Henczel, The Impact of National Library Associations, above n 251, 159.

491 Ibid.

492 Ibid 131.

493 Ibid 136.

D. Private and commercial perks

Our interview participants discussed a number of ‘perk’-like benefits provided by the Law Society:

a. Limited liability

Some participants cited the Law Society’s limited liability scheme as a key benefit of membership.

b. Insurance

A number of participants spoke also about the value of LawCover – the Law Society’s professional indemnity insurance scheme. Another felt that LawCover’s monopoly over professional indemnity insurance for lawyers was necessary to prevent competition between insurance companies to the detriment of practitioners and, presumably, the public.

c. Library

Some participants mentioned the Law Society’s library as being useful.

d. Physical premises

Three participants said they valued the ability to use the Law Society’s physical premises in the Sydney CBD.

e. Advice and educational resources for small practices

A number of participants felt that the Law Society’s advice and services for small practices – in particular its ‘Small Practice Portal’ – were valuable incentives for membership.

f. Advertising

Two regionally located participants noted the Law Society’s advertising for lawyers as of particular benefit to members in those areas.

g. Credit cards and other financial perks

Three participants mentioned that they valued the Law Society’s (now discontinued) credit card, and others mentioned other promotional perks like the ‘Qantas Club’ membership discount and other ‘Member Connexions’ benefits.

4. SPECIFIC CHALLENGES

A. Targeting, accessibility and utility of services across sectors

Some of our interviewees noted that, because of fragmentation, the association did not seem like it was directed toward them. For instance, a government lawyer perceived that many of the commercial benefits (or ‘perks’ like Qantas Club membership and car loan discounts) were directed toward the ‘rich’ or private sector lawyer, not the government lawyer. In contrast, many other participants perceived the association to be targeted toward lawyers in small or sole practices, those ‘less well-off’ practitioners without the resources and connections to otherwise access ‘associational’ benefits.

Two regular member participants felt that the procedure for renewal of practising certificates is not well adapted to lawyers not in private practice, who do not have access to firm credit cards.

B. Cost barriers to membership

In a survey study of 116 practising librarians,⁴⁹⁴ Kamm reported most respondents citing the cost of association membership as reason to give it up or decrease participation.⁴⁹⁵

Many of our interview respondents from large firms reported that they remained members because their employer paid. In smaller firms where this is not possible, there may come a point at which the additional cost is not worth the benefits of membership. In an extreme case this could see large firm practitioners – who may not ‘need’ or necessarily want to participate in the association (see discussion in the next section)⁴⁹⁶ – as the only remaining association members.

SOME OF OUR INTERVIEWEES NOTED THAT, BECAUSE OF FRAGMENTATION, THE ASSOCIATION DID NOT SEEM LIKE IT WAS DIRECTED TOWARD THEM.

494 Kamm, above n 344, 297.

495 Ibid 300.

496 See Part III: Findings: Representative, Community and Membership Functions – Value and Challenges, Core Challenge: Influences from Workplace Organisations, below.

CORE CHALLENGE: INFLUENCES FROM WORKPLACE ORGANISATIONS

One significant challenge to associations' influence over their professions is the increasing role of organisations and workplaces in shaping practitioners' behaviours, their 'professional' identities, and their values.⁴⁹⁷ As we will see, this challenge can endanger any of the activities and functions discussed above.

In the literature, authors write of associations' dwindling influence as a shift from 'occupational' to 'organisational' professionalism. In the more traditional or historical 'occupational professionalism', practitioners' values and identities are developed independently of their individual workplaces, and form a shared culture typically monitored and enriched by professional associations.⁴⁹⁸ This contrasts with a newer, workplace-oriented 'organisational professionalism', where the workplace is increasingly the strongest force shaping practitioners' professional identity and practice.⁴⁹⁹ Workplaces become 'the most powerful arena of professionalism'⁵⁰⁰ and take over associations' existing roles. This change might be linked to the increasing 'commodification' of professional services: when 'clients are converted into customers ... professional work competencies become primarily related to, defined and assessed by the work organization'.⁵⁰¹

Overall, groups with particularly strong workplace connections may feel that associations are simply unnecessary.

In his interview study of the Law Society of England and Wales, Francis found that association leaders and large-firm employees both acknowledged significant self-removal of large firms.⁵⁰² Large-firm solicitors do not feel that they 'need' associations,⁵⁰³ and may accept their authority only if it is statutorily imposed.⁵⁰⁴ In our interviews, participants felt that large firms, government lawyers and corporate (in-house) lawyers were particularly 'removed' from the Law Society for this reason.

These changing pressures were felt in a number of ways by participants in our interviews. A number of specific points are set out below.

OVERALL, GROUPS WITH PARTICULARLY STRONG WORKPLACE CONNECTIONS MAY FEEL THAT ASSOCIATIONS ARE SIMPLY UNNECESSARY.

A. Workplaces may not support association participation

Some interview participants in Henczel's study of 55 library association members felt that a lack of support from their employer (not only in terms of financial support for association membership, but support for association participation in terms of providing time and opportunity to engage) created an additional barrier to ongoing engagement with their association.⁵⁰⁵

Philips and Leahy also found, through a survey study of 1257 registered rehabilitation counsellors (association members, former members, and non-members), that participants typically did not feel that their employers supported professional association membership.⁵⁰⁶

B. Workplace values supplant 'professional' values

Workplaces are prominent sites for the formation of practitioners' ethics and values. Levin's interview study of 41 New York City lawyers found that new lawyers were learning ethical norms from overhearing more senior practitioners,⁵⁰⁷ from others in their firm or office space,⁵⁰⁸ and from 'sitting in a bar at the end of the day'.⁵⁰⁹ Of course, this is not entirely new; professional socialisation has typically been marked out as involving close apprenticeship relationships.

However, it may be that associations' influences have decreased and that the balance has shifted further toward workplace organisations in recent times. In our interviews, most participants felt that their primary ethical referents and support came from inside their workplace, rather than from the association. A number of participants mentioned their ability to rely completely on firms' in-house ethics guidance and wellbeing programs.

497 For an overview of literature on these issues, see Mirko Noordegraaf, 'Risky Business: How Professionals and Professional Fields (Must) Deal with Organizational Issues' 32 *Organization Studies* 1349, in particular 1362–6.

498 Julia Evetts, 'The Management of Professionalism: A Contemporary Paradox' in Sharon Gerwitz et al (eds), *Changing Teacher Professionalism: International Trends, Challenges and Ways Forward* (Routledge, 2009) 19, 23–4.

499 *Ibid.* 20. The trend toward 'organisational professionalism' has been driven in part by the growing concentration of power in a shrinking number of 'Big' firms: see, eg, Suddaby, Cooper and Greenwood, above n 13.

500 Mather and Levin, above n 99, 16–7.

501 Evetts, 'A New Professionalism?', above n 51, 416.

502 Francis, 'Out of Touch', above n 7, 331.

503 *Ibid.* 330–1.

504 *Ibid.* 338.

505 Henczel, *The Impact of National Library Associations*, above n 251, 217.

506 Philips and Leahy, above n 488, 215.

507 Levin, 'The Ethical World', above n 10, 362.

508 *Ibid.* 363.

509 *Ibid.*

In the large-firm context, one participant described how new lawyers learn the norms of practice from a more senior partner, who will translate their knowledge of broader occupational requirements into a particular organisational version. Another participant, a senior partner at a large law firm, pointed out that firms – driven increasingly by business concerns in addition to their underlying professional values – are ‘always’ attempting to develop their own distinct and functional professional cultures.

Outside the large-firm context – one interview participant said that government and in-house lawyers were also ‘removed’ from the Law Society’s influence and community:

[Government and in-house lawyers] feel more connected to their company or their department, they’ve got that identity.

Finally, one participant noted an additional way in which organisations or practice areas determine their own identities: many specialist areas have their own, formal codes of practice that place more specific obligations on practitioners than general codes – one participant noted for example the code of conduct for public prosecutors.

C. Workplaces provide professional education

Our interview participants spoke of the many ways in which workplaces are in practice localising knowledge and fostering an ‘organisational’ focus. Many discussed how large firms and government departments tend to run their own extensive (and free) in-house training and development programs. One participant spoke of starting out at a large firm, saying she did not ‘avail herself of any of [the Law Society’s] services at all’ during that time, because there was no need to go outside the workplace:

When you are at a firm, you know, you have constantly got CLEs being rolled out and you have that kind of support offered to you. Although [the Law Society courses] sounded quite interesting and enticing, you’ve got a lot of those resources available to you for free [at work].

Apart from a few participants noting that the Law Society’s ethics training was still preferred, these in-house education providers were generally⁵¹⁰ regarded as offering a higher quality, more useful service than those run by ‘outsiders’ like the Law Society. One participant from the public sector felt that her employer’s courses on professional ethics were ‘good, with real case studies’

– and so more specialised than the Law Society’s more generalised offerings. Despite many participants’ positive comments about the quality of the Law Society’s education generally, one participant, a partner at a large firm, said that the Law Society’s CPD tended to be ‘less sophisticated’ than the training by large firms, which was training given by partners, management consultants or employment lawyers brought in-house:

The [Law Society] people [teaching in a course to get an unrestricted practising certificate] were frankly not as capable as the people who teach me internally.

Some participants discussed an additional explanation for organisations’ desire to centralise the expertise-building of their employees: a sizable proportion of training activity within large firms is intended to provide a free, professional development and informational service to (in-house counsel) clients in exchange for future work. One regular member participant described how firms directly engage clients with their educational work, and how the ‘networking opportunities’ these events provide further decreases the attractiveness of Law Society programs:

[CLE] is part of the suite of business development strategies deployed. It is a big thing for these firms to host these big, sort of fancy CLE events and invite clients, and you as an internal lawyer reap the benefits by being able to, you know, attend that and gain points. So, there’s no impetus for you to pay for what the Law Society is offering, even though some of it might look quite useful, it’s a big draw card for those firms to sort of hold those events and we go because it’s both the networking and the box ticking element. I’m saying box ticking but it is very useful, you know, the refreshers they offer at those events, but obviously we’re there because we have to be.

Finally, some participants noted that large law firms have their own research departments to develop educational programs and support their employees in day-to-day practice – firms are deploying resources for specialised, relevant services that associations, with their broad membership, cannot necessarily compete with. Organisations may therefore offer practice updates that are more focused, and so more useful to employees – and a number of participants noted how this reduced their motivation to read Law Society newsletters.

510 See Part II: Findings: Regulatory Functions – Value and Challenges, Section 1A(3)(a): Formal education: valuable to members and the profession.

D. Workplaces can circumvent other association functions

Apart from their ability to provide guidance, education and support for practitioners (meaning that associations may not be needed for those services), workplaces might also fill other ‘traditional’ association roles. For example, one interview participant said that the growing number of graduates looking for work in firms means that any role the Law Society may have had in aiding job-seeking has been diminished:

The constituency wants to employ graduates – we don’t need the Law Society to find them. They’re coming to us in desperation to get jobs, or we go to the university direct to find them.

A few of our participants also spoke about how they have no need for the Law Society’s formal or informal networking functions to build professional networks. One regular member participant said that her main contacts came from work – either others in her firm, or opponents from matters. Another said that industry networking events, aimed at building work connections rather than at ‘professional’ values, were more than enough:

Any night of the week, you could find a networking event that is designed to put ... you know, [groups like] bankers in touch with each other, and lawyers would attend that as well ... I’ve never used the Law Society or any other equivalent sort of institution to do that sort of thing.

PART IV: FINDINGS

POSITIVE ATTITUDES AND BELIEFS ABOUT ASSOCIATIONS

Throughout our interviews, though participants' backgrounds and their experiences with the Law Society differed, the clear majority showed commitment to the association. In a number of areas, participants expressed views that supported the Law Society's regulatory and representative functions over possible alternative arrangements where state and market pressure diminish the association's role.

1) REGULATORY AND REPRESENTATIVE ADVANTAGES

A. Expertise in professional standards

In our interviews, many participants felt that conduct and expertise standards are meaningful only if determined by members of the profession – this can be due to the fact that reputation among peers is of great importance to professionals, and also due to the fact that only professionals in the field can be aware of the particular demands and requirements that should be in place:

To me, the sort of distinct character of the Law Society is that it is in essence a self-regulatory body and the people who run the Law Society and perform its functions are people who know what it is to be part of the profession they are regulating.

Participants discussed how a government or an external body alone could not determine professional standards without at least relying on the leadership of experts in that profession:

How can you know what good practice is, if you are talking to someone who has never practised?

'TO ME, THE SORT OF DISTINCT CHARACTER OF THE LAW SOCIETY IS THAT IT IS IN ESSENCE A SELF-REGULATORY BODY AND THE PEOPLE WHO RUN THE LAW SOCIETY AND PERFORM ITS FUNCTIONS ARE PEOPLE WHO KNOW WHAT IT IS TO BE PART OF THE PROFESSION THEY ARE REGULATING.' - LAW SOCIETY MEMBER

'HOW CAN YOU KNOW WHAT GOOD PRACTICE IS, IF YOU ARE TALKING TO SOMEONE WHO HAS NEVER PRACTISED?' - LAW SOCIETY LEADER

It's only a peer group that can look at professional standards, that can say what has to be done and can provide leadership and education ... [An external body can] perhaps police things, but do they really understand the profession? My answer would be "No"... [you need] active practising members who can establish standards, educate others and provide guidance in those professional standards.'

B. Responsive and peer-enforced regulation

In our interviews, a number of participants expressed the view that a professional association as regulator should be 'in touch' with its profession. As one Law Society leader explained:

For a professional organisation to really be in touch with its profession and to take ownership of our standards, to make sure that we're the best we can be and that there's excellent across our profession, self-regulation is really important. We want to say who gets to be one of us as a profession ... to hold our own to account.

A few of our interview participants spoke about how the Law Society's intimate relationship with members (arising from the fact that it is by definition a 'member organisation') allowed it to regulate 'responsively' and allowed it to uphold the public interest by serving its own members. As one regular member explained:

[It] can look [from] one perspective like a cosy little club that's not really doing too much, but on the other hand, the way you can look at it is that it is a way to achieve properly responsive regulation.

'FOR A PROFESSIONAL ORGANISATION TO REALLY BE IN TOUCH WITH ITS PROFESSION AND TO TAKE OWNERSHIP OF OUR STANDARDS, TO MAKE SURE THAT WE'RE THE BEST WE CAN BE AND THAT THERE'S EXCELLENCE ACROSS OUR PROFESSION, SELF-REGULATION IS REALLY IMPORTANT. WE WANT TO SAY WHO GETS TO BE ONE OF US AS A PROFESSION ... TO HOLD OUR OWN TO ACCOUNT.' - LAW SOCIETY LEADER

One Law Society leader described peer-generated and peer-enforced standards as more meaningful than external standards and peer recognition as a critical component of professional self-identity:

You know, your degree makes you qualified to practice, but to feel like you're a professional, you want to belong to your professional association – because that's what ... Being recognised by your peers as being fit and proper to be part of that profession is something that only your peers in the profession can give. No one else can give that. You know, that pursuit of professional goals, pursuit of ideals.

Another participant, a Law Society leader, also explained how peer-recognition, professional ethics, and professional self-identity are intrinsically linked:

How you conceive of yourself as a professional – that you're not simply someone who is out there to get results and make money, but you're someone who – it's important to stick to your duties and obligations to the court and to clients – your ethical duties – and to be seen as doing so by your colleagues.

C. Connection to core public function and values

Most of the interviewees felt, and often expressed in strong terms, that even when performing functions 'on behalf of' governments, an association's underlying value runs deeper than as a mere regulatory arm. To one participant, a leader in the Law Society, the associations

were foundational to civil society; when setting and enforcing codes of ethics and conduct, an association is not working to uphold a governmental institution, but to protect professional values and ethics – that the association helped to form:

It's a system that underpins our social being ... it's part of those fundamental tenets of how Australian society or most common law countries operate.

This participant felt that the tools of government – its legislative and administrative powers – are not properly adapted to professional regulation; professionalism is about relationships between people and institutions, based on values, experiences and circumstances, rather than rigidly imposed legislative standards. Another participant reiterated:

[The Law Society's] motto – 'defending the rights of all' – has been around for a very long time ... that motto has been front and centre, right from the early days.

Another interviewee, a Law Society leader, said that the solicitors' code of ethics is derived from and informed by underlying 'professional' values that the association develops and embodies:

I think it's important to note that the conduct rules don't emanate from the government. Those ethical standards have their genesis, from the days of Cicero – it's come up through the court system and our whole system of justice. It's nothing to do with legislation. That is some of it's been codified, but that's as far as it goes; we have a much higher purpose than that.

We found similar evidence of this belief in the literature. Barry and Ohland conducted a 'wide-ranging descriptive survey of the literature related to ethics' in the engineering, health, business and law professions.⁵¹¹ They found that while each profession's ethics evolved differently depending on the history of the particular profession, there was a 'common recognition that engineering ethics, medical ethics, business ethics and legal ethics are professional ethics', with certain aspects 'common among many disciplines'.⁵¹²

511 Brock E Barry and Matthew W Ohland, 'Applied Ethics in the Engineering, Health, Business, and Law Professions: A Comparison' (2009) 98 Journal of Engineering Education 377, 377.
512 Ibid 384.

D. Reputation through and alongside self-regulation

In the literature, there was some empirical research to suggest that associations will enforce standards rigorously because stringency is simultaneously in the interests of the profession and the public. In Francis' interview study, including a total of 26 members and leaders of legal professional associations in the UK,⁵¹³ the association leaders interviewed felt that self-regulation and associational discipline was 'in both the profession's and the public's interests',⁵¹⁴ and that associations responded to increased pressure and scrutiny by striving to be seen as 'model regulators' with 'tightened standards'.⁵¹⁵

In Henczel's interview study of 55 library association members, participants felt that associations' functions that directly addressed government concerns, like the upholding of professional ethics and ensuring professional standards, were essential to the survival of the profession.⁵¹⁶

In our interviews, many participants likewise felt that the Law Society may, by being 'tough' in complaints handling, serve its own interests as an association and the interests of the profession – it needs to maintain the standards of its members in order to maintain public trust and confidence (as one participant said: 'you get one rotten apple, it ruins it for everybody'). Participants described how this 'toughness' exists alongside the association's expertise, professionalism, responsiveness and supportiveness (as discussed above):

So, the Law Society helps the lawyers in a big way and educates and counsels and protects, and if necessary, dare I say – really slams them hard, and we are very unforgiving, in my opinion. ... The people who are at the top of the tree [in Law Society disciplinary roles] have had a whole lifetime of experience, and they're really reasonable, albeit tough...

I think the Law Society has the balance right ... in that it's there to help members and give them support but also takes a bigger picture view that the profession and public faith in lawyers as officers of the court – holding the public trust is critical, and it's critical to the Law Society and to [the] membership as a whole that we are seen to be enforcing that just as much as a government or statutory body.

I suppose because there's a standard that's set by the Society, then there's an expectation in the public that people will meet that standard. If there wasn't an association, then who sets the standard? I think that the Law Society does have a very high expectation of its members; that the public has faith in that level, that standard. We tend to be pretty tough on our own, because we don't want the standards to slip. So, it's important for the sustainability of any professional association to make sure that the people that we want to call our peers, that those standards are really high, and maintained.

SOME EMPIRICAL RESEARCH SUGGESTS THAT ASSOCIATIONS WILL ENFORCE STANDARDS RIGOROUSLY BECAUSE STRINGENCY IS SIMULTANEOUSLY IN THE INTERESTS OF THE PROFESSION AND THE PUBLIC.

513 Francis' methodology is contained a separate article to his findings: Andrew M Francis, 'Legal Executives and the Phantom of Legal Professionalism: The Rise and Rise of the Third Branch of the Legal Profession?' (2002) 9 International Journal of the Legal Profession 5, 7.

514 Francis, 'Out of Touch', above n 7, 338.

515 Ibid.

516 Henczel, The Impact of National Library Associations, above n 251, 266.

2) ADDITIONAL ADVANTAGES OVER STATE REGULATION

A. Cost and resource savings

A number of participants discussed how valuable the Law Society's volunteer work was as an alternative to state regulation (and its attendant costs for the public). Law Society leaders noted that the Law Society's interpretation and response to proposed legislation was 'free advice' for the government:

[When making suggestions on legislation relating to insurance] we spend money out of our own members' pockets, quite a lot of money – on actuaries, the costings, and then we convince the government.

If you've got a committee of 25 expert criminal lawyers in the room [each taking time away from paid work] ... well what's that? That's a two-hour committee meeting, once a month, plus reading papers ... I think we've got 19 Policy Committees. So if you multiply that out you start getting a notion of how much value we put into law reform, for free.

A number of other interviewees noted that the Law Society's disciplinary function is carried out by volunteers, and discussed the significant resource and financial benefits of associations' participation in the co-regulatory system over entirely government or government-funded alternatives. As one regular member said:

Some regulatory slack is taken up by the various [professional] societies. [The government doesn't] need to proactively monitor all professionals themselves.

'IF YOU'VE GOT A COMMITTEE OF 25 EXPERT CRIMINAL LAWYERS IN THE ROOM [EACH TAKING TIME AWAY FROM PAID WORK] ... WELL WHAT'S THAT? THAT'S A TWO-HOUR COMMITTEE MEETING, ONCE A MONTH, PLUS READING PAPERS ... I THINK WE'VE GOT 19 POLICY COMMITTEES. SO IF YOU MULTIPLY THAT OUT YOU START GETTING A NOTION OF HOW MUCH VALUE WE PUT INTO LAW REFORM, FOR FREE.'

- LAW SOCIETY LEADER

'THE EXPENSE SAVED BY THE LAW SOCIETY THROUGH THEIR VOLUNTARY WORK WOULD RUN INTO MANY HUNDREDS OF THOUSANDS OF DOLLARS EACH YEAR.'

- LAW SOCIETY LEADER

Two Law Society leaders believed that due to the number of expert committee members and time involved, financial savings would be in the hundreds of thousands, or even millions, of dollars:

The work of the Professional Conduct Committee, like all other committees of the Law Society, is not funded. The PCC generally meets twice a month and with approximately 30 members I think it is fair to say that if you were to cost their involvement in terms of attending meetings, preparation and travel, the expense saved by the Law Society through their voluntary work would run into many hundreds of thousands of dollars each year.

[The] saving to government is huge. If government was to try to replicate [the Professional Conduct Committee] by a public service agency, it would cost millions more than it's currently costing, because all of the work done by the solicitors and members of the Professional Conduct Committee is done free of charge.

B. Continuity

One interview participant, a leader in the Law Society, pointed out that the value of an association was a product of its old age and stability. This ‘continuity’ could not be offered by a government, which changed at least every few years. Another regular member-interviewee said that her experience as a government lawyer made her more certain of the crucial role of an association and its continuity benefits over governmental regulation.

I can say we are guided by funding and resource constraints by a particular market, in particular the government in power at that time who might inform certain policies that feedback down ... [Government bodies in charge of professionalism] could be removed at whim by a government or a funding cut.

C. Impartiality and independence

One interview participant noted the importance of independent (that is, non-governmental) regulation of professions in general, and two others – a regular member and a leader – argued that it was especially important that the government not be responsible for regulation of the legal profession, as it prosecutes crimes and is a party to significant amounts of litigation and so would not be able to be truly impartial.

As we saw above, a number of participants also felt the Law Society, as a non-government body, had an important role in protecting democratic values via its legislation advocacy.⁵¹⁷ One Law Society leader suggested that the Law Society’s roles in advocating for the public interest and maintaining professional standards were symbiotic, and that the association was successfully fulfilling both those aims:

I mean somebody’s got to keep the government on their toes about [legislative reform that may impact individuals’ rights], and somebody’s also got to be monitoring the solicitors so we know where the bar is. We know that our practice has to meet certain requirements, we need to be ethical ... the Law Society really promotes ethical practice standards for practitioners, then that translates into better service for the community.

D. Expert professional guidance

One participant, a Law Society leader, gave an illustration of how association support is of a uniquely high quality – making the point that although a certain query might be raised – either via the internet (Apple’s ‘Siri’) or via a government advice service – the simple ‘question-answer’ format that these services require would not produce the same level of practical advice that a specialised service, like that offered by an association, can provide:

If you had Siri, or a government department, they’ve got their great call centre style, however if it doesn’t fit in a set question or answer, then they can’t fully answer it. We apply a more detailed and practical response...this is useful because I don’t think we’ve ever had the same question twice ... We have practical experience to draw on. And ... people will tend to discuss far more easily to one of their own than to one who is not.

517 See Part II: Findings: Regulatory Functions – Value and Challenges, Section 2B(3)(a): Public interest and democratic principles, above.

3) ADDITIONAL ADVANTAGES OVER MARKET REGULATION

A. Professional values

Two of our interview participants, Law Society leaders, felt that professional standards could not be kept by resort to market pressures or workplace influences alone, as a consumer or client focus cannot produce publicly interested ethical behaviour:

Workplaces are primarily businesses, so your workplace is there to try to ensure that it is sustainable as a business ... A professional association is there to ensure that the values of being a legal practitioner area upheld, so that professional standards are upheld ... The association has a different function to a law firm.

What you have to do is understand how to deal with a problem, how to deal with it ethically, and how to ensure that you can uphold the clients' rights yet maintain your standards and duties to the court, the client and the profession. That's where [the Law Society comes] in. That's why it will never change.

One participant, also a leader in the Law Society, felt that a market system 'probably varies too far away from ensuring that people have an incentive to stick within the ethical boundaries' and honour their professional duties. Market forces could not, in his view, activate practitioners' senses of identity as professionals:

Not simply someone who is out there to get results and make money, but someone who thinks it's important to stick to your duties ... and be seen as doing so by your colleagues.

Others expressed similar views, including that consumer-focused practice would 'slide too far' toward competition at the expense of ethical, high-quality practice; and that clients should not be seen by professionals as merely 'commodities to make money' or transact. One participant spoke about how even if standards are externally imposed (for example, with legislated mandatory educational requirements), workplaces, driven by market pressures, would be inclined to 'tick boxes' rather than truly work to guarantee the standards of their employees.

Workplaces could not replace the Law Society either because they would be too busy and they do not care – there would just be a lot of ticking of CPD boxes and more fudging.

Finally, one participant said that without the Law Society, there would not be a body making sure that young lawyers had the good working conditions needed for inculcation and support of their own improving standards of practice and ethics.

B. Avoiding informational asymmetry and exploitation of users

One participant, a Law Society leader, explained how professional practice gave rise to moral hazard, in the form of 'opportunities to exploit people', by virtue of information asymmetry; clients are far less informed about the services that they require than practitioners are about the services that they in fact provide.

[The market] doesn't work when there is extreme informational asymmetry. For example, I could get \$25 000 out of you, or a client, very easily. I won't do it in one hit, I'll be more subtle. But this is much harder when there is a regulatory body and procedures.

'[THE MARKET] DOESN'T WORK WHEN THERE IS EXTREME INFORMATIONAL ASYMMETRY. FOR EXAMPLE, I COULD GET \$25 000 OUT OF YOU, OR A CLIENT, VERY EASILY. I WON'T DO IT IN ONE HIT, I'LL BE MORE SUBTLE. BUT THIS IS MUCH HARDER WHEN THERE IS A REGULATORY BODY AND PROCEDURES.' - LAW SOCIETY LEADER

4) CO-REGULATORY ARRANGEMENTS

Though participants most often spoke of the Law Society's regulatory role in an absolute sense, a number did acknowledge that its current role is as part of a co-regulatory system, where, as we saw above,⁵¹⁸ disciplinary obligations are shared with the Office of the Legal Services Commissioner ('OLSC'). A number of participants described how the Law Society's handling of complaints relieved pressure on the OLSC, and felt the co-regulatory system was additionally beneficial in terms of resource- and expertise-sharing. Three Law Society leaders said:

The complaint process, though it goes to an independent office (the Legal Services Commissioner), they would say, "well, what has the Law Society said?", what have we looked at?

I mean, it's got to save the government time – because I mean the Office of the Legal Services Commissioner sends a significant [number of] complaints over to us, rather than just keeping them in-house.

There's been a good relationship, right from the beginning when the OLSC was established,⁵¹⁹ and that relationship of trust and cooperation is really vital.

518 Part II: Findings: Regulatory Functions – Value and Challenges, Section 1D(2)(a): Complaints Handling, and related discussion, above.
519 This finding was contested by other interviewees who described a far better relationship in recent years.

CORE BENEFITS: ASSOCIATION PARTICIPATION

Associations' functions can – as well as being valuable for their primary purposes (for example, regulation to protect the public, or representation for the profession's reputation) – benefit members by providing them with opportunities to participate in, and contribute to, meaningful activities, outside, but tied to, their work. The evidence in the literature and our interviews suggests that when members are active in their association, the benefits they generate and derive go beyond what they might have set out to achieve – improving their work, their reputation, their relationships and their personal identity in the process.

A. Participation builds member fidelity, sense of responsibility and reputation

Blau's study of professional 'commitment' profession included surveys of almost 1000 medical technologists, business students and graduates, and MBA students between 1996 and 2001.⁵²⁰ Discussing some of his findings, Blau suggests – but cannot conclude on the basis of the particular research design – that increased commitment to an association can cause members to feel they have 'invested' in their profession and have a stronger 'responsibility to remain in it'; among other things, greater association participation would, by 'increasing one's accumulated occupational commitment costs ... further increase one's normative occupational commitment'.⁵²¹

In Henczel's interview study of library association members, 42 of 55 participants spoke of how participation in the association improved their 'public equity' – that is, the degree to which they were 'known and valued within the profession'.⁵²² That public equity improved their job-hunting success and likelihood of obtaining tenure.⁵²³ Professional self-image, including being seen by others as an 'active member of the profession', also contributed to positive attitudinal changes – and was another benefit provided by the association.⁵²⁴

B. Participation benefits employers

In Henczel's interview study of library association members, 31 of 55 participants spoke of how their association participation affected the reputation of their firm.⁵²⁵ It seems as though these benefits for firms were created by a combination of the member's efforts and skills and the association's forum. For example, members' good reputations in the association, and their 'performing well' in association activities positively influenced the reputation of their firms and increased exposure of their firms' names.⁵²⁶

WHEN MEMBERS ARE ACTIVE IN THEIR ASSOCIATION, THE BENEFITS THEY GENERATE AND DERIVE GO BEYOND WHAT THEY MIGHT HAVE SET OUT TO ACHIEVE – IMPROVING THEIR WORK, THEIR REPUTATION, THEIR RELATIONSHIPS AND THEIR PERSONAL IDENTITY IN THE PROCESS.

520 Gary Blau, 'Testing for a Four-Dimensional Structure of Occupational Commitment' (2003) 76 *Journal of Occupational and Organizational Psychology* 469, 473–6.
521 *Ibid* 484.
522 Henczel, *The Impact of National Library Associations*, above n 251, 180.
523 *Ibid* 181.
524 *Ibid* 126.
525 *Ibid* 132.
526 *Ibid* 133.

C. Participation builds and shares skills, perspectives and connections

Frank's focus group findings included that participants felt committee participation improved their leadership skills and management skills, in turn improving their ability to work well in groups.⁵²⁷ In Henczel's interview study of library association members, 44 of the 55 participants felt that participation in their association was a way to increase skill (through volunteering, education, and information) and experience things 'they might not have otherwise experienced'.⁵²⁸

A number of our interview participants noted that active participation in Law Society activities (for example, through committee membership) exposed members to broader professional issues and views – and also allowed them to share their own experience with the broader profession:

I thought [joining a Committee] was a good way of keeping on top of the issues that were happening in [a practice] area without working in it ... regardless of what happened and where I ended up [working], I could be a part of that Committee and maintain that interest and that knowledge...

[Being on a Committee] really does keep me up to date with the law, and I also think that my perspective as a regional practitioner assists [the Committee] and gives a very different perspective. I think [regional practitioners] have a lot to offer [Committees], and we get a lot out of it.

One regional leader felt that participation in the association in general made members more likely to be good practitioners:

Look, people who turn up more, and are more involved in their own professional development, are generally better practitioners [because] you're taking an interest, plus you also know if you're doing something wrong ... Sitting in an office by yourself it's very easy to get bogged down, surrounded by files... Sometimes you can't see the forest for the trees.

527 Frank, above n 263, 311.

528 Henczel, The Impact of National Library Associations, above n 251, 166, 169–70.

PART V: FINDINGS

NEGATIVE ATTITUDES AND BELIEFS ABOUT ASSOCIATIONS

1. TENSION BETWEEN REGULATORY AND REPRESENTATIVE ROLES

A. To regulate or to support members?

Karseth and Nerland analysed policy documents from four Norwegian professional associations, and identified two distinct approaches associations⁵²⁹ took to ‘safeguarding professional practice’.⁵³⁰ The first – the ‘direct intervention’ approach – sees associations promulgating formal rules and standards, backed up by threat of sanction, designed to directly influence the quality of members’ work.⁵³¹ The second – the ‘distant regulation’ approach – places greater emphasis on ‘individual autonomy and the importance of discretionary decision-making in professional work’; individual practitioners are guided, and their discretion is supported, by associations’ emphasis on ‘reflective practice’ rather than discipline and standards.⁵³² The authors deem discretionary decision-making to be ‘critical’ to professionalism,⁵³³ but note the inherent difficulty in any association’s choice of safeguarding approach – to overemphasise direct intervention may mean over-regulation and a ‘danger of erasing the space for professional judgements’; but to regulate at too great a distance may ‘leave the practitioners in a professional vacuum, with a lack of structures and standards to guide them in their discretionary work’.⁵³⁴

In our interviews, one participant, a regular member, seemed to feel that the Law Society tended too far toward what Karseth and Nerland identified and called ‘direct intervention’ (see above). This participant felt he was ‘policed’ rather than supported by the association. He would have preferred the Law Society to lose or weaken its regulatory role and emphasise its support of members and promotion of their interests. He did not agree that maintaining a regulatory function garnered great status for the profession as an institution:

I consider the Law Society to be my regulator, rather than my professional helper, to be frank. My early experiences with the Law Society when I was going out into practice on my own, was that they would feel like the policeman that was waiting for me to do something wrong ... it was not a very friendly interaction. I think [the Law Society] should be a champion of the profession, that is there to help you, and that the regulation of trust accounts should be undertaken by a separate organisation ... On the one hand, it is a professional association that’s there to support its members ... On the other hand, I see them as a regulatory body that’s waiting for you to do something wrong, and then punish you for it.

'I CONSIDER THE LAW SOCIETY TO BE MY REGULATOR, RATHER THAN MY PROFESSIONAL HELPER, TO BE FRANK. MY EARLY EXPERIENCES WITH THE LAW SOCIETY WHEN I WAS GOING OUT INTO PRACTICE ON MY OWN, WAS THAT THEY WOULD FEEL LIKE THE POLICEMAN THAT WAS WAITING FOR ME TO DO SOMETHING WRONG ... IT WAS NOT A VERY FRIENDLY INTERACTION. I THINK [THE LAW SOCIETY] SHOULD BE A CHAMPION OF THE PROFESSION, THAT IS THERE TO HELP YOU.' - LAW SOCIETY MEMBER

529 Berit Karseth and Monika Nerland 'Building Professionalism in a Knowledge Society: Examining Discourses of Knowledge in Four Professional Associations' (2007) 20 Journal of Education and Work 335, 335.
530 Ibid 350.
531 Ibid.
532 Ibid.
533 Ibid.
534 Ibid 350-1.

2. MEMBERS' AMBIVALENCE ABOUT ASSOCIATIONS

A. Associations needn't be regulators

One regular member participant, a manager of a medium practice, did not feel strongly about the value of the Law Society maintaining a regulatory role, and said that general views of the Law Society among his colleagues and himself were ambivalent, and unengaged:

I certainly don't have a strong view that [the Law Society] should keep [its regulatory role]. ... I know of no one who isn't happy with it ... no one really has a negative view of the Law Society. But certainly no one is positive, and the answer probably to your fundamental question is do we talk about it? Not very much.

Similarly, another regular member, the manager of an Incorporated Legal Practice ('ILP'),⁵³⁵ said that most lawyers did not decide to act ethically because they had evaluated the likelihood of enforcement, and so it did not matter whether the government or the association did the regulating. Professionals abide by codes and legislation on principle, not out of fear of punishment by any particular body:

We don't operate based on where we think enforcements are going to [come from] ... The law is the law, we comply with the law ... I feel that law firms and lawyers are highly, highly regulated, and whether there is a split between [the Law Society's] membership services and the regulatory function does not make any difference to me at all ... it's just as regulated and we comply.

Some may feel that a true 'professionalism' would be better achieved without the pressures and demands of association regulation. One participant, a regional leader, conducted a 'thought experiment' in which he imagined that the Law Society, as a traditional association, had lost its regulatory function. He speculated that the association's membership would shrink, but he thought that it nonetheless might be valuable overall for the Law Society to return to its foundations, and 'enact old fashioned professional values' based on reputation and community:

For example, we won't be reporting on you simply as a negotiation strategy, we will take your word at face value, we will take your cheques ... If the Law Society lost its regulatory function, it would make its mission clearer and we'd actually see who means it, who's serious about professionalism. To consumers we would say: "The dodgy solicitor is shut out, the rest of us will ostracise him, they can still practise but without us." If you transgress, you will now find the door closed ... you're on your own. [This Law Society] doesn't have to include everyone, and if you're in it you're treated better, you have status.

B. Professional standards are not determined by associations

A few of our interview participants felt that their sense of 'professionalism' is shaped by a reputational-commercial logic; associations are increasingly irrelevant to their decisions about 'professional' conduct. One participant, the managing partner of a generalist firm, elaborated, describing the 'business' of lawyering: 'In running a good business, in professional service, reputation is everything ... just the same as running a restaurant or running an AirBnB.' To this participant and others, the legal profession's ethical standards were seen as a constant 'floor', 'but good legal practice operates well above the floor. That way it differentiates itself in the crowded market'.

There was similar evidence in the literature. Wilson and Halpin, seeking to understand the sources of professional identity, conducted a survey of four library managers and focus groups with 24 library staff.⁵³⁶ Their participants compared association membership 'almost to a leisure activity, as this was not associated with professional competence and ability'.⁵³⁷ Instead, employers were seen as the 'only true judges of professional competence, and professionalism was associated with performance in the workplace in terms of the quality of the service provided',⁵³⁸ rather than according to professional values or associations' referents.

535 ILPs are corporations that may provide both legal and non-legal services. They are subject to special disclosure obligations when dealing with clients (that is, what type of services the client is receiving, and who will be providing those services): Legal Profession Uniform General Rules 2015 (NSW) r 31. Further, principals of ILPs can be held personally responsible for the practice's contraventions of the LPUL in some circumstances: LPUL s 35. Certain other reporting, insurance and governance requirements also apply: see Law Society of New South Wales, 'Practising in NSW under the Uniform Law: Law Practices - Incorporated Legal Practice (ILP)' (Information Brochure, 2018) <<https://www.lawsociety.com.au/sites/default/files/2018-03/Incorporated%20Legal%20Practice.pdf>>.

536 Kerry M Wilson and Eddie Halpin, 'Convergence and Professional Identity in the Academic Library' (2006) 38 Journal of Librarianship and Information Science 79, 83.

537 Ibid 89.

538 Ibid.

CORE CHALLENGE: MEMBERS' LACK OF AWARENESS AND ENGAGEMENT

Despite their best efforts and all the potential benefits they offer, a major challenge for associations is to instigate membership engagement – to lock in members⁵³⁹ as potential users of their services, as voters and future committee members, and general contributors. White and Olson, in a study surveying 14 associations' chapter presidents and 81 professional nurses (of whom half were association members), found that knowledge of associations' benefits and functions is crucial to obtaining and retaining members, particularly regarding younger, less experienced practitioners without a history of exposure to, or engagement with, associations.⁵⁴⁰

A. Members lack awareness of association functions

In our interviews, a number of regular member participants commented that many members do not know what benefits the Law Society actually offers or how it works to provide those benefits:

I was thinking, generally maybe [the Law Society is] hindered in getting the benefits out to members, by, well, it seems like a lack of knowledge – so whether that comes from the Law Society, doesn't sell itself well enough, or if it's also people not being bothered to see what's out there, or a combination.

Lack of awareness and engagement was a prominent theme in the literature. White and Olson, through a survey of 14 associations' chapter presidents and 81 professional nurses (half of whom were association members),⁵⁴¹ found that non-membership among young, less experienced nurses was often caused by associations' poor publicisation of information about the association and its benefits.⁵⁴² In Frank's focus group study, while participants felt association participation 'contributed significantly to one's sense of professional community',⁵⁴³ they also felt that the 'size and complexity of national professional associations' meant that it could be 'difficult to get started and to become actively involved'.⁵⁴⁴

B. Lack of engagement compounds lack of awareness

In our interviews, there was a distinct view among some of the associational leaders that members were largely unaware of the benefits they received from their membership because of their lack of engagement:

I don't think they realise how hard the committees work and how influential they are.

'I WAS THINKING, GENERALLY MAYBE [THE LAW SOCIETY IS] HINDERED IN GETTING THE BENEFITS OUT TO MEMBERS, BY, WELL, IT SEEMS LIKE A LACK OF KNOWLEDGE – SO WHETHER THAT COMES FROM THE LAW SOCIETY, DOESN'T SELL ITSELF WELL ENOUGH, OR IF IT'S ALSO PEOPLE NOT BEING BOTHERED TO SEE WHAT'S OUT THERE, OR A COMBINATION.'

- LAW SOCIETY MEMBER

A number of regular member participants simply felt that the Law Society was not relevant to them or their practice; without a perceived 'necessity' to engage, the Law Society was merely a 'background thing'. One regular member participant said that while he knew about the Law Society's law reform activity, he had 'never actually read anything' that it had written or found out whether it was successful. Another regular member participant, a managing partner of a small ILP, spoke of how the additional managerial pressures of his role made association engagement even more difficult, and that this meant he did not appreciate the Law Society's benefits:

Maybe if I didn't run my own practice and have to do all the other stuff that goes along with it, I would have a different view of it or participate more in the profession in a general sense, in an extracurricular sort of sense. It would mean I would go along to meetings, and the dinners and things ... I go to the bare minimum CLE's to be honest and I do as many in-house as I can, 'cause I'm working 12 to 14 hours a day anyway. So, my engagement with the Society doesn't give it a fair run.

Limited awareness also meant that regular members were unaware of how they might engage with the Law Society on a casual, and sustainable, basis. For example, one participant said she would like to be involved in mentoring but was not sure whether the Law Society ran such a program – it does.⁵⁴⁵

⁵³⁹ Mary Joe White and Rhonda S Olson, 'Factors Affecting Membership in Specialty Nursing Organizations' (2004) 29 *Rehabilitation Nursing* 131.

⁵⁴⁰ *Ibid* 134.

⁵⁴¹ *Ibid*.

⁵⁴² *Ibid*.

⁵⁴³ Frank, above n 263, 315.

⁵⁴⁴ *Ibid* 317. These findings about 'size and complexity' might be linked back to discussion and findings about fragmentation above: see Introduction, Section 3A(b)(iii): Social and digital economy pressures, above; and Part III: Findings: Representative and Community Functions – Value and Challenges, Section 3B(4)(a): Divergent motivations, needs, and attitudes, above.

⁵⁴⁵ See Part II: Findings: Regulatory Functions – Value and Challenges, Section 1C(2)(f): Mentoring, and related discussion, above.

One Law Society leader felt that it was not until members became directly involved that they were able to appreciate the association's benefits and, indeed, receive the full range of benefits – though this participant did not comment on how the association was or could be more active in encouraging members' engagement. This discussion also links to that above about associations' council members being 'a class apart' from regular members in their engagement with and support for the association.⁵⁴⁶ Council members, more engaged with and aware of the association's activities, may also therefore derive particular benefit from the association. This may mean they need to make careful efforts in their management of the association to acknowledge how their own experiences and attitudes might differ from those of regular members.

C. Ability to engage affects membership decisions and members' perceptions of value

Walsh and Daddario, in their survey study of 36 early-career association members, found that when making membership decisions, potential members⁵⁴⁷ appear to 'give serious consideration' to their ability to attend meetings and actively engage with the association, and value membership less if they cannot avail themselves of association opportunities.⁵⁴⁸ Deleskey surveyed 85 association members and 33 non-members,⁵⁴⁹ and similarly found that where members are 'unable to attend meetings and take part in organisational activities, they do not perceive membership benefits as significant'.⁵⁵⁰

D. Members lack time and energy to engage

Professionals tend to be immensely busy, largely due to the complicated (technical, applied, procedural and emotional) demands of their work⁵⁵¹

Participants in Henczel's study of 55 library association members felt that costs, lack of time, limited opportunities and competing associations impeded their engagement with the association.⁵⁵² Bauman reported many of her interview participants commenting 'that they did not believe they had the time to read current publications', and sometimes 'found the content in these publications to be unrelated to their needs and interests', and that a discounted price made no difference to these members' sense of the value derived from the publications⁵⁵³

ONE LAW SOCIETY LEADER FELT THAT IT WAS NOT UNTIL MEMBERS BECAME DIRECTLY INVOLVED THAT THEY WERE ABLE TO APPRECIATE THE ASSOCIATION'S BENEFITS.

Many of the participants in Levin's 41 interviews regretfully noted that they didn't have time to attend association functions (other than those they would have to attend to get CPD points).⁵⁵⁴ Some of Levin's interview participants spoke of situations where financial stress made it tempting to take on work that they were not experienced in.⁵⁵⁵ Others said they might feel 'pulled' to take on work as part of providing a 'cradle to grave' service to clients, particularly where the lawyer was 'rooted in the ethnic community' or felt they were 'a trusted family lawyer'.⁵⁵⁶ It is easy to imagine these or similar issues applying to all professions to some extent. In each case, these kinds of pressure will make it less likely that professionals feel they have the time or energy (or desire) to engage with their associations.

In our interviews, many participants who were not actively engaged in the association recognised that they could be more involved in the profession, but often felt unable due to competing demands on their time. One regular member said:

It's always something that I think I should be doing more of – being more into the profession. I should be more of a 'lawyers' lawyer,' [rather] than just focussed on getting the immediate job done. But ... when you've got so many different competing demands, it just seems to be something that falls by the wayside.

546 Francis, 'Out of Touch', above n 7, 341.

547 Anne M Walsh and Kara Daddario 'The Dynamic Nature of Professional Associations: Factors Shaping Membership Decisions' (2015) 17 Journal of Applied Business and Economics 115, 118.

548 Ibid 123.

549 Kathleen Deleskey, 'Factors Affecting Nurses' Decisions to Join and Maintain Membership in Professional Associations' (2003) 18 Journal of PeriAnesthesia Nursing 8, 12.

550 Ibid 14.

551 For a discussion relevant to Australian lawyers, see Natalie Mei-Chuen Drew, Doita Datta and Jill Howieson, 'The Holy Grail: Work-Life Balance in the Legal Profession' (2015) 38 University of New South Wales Law Journal 288.

552 Henczel, The Impact of National Library Associations, above n 251, 142.

553 Sheri Bauman, 'To Join or Not to Join: School Counselors as a Case Study in Professional Membership' (2008) 86 Journal of Counseling and Development 164, 175.

554 Levin, 'The Ethical World', above n 10, 333.

555 Ibid 326.

556 Ibid.

Another participant said even reading associations publications can require too much time and effort:

I probably now haven't read [the Law Society Journal] for eight years. I do open the packet and then I intend to read it, I just get busy. Most of us run a practice and other things.

Another of our interview participants, a regional Society leader, told us that lawyers are too busy to even check the Law Society website for its resources, and felt that this was a 'massive hindrance to information-sharing' and also to 'people seeking out the information they need'. She felt that the Law Society could not be doing more than it is to encourage engagement, and that members are unlikely to take a proactive approach to engaging with the Law Society until things become dire:

I had someone comment regionally that they didn't get anything from the Law Society in terms of advice about costs, and then I said to them, "Well, have you called the Costs Department? Have you gone onto the website and looked at all the practice directions, and the guidance that's online?" They said, "No"... I think it's just human nature to be quick to complain before you've really looked into the situation. People often don't help themselves until they're at the complaining stage.

'I PROBABLY NOW HAVEN'T READ [THE LAW SOCIETY JOURNAL] FOR EIGHT YEARS. I DO OPEN THE PACKET AND THEN I INTEND TO READ IT, I JUST GET BUSY. MOST OF US RUN A PRACTICE AND OTHER THINGS.'

- LAW SOCIETY MEMBER

PART VI: CONCLUSION AND RECOMMENDATIONS

One of our participants called associations ‘complicated beasts’. This Report, through its delineation of associations’ convoluted features, purposes and pressures, has vividly demonstrated the truth in this view.

The Report’s review of professional associations literature and its in-depth interview study of the Law Society confirmed that professional standards are regulated by a mix of modes and inputs: professions’ self-regulation; state-backed legislation; and market and social incentives. The Report recognised and illustrated how it is not possible to isolate a professional association from its context beside the state and market – and attempts to evaluate associations’ roles in ensuring professional trust are limited (and made complicated) by that fact. Nonetheless, several qualities and activities of associations can be studied. To that end, the Report analysed literature and interview data by reference to an adapted model of associational excellence. The model was designed to capture associations’ three main roles, each emphasising a different beneficiary: the public, the profession, and association members. The Report assumed and showed that the energy with which these roles are pursued, how they are prioritised, and how well they are achieved varies within and between associations. Despite this variation, the Report established that, overall, associations continue to play a vital public role in the pursuit and guarantee of professional trust, in ensuring high standards of competence and ethicality.

The findings revealed high associational value and effectiveness in specific areas, such as associations’ capacity for tough, impartial, yet supportive discipline; their high-quality guidance on ethics and other professional issues; and their ability to protect public interests and values through legislation advocacy. The Report also showed how associations continue to play significant roles in professional cohesion, identity and status, some of which in turn supports their public-serving efforts. For example, the Report demonstrated multiple connections between membership status (in particular, active membership) and a range of benefits for professionals, as well as their clients, the public and the profession itself. Another strong theme was that, despite having many outside options, when making key decisions professionals still look to associations for guidance and support. Interview participants also gave many reasons why associations’ roles in regulation should be protected:

leaving professional standards to states or markets alone may not be morally desirable, financially and practically feasible, or effective. These findings, as well as the Report’s summaries of models of associations and its comparison of associations⁵⁵⁷ with other regulatory options,⁵⁵⁸ provide a reference and a basis – for associations and outsiders – to develop an understanding of associations’ benefits, and how those benefits can be examined and measured.

The Report also highlighted associations’ under-utilised strengths and missed opportunities, many of which are addressed in the next part as action points. For example, one dominant theme from the literature and interviews was that many strengths of professional associations are simply not communicated effectively to their ‘masters’ (the public, the government, and members).⁵⁵⁹ In one study we saw that even politicians – a group one might assume to be familiar with associations – lacked awareness of associations’ roles.⁵⁶⁰ As that study also showed, the effects of low awareness and understanding can include presumptions of associations’ obsolescence.

THE FINDINGS REVEALED HIGH ASSOCIATIONAL VALUE AND EFFECTIVENESS IN SPECIFIC AREAS, SUCH AS ASSOCIATIONS’ CAPACITY FOR TOUGH, IMPARTIAL, YET SUPPORTIVE DISCIPLINE; THEIR HIGH-QUALITY GUIDANCE ON ETHICS AND OTHER PROFESSIONAL ISSUES; AND THEIR ABILITY TO PROTECT PUBLIC INTERESTS AND VALUES THROUGH LEGISLATION ADVOCACY. THE REPORT ALSO SHOWED HOW ASSOCIATIONS CONTINUE TO PLAY SIGNIFICANT ROLES IN PROFESSIONAL COHESION, IDENTITY AND STATUS, SOME OF WHICH IN TURN SUPPORTS THEIR PUBLIC-SERVING EFFORTS.

⁵⁵⁷ For discussion of three theoretical models of professional associations, see Introduction, Section 3A(a)-(c), above.

⁵⁵⁸ See generally Introduction, Section 1: Background and Objectives, above. For a comparison between associations, state and market regulation, see Introduction, Section 3(B): Why should associations continue to play a significant role?, above. For relevant findings, see Part IV: Findings: Positive attitudes and beliefs about associations, Section 2: Additional advantages over state regulation, and Section 3: Additional advantages over market regulation, above.

⁵⁵⁹ See Introduction, Section 1(d) A prognosis, and a reality check for associations, above.

⁵⁶⁰ CIOB Report, above n 14.

The findings also revealed several pressure points, cross-purposes, and areas in which associations are not as effective (in reality and perception) as outsiders might assume and as associations might hope. The Report uncovered some major threats and challenges facing associations: low engagement; negative and ambivalent attitudes; the rise of workplace authority; and fraught relationships with government. There was also some indication that improvements need to be made to associations' internal processes.

This Report was produced with the intention that associations and other bodies (e.g. oversight bodies, researcher groups, etc.) could use it to articulate, assess and improve upon associations' value. In the next and final part of the Report, we provide recommendations that address some of the weaknesses identified. There are also clearly wider institutional tensions that need contemplation and resolution by associations themselves – including with government audiences. For example, the lack of a public body or public voice in professional regulation (a concern raised by one interview participant)⁵⁶¹ is not something that outsider research or commentary can address.

As our final recommendation below outlines, in order for associations to play a key role in ensuring the trustworthiness of professions, there is more – and ongoing – work to be done.

⁵⁶¹ See Part II: Findings: Regulatory Functions – Value and Challenges, Section 2C(4)(a): Narrow public consultation, above.

B. RECOMMENDATIONS

1. AWARENESS AND ENGAGEMENT

A. Improving communication with members

Philips and Leahy, following a survey of 1257 registered rehabilitation counsellors (association members, former members, and non-members),⁵⁶² point out that because professional identity was – in their study – the most important determinant of association membership,⁵⁶³ associations can, even if struggling financially and lacking other resources, still recruit and retain members by adopting strategies like ‘regularly reminding current members of the strength they add to the profession and that their active membership communicates a high level of professionalism’.⁵⁶⁴ After analysing 13 299 survey responses from members of 18 professional associations, Ki and Wang found that members placed great importance placed on associations’⁵⁶⁵ certification functions, and suggested that associations ‘should pay more attention’ to offering and publicising this benefit.⁵⁶⁶

As we saw in our interviews, Law Society regular members sometimes had limited understanding of the association’s work, its structure, and its benefits. Some wondered whether their lack of knowledge was due to the Law Society’s lack of marketing of benefits and engagement opportunities. Some of the leaders interviewed reflected on the need to be better at communicating the association’s value, how hard it works and its impact (‘Our members need to know more . . . so they realise the value of [the Law Society’s work]’). Many leaders also felt there was a need to communicate to members that ‘greater involvement means greater benefits’.

One regular member suggested that a small part of the Law Society’s weekly newsletter, ‘Monday Briefs’, should be dedicated to directly informing members of benefits and functions, and ways in which they might have an input into committee work.

B. Improving awareness in the public and the government

As we saw above, research has revealed low-level knowledge about associations and cynicism about their roles among the public and in government. A number of our interview participants wanted the association to more actively market its own social value, and to remind the government⁵⁶⁷ and the public of the indirect and direct value generated by the association on behalf of the profession. In the case of law, examples of direct value for the public included how much lawyers as professionals do pro bono or at reduced cost, including at a community level (for instance, helping local clubs, schools, and neighbourhood planning).

Though his recommendation is extreme, one participant was very confident in the Law Society’s value, yet unsure that the government actually appreciated it – and felt that the government would not realise unless the association was gone:

[The Law Society] should give [its regulatory role] away and see how the government goes bearing the cost, and let them come back to ask for help.

As a more moderate option, a number of other participants felt that the Law Society’s website was difficult to use, and that its information for the public – about the Law Society, lawyers, and the legal profession – could be improved.⁵⁶⁸ These improvements should address both the accessibility of information and its intelligibility. Information about associations’ roles and achievements should be provided alongside material to explain social and economic contexts, (where relevant, this may include statistical data or the recounting of personal experiences) to allow for informed outsider understandings.

ACTION POINT #1: Use existing resources and platforms to promote association works, benefits and opportunities for members.

ACTION POINT #2: Prioritise publicity and promotion of the association's work, improving public, government and other stakeholders' access to information.

⁵⁶² Philips and Leahy, above n 488, 210.

⁵⁶³ Ibid 214.

⁵⁶⁴ Ibid.

⁵⁶⁵ Ki and Wang, above n 302, 205–6.

⁵⁶⁶ Ibid 213–4.

⁵⁶⁷ CIOB Report, above n 14.

⁵⁶⁸ A number of other participants noted that a website overhaul was in progress, and that they saw improvement in the new version.

C. Formatting communications for easy access and engagement

Some participants also discussed the content and format of the Law Society's publications. One participant felt that members' problems with association engagement stemmed from busyness, and were unavoidable – he read Law Society updates only when 'in transit to work', and if too busy would not bother clicking on or opening links. Another participant discussed the formatting of the 'Monday Briefs' weekly newsletter and email: it would be preferable to have the content of the 'Briefs' in the body of an email, rather than a link to an external page, or else more information should be included in the email to make it easier to figure out which linked articles were of interest and importance. Another recommended that the email be simply a series of one-line dot points with external links. A few participants were embarrassed to have amassed a few un-opened issues of the *Law Society Journal*, indicating that they wanted to, or felt they should, read them, but lacked the time or motivation. One regular member participant wondered whether the *Law Society Journal* format could be modified so that it could be read in a couple of hours.

These participants felt that these modifications would be more likely to capture members' attention and would remove at least some of the effort- or time-related obstacles to members' seeing the content.

D. Expanding and improving engagement options

Providing engagement opportunities for members with varied interests and varying degrees of available time and energy is critical to maintaining their interest in and support for associations.

In our interviews, one regular member wondered whether the Law Society should run a compulsory event or other form of engagement to 'jolt' busy members and ensure they are 'getting something out of' the association. Another felt that there would be benefits in running more, larger conferences, providing a 'real melting pot' of lawyers, events focussed not on clients but on learning with peers; members need and are attracted to events 'that bring the profession together ... that [have] that sort of collegiality and commonality' atmosphere' about them.⁵⁶⁹

Some regular members felt the Law Society needed to enable a broader variety of contributions to the association and, by extension, the profession – to recognise that members all have 'a valuable contribution to make', but have different personalities and commitments.

Many said that they were not interested in, or suited to, committee work and did not enjoy 'big dinner' type events. One participant thought that a valuable and more accessible means of contribution might be the opportunity to contribute writing to the Law Society website – pieces shorter than *Law Society Journal* articles, and focussed on individual experiences in practice; 'what happened to me on this matter and what did I learn'. Associations should take advantage of the general motivation among members for contexts in which their professional identity and community are supported.

ACTION POINT #3: Format publications to grab members' attention and enable quick, easy reading.

ACTION POINT #4: Develop a range of engagement options – from big conferences to small contribution opportunities – to capture all members' interests and personal styles.

569 In September 2018, the Law Society will hold the inaugural 'Future of Law and Innovation in the Profession (FLIP) Conference and Innovation Awards Dinner', featuring, among other things, 40 international and Australian expert speakers, 14 forum sessions, and an awards dinner: Law Society of NSW, Flip Conference <<https://www.lawsociety.com.au/advocacy-and-resources/advocacy/flip/flip-conference>>. This might be an event like what this participant envisaged, however, notably, he wasn't aware that it was being held.

2. EDUCATIONAL AND RESEARCH LEADERSHIP

A. Program quality and relevance

In our interviews, participants said that the Law Society's aim should be, as one regular member put it, *'to make themselves a [CPD] provider that we want to choose, the provider of choice, not just the default option'*. Another regular member agreed; the professional association should not be seen as 'just another CPD provider' but the leading source of training – and to that end the Law Society needed to be more 'aggressive in their marketing' of CPD programs. One regular member said that provision of CPD not only promotes members' knowledge but reinforces the association's presence – *'it reminds everyone that the Law Society is there if you have something [like education that] you need from the Law Society'*.

Participants offered a number of suggestions for improvement in this area. One regular member, a senior associate, said that there was a need for 'proper' and more 'reality-focused' courses – rather than single sessions – and especially for specialist accreditation. Her suggestion was rooted in personal experience and need – she was about to do a 2-day online course in insolvency through a UK association. Many others said that CPD offerings need to be adapted to experience levels; to consider, for instance, that senior members will tire of repetitive offerings even if they are of objectively good quality. Others spoke about the need to ensure that educational offerings were targeted and updated to address emerging practice environments and needs – primarily in business management, organisational culture, technology and training. Their suggestions included incorporating new people and new ideas when developing programs designed, including to better educate members about managing (or preventing) changes in organisational purpose, demographics and culture. One participant specifically noted the need for programs to educate members – particularly older practitioners – in IT, and the benefit of providing research and general computer skills updates or 'booster' courses.

B. Integration

In our interviews, one regular member felt that the Law Society should maintain better relationships with universities, to support and deliver specialised programs at the postgraduate level. Associations would benefit from maintaining a greater presence in universities, and in providing opportunities tied to members' postgraduate experiences, so that practitioners maintain their intellectual engagement with practice and are able to share their knowledge with their peers:

Trying to integrate that with perhaps postgraduate paths for practitioners would be a positive thing. I mean, I found my postgraduate experience to be a great one in terms of maintaining the intellectual rigor of my experience in practice, and I found ways, individually, to be able to share the benefits of that, you know, with my colleagues. But [that] has been in the absence of any professional associations stepping in or presenting opportunities to people who are going through that course to then share their skills or what they've learned more broadly. [There are] opportunities for integration there ... and a lot of value probably [that] goes untapped.

Weil and Kirk similarly found that 70% of the 242 members of the Association of Mental Health Administrators who responded to their poll felt that the association should have a 'stronger liaison with graduate programs', and a majority felt that the association should assist in developing curricula and accrediting programs.⁵⁷⁰

ACTION POINT #5: Aim to be the CPD-provider of choice. Make quality, industry-leading, and innovative education programs a priority and ensure that ethics offerings are informed by data from complaints.

ACTION POINT #6: Use and improve partnerships with universities to encourage association participation throughout member's careers.

⁵⁷⁰ Weil and Kirk, above n 170, 33.

C. Innovative formats

Some of our interview participants felt there would be value in educational materials and courses in more accessible formats, more directly transferable to practice. For example, one regular member said that it was hard for managers to know what they should be covering with juniors and new members of staff in their induction, especially regarding ethics. She wondered if the association could provide a handbook of areas to systematically cover (rather than simply leaving it to learn-by-experience).

Some very basic ethics, [the Law Society] can emphasise through a very simple course, or provide guidelines for senior staff and small law firms to participate; when they come back they can take ... as guidelines to train their staff ... We all have our [personal experience] 'handbook'; it's how we accumulate knowledge and information along the way – but if the Law Society could have something like that, something very easy to circulate, as a guideline ... that would be good.

Another regular member said that he would appreciate if the association provided smaller-format 'refreshers' on lawyers' ethical responsibilities and obligations delivered via presentations of scenarios that members have faced and analysis of what rules and principles applied.

Finally, one regular member said that the utility of the Law Society's brick-and-mortar library is declining with the increasing availability of information online. Making more library resources available online would maintain the association's role in practitioners' self-education and research.

D. Research and publications

Our findings revealed that in many contexts professionals trust associations more than government or business, to be more comprehensive and impartial in, for instance, interpreting law reform, evaluating technological products and articulating best industry practice. This trust could be further substantiated by associations through rigorous research (to then inform its educational programs). Haddow, in a detailed study of the content and extent of two associational publications over a year,⁵⁷¹ found that despite the potential of associations' publications to 'communicate research information to practitioners', that potential was 'not being realized'.⁵⁷² She found that there was minimal research content (at most, 16%) and that much of it was brief or merely a citation.⁵⁷³ The potential for great value was clear; whenever there was 'expanded discussion', it was 'excellent and clearly targeted at a practitioner audience'.⁵⁷⁴ The low rate of inclusion of this type of information was a missed opportunity to provide a great benefit to members.⁵⁷⁵

We also heard concerns about publications' content in our interviews. A number of participants commented that the Law Society's publications have become increasingly commercial or 'tabloid' in recent years.

ACTION POINT #7: Devise usable, everyday educational tools: accessible, engaging and relevant programs; and make research and resources available online.

ACTION POINT #8: Realise the informative potential in research and publications, and do not sacrifice their rigour and tone.

571 Gaby Haddow, 'Communicating Research to Practice: The Role of Professional Association Publications' (2010) 34(108) Library and Information Research 33, 36.
572 Ibid 38.
573 Ibid.
574 Ibid.
575 Ibid 41.

3. PRESENCE IN FIRMS

In our interviews, one regular member, a partner in a large firm, said that the Law Society could do more to help support lawyers dealing with increasingly common firm management and workplace culture issues, helping members maintain fidelity to their firms as well as their professional ideals. This participant felt that this area provided a 'niche opportunity' for association input, and that making existing resources free would help build the Law Society's 'brand':

People always do struggle with [supplying] ethics and practice management training. I know there are online tools, but I'm not aware whether the Law Society has got online tools. But I think there's an argument that those things should be provided for free. For brand recognition purposes ... I could see that [the Law Society] would, even with the big old firm, get traction through offering certain services that people may struggle with elsewhere.

ACTION POINT #9: Act on opportunities to boost the association's image and engage with members facing new problems.

4. RATIONALISATION AND HARMONISATION

Some participants stressed the need for professional regulation – whether at the legislative or association level – to be rationalised nationwide. A regular member, the CEO of an Incorporated Legal Practice, said the most 'frustrating' problem was there being so many associations, insurers and regulators in Australia – which results in unnecessary and costly duplication of effort. These issues are to some extent caused by the differing legislation across states, but this participant emphasised the need to rationalise the legislation:

If the UK can operate with a single law society for all of England and Wales, why do we need seven [state-level] Law Societies, seven corresponding insurers and 6 different sets of (State-based) laws regulating the profession? We've got a much smaller population of lawyers in Australia, but seven times' the cost and complexity. Our attempt at rationalisation, the Legal Profession Uniform Law, should really be called the '2-State Law', as none of the other jurisdictions have signed up; and even across NSW and Victoria – we still don't have integration – with separate law bodies, separate insurers that don't work across both States, and separate guidance. At some point, don't we have to ask ourselves the question, why do we insist on such multiplicity with all the wasted cost and effort? And if we can't get our heads around a single national law and regulating entity, why can't we at the least have a single national regulator with State-based member services?

Particularly for practices with a presence in multiple jurisdictions, this participant felt that the multiple regimes were creating unnecessary risk for businesses – employees in different states were subject to different insurance policies and premiums, which for risk management purposes becomes an 'absolute mess'. The participant felt that Law Societies and their insurance companies should not continue to operate in state-level 'vacuums'; they can and should coordinate for the good of their members and the profession as a whole.

These findings connect to our discussion above of associations acting as intermediaries for their members and professions.⁵⁷⁶ Associations can and should identify external challenges facing members and their practice environments, and utilise their privileged positions and relationships with governments and other bodies to work toward efficient and effective nationwide and potentially global solutions. These efforts should be directed towards the greater goal of defining and ensuring best practice among professionals.

ACTION POINT #10: Where possible, corporate and integrate with stakeholders and bodies across jurisdictions, to unify systems, help members, in multi-state firms and interstate practice, and ensure global best practice.

⁵⁷⁶ See Part III: Findings: Representative, Community and Membership Functions – Value and Challenges, Section 2A(3)(a) Authoritative, trustworthy and progressive, above.

5. CONSULTATION WITH MEMBERS

A. Member feedback

Markova et al, through analysis of 1980 completed online surveys of members of large international professional associations,⁵⁷⁷ also found evidence that seeking input and providing quality ‘customer service’ to members was a ‘major factor’ determining associations’ membership retention; only after ensuring that members’ opinions and needs are heard and addressed can an association effectively open the ‘gateway’ through which its benefits can be accessed.⁵⁷⁸

A number of our interview participants said that the Law Society needed to seek formal feedback about its performance from all members, to add to the indirect feedback it already obtains through informal means. Though a Law Society leader expressed the view that the Law Society responds ‘to the needs of the profession quickly’ and identifies issues ‘far better than an alternate organisation could do’, members did not always agree that this ‘response’ was enough in an absolute sense, and felt that more direct communication was needed. Many said that they’d never been asked for feedback on the association. One alluded to the possibility of simply surveying members for their opinions:

[They] don’t ask for feedback ... [on] how they’re performing, what services we think they should offer – like as a general member ... I don’t think I’ve ever seen anything from the Law Society asking what I felt ... no ‘customer satisfaction survey’ equivalent.

6. CONTINUOUS SELF-EVALUATION

A. External

As we saw above, associations play an important part in preparing their professions and members for changes coming from the ‘outside world’.⁵⁷⁹ At the same time, associations are tasked with representing their professions and members,⁵⁸⁰ as well as using their body of professional knowledge and expertise to regulate and advocate in the ‘public interest’.⁵⁸¹

Associations must maintain a complete understanding of not only what external pressures and changes face their professions, but what the ‘public interest’ is in the context of those changes. Without constant assessment of prevailing public opinion and experience, and constant evaluation of the association’s role, an association can (or should) never be confident in the virtue, relevance or legitimacy of its activities. Without confidence, associations will struggle to convince members, government, and other stakeholders of their value. Without governmental and ‘social permission’, associations will lose influence and may dissolve.

Our findings provide examples of how associations can avoid this negative chain reaction: by conducting research and sharing evidence-based insights;⁵⁸² by working more systematically with outsiders;⁵⁸³ and by engaging with members, including less-engaged ones, to benefit from an understanding of their world-views.⁵⁸⁴

ACTION POINT #11: Actively and regularly assess members’ perceptions of the association, and seek their input on its activities.

ACTION POINT #12: Stay up-to-date with the public opinions and experiences that are shaping and being shaped by social, political and technological changes – both national and internationally. Continually assess the association’s and profession’s roles in these changes.

577 Markova et al, above n 4, 499

578 Ibid 505–6.

579 See Part III: Findings: Representative, Community and Membership Functions – Value and Challenges, Section 2A: Mediator of Change, above.

580 See Part III: Findings: Representative, Community and Membership Functions, Section 1A: Representation, above.

581 See Part II: Findings: Regulatory Functions – Value and Challenges, Section 2B(3)(a): Public interest and democratic principles, above, and Section 1D: Competence and conduct, above.

582 See Van Achterberg et al, above n 92; Borah and Aguiniga, above n 186.

583 See Part II: Findings: Regulatory Functions – Value and Challenges, Section 2C(4)(a): Narrow public consultation, above.

584 See Part V: Findings, Core Challenge: Members’ Lack of Awareness and Engagement, above; and Part IV: Findings, Core Benefits: Association Participation, above.

B. Internal

Finally, it is important for associations to understand that the work of evaluation and adaptation must come from within. Our research has identified several tensions that need resolving and highlighted, for instance, how an association's value varies within its leadership (Board and non-Board) and between its leadership and membership. Our research – and the ability of any outside commentator – to assess associations' efficiency and efficacy is limited. For example, though we asked participants to comment on the Benton Model,⁵⁸⁵ we were unable to deeply assess some of its features – like the Law Society's accountability and transparency, the extent of its collaborations with other bodies, or the depth and frequency of its internal knowledge-sharing and of its consultations with the public. Interview participants were unaware of many of these functions existing at all, let alone their success. Furthermore, some of the features of the Model itself were not adapted to assessment of an association (as a member organisation with representative and membership functions), as opposed to a purely regulatory body.

The task of honest self-assessment remains to a great extent with associations.

ACTION POINT #13

Rigorously and continually assess all association functions and processes, impartially taking into account insider and outsider perspectives

585 See Introduction, Section 3C(a): Regulatory functions, above, and Appendix 1: Benton Model (Streamlined Version) below.

APPENDICES

APPENDIX 1: BENTON MODEL (STREAMLINED VERSION)

The Benton Model is a reference model used by the Professional Standards Councils ('PSC') to identify 'the key standards, processes and practices a group should strive to have in place before it can be defined as a profession'.

The following is a streamlined version of the Model shared on PSC's website as a reference for professions and associations to self-assess their performance. Alongside further explanation of how the PSC uses the model, it is available to download: <https://www.psc.gov.au/what-is-a-profession/academic-view>

The full version of the model appears in D C Benton, M A González-Jurado and J V Benoit-Montesinos, 'Defining Nursing Regulation and Regulatory Body Performance: A Policy Delphi Study' (2013) 60 International Nursing Review 303, 308.

<p>Legislation Advocacy and Responsiveness</p>	<p>Implementing legislation</p> <ul style="list-style-type: none"> • Interprets legislation to facilitate changing public protection needs <p>Advocacy</p> <ul style="list-style-type: none"> • Routinely provides comments on wider reform and change • Promotes professional issues that are congruent with protecting the public <p>Responsiveness</p> <ul style="list-style-type: none"> • Has processes that are consistent with related disciplines • Keeps guidance, codes, standards, competencies and rules in step with changing expectations of the public
<p>Organisational and Internal Governance</p>	<p>Board Governance</p> <ul style="list-style-type: none"> • Board is subject to regular performance appraisal • Criteria for selection and appointment of senior officials and Board members • Induction processes are in place for new Board members <p>Business processes</p> <ul style="list-style-type: none"> • Has adequate resources to enable all responsibilities to be fully discharged • Collaborates with other agencies to minimise admin and maximise use and impact of data • Mechanisms to align accreditation with government and related systems • Develops guidance and rules that are supportive of change in sector • Has mechanisms in place to detect and deal with fraudulent applications • Committees have clear and explicit terms of reference and accountability to Board <p>Quality improvement</p> <ul style="list-style-type: none"> • Identifies and promotes best regulatory practice • Has access to and seeks relevant expert advice to support its decision making and regulatory functions • Emergent trends from the outcomes of conduct and competence processes are used to inform revisions of standards and future competence requirements • Routinely examines a sample of completed CPD returns • Monitors its performance and seeks to continually improve its processes for dealing with complaint matters

APPENDIX 1: BENTON MODEL (STREAMLINED VERSION)

<p>External Governance and Public Accountability</p>	<p>Accountability</p> <ul style="list-style-type: none"> • Is held to account (by members and others) for its performance and its strategy • Process for development of standards, codes and practice expectations is free of inappropriate influence (including by government, the profession, employers or other interested parties) • Acts in a manner that maintains the confidence of the public, professionals, employers and other key stakeholders • Responds to its regulatory commitments with diligence <p>Transparency</p> <ul style="list-style-type: none"> • Has a set of clearly defined and publicly available operating procedures • Provides clear and succinct information on their responsibilities and process to registrants and public • Has clear appeals processes that can be pursued if the decisions or actions are thought to be unsound <p>Collaboration</p> <ul style="list-style-type: none"> • Engages and consults key stakeholders in the development of policy and standards
<p>Responsibilities and Functions</p>	<p>Competence and Conduct</p> <ul style="list-style-type: none"> • Continuing competence procedures are in place and uses data from multiple sources • Maintains independence in resolving allegations and complaints • Clear, accessible and well publicised complaints procedures that facilitate public engagement are readily available • Has standards of performance and clear impartiality in dealing with receipt, acknowledgement, investigation and resolution of complaints and allegations • Has an adequate range of meaningful sanctions for non-observance of standards and non-compliance, and sanctions are public <p>Registry</p> <ul style="list-style-type: none"> • A register of professionals controlled is accurate and readily accessible by the public, registrants, employers and other interested parties • Ensures that only persons who meet stipulated criteria for practice can be registered • Renewal procedures are efficient and effective and requires compliance requirements to have been evidences <p>Ethics and Professional Behaviour</p> <ul style="list-style-type: none"> • Promotes individual behaviour that is reflective and self-regulatory • Develops and promotes sound ethical and conduct codes that exceed or expand on minimum legal requirements <p>Standards and Education</p> <ul style="list-style-type: none"> • Develops codes and standards that improve consumer protection outcomes • Ensures educational programs are aligned with the competence required for practice • Codes, standards and education requirements are developed in collaboration with educational providers, employers, professionals and the public

APPENDIX 2: METHODOLOGICAL DETAILS

To collect and synthesise relevant academic literature for this Report, we conducted searches in multiple research databases, with a combination of a number of terms related to associations (for example, 'professional associations'; 'professional bodies'; 'profession' AND 'association' OR 'organisation' OR 'body'), and with a number of terms relating to beneficiaries and associational value (for example, 'membership'; 'public interest'). We then assessed the works for relevance, including only those studies that centred on professional associations. We uncovered some research that centred on professions broadly (theoretical and sometimes empirical) but also included content about associations (for example, discussing their role in the professional project). These works were most often speculative or bore only passing relevance to our question, and so were typically excluded from our study unless they addressed a particular activity or value of associations in contemporary climates (as distinct from potential or historical roles of associations in, for example, establishing and protecting a field of professional knowledge). After assessing the works for relevance, we included a total of 48 studies. We also analysed 16 additional works that touched upon external forces relevant to some of our discussion about contexts and circumstances – for example, those that explain historical circumstances or emerging pressures on associations. Our final sample captured a range of countries (including the US, Canada, the UK, Australia, New Zealand, the Netherlands, and Norway) and professional contexts (including law, healthcare, library, education, counselling, and business fields).

INTERVIEW SAMPLING

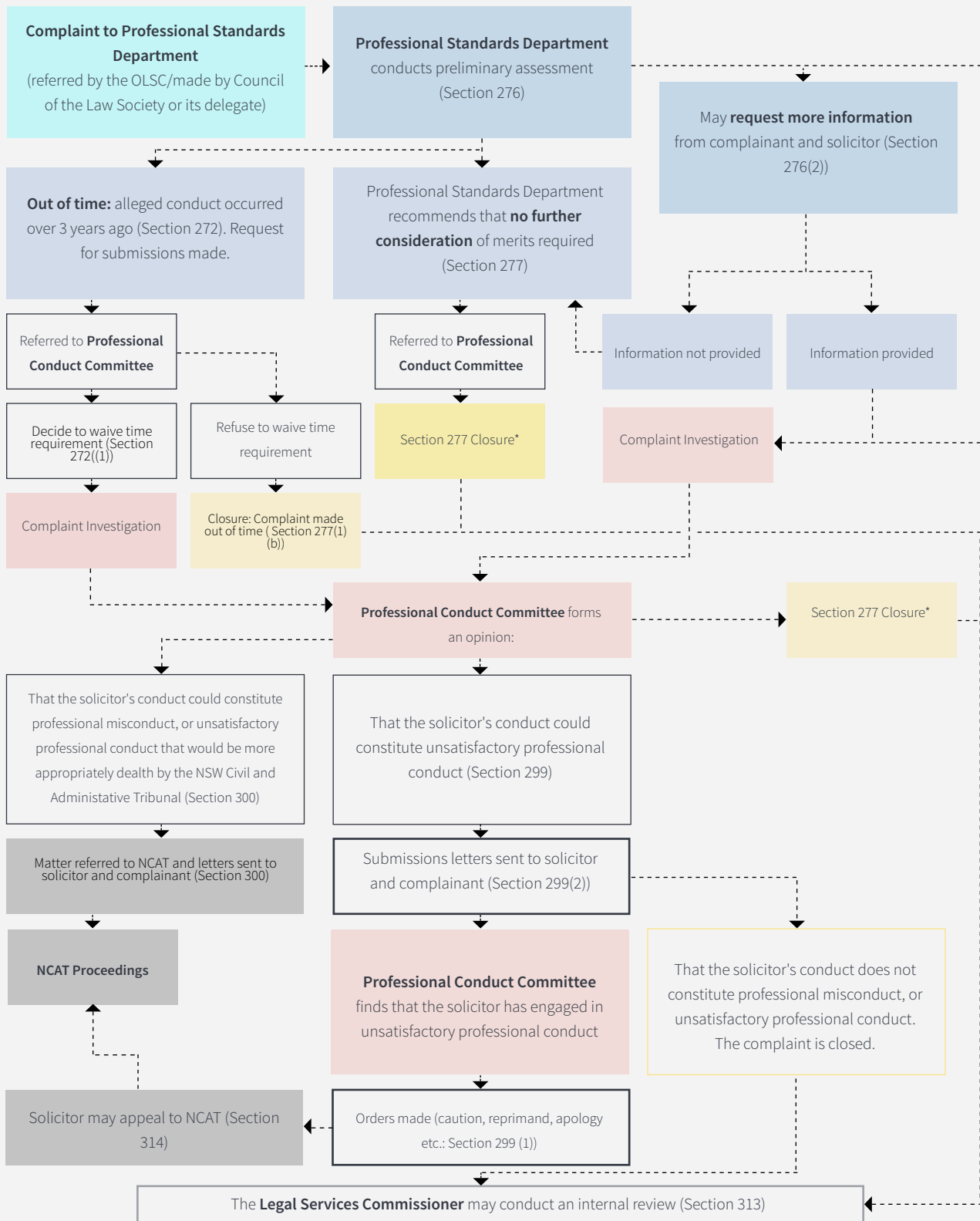
The table below provides demographic information about participants in our interview study.

		N (Total n = 24)
Gender	Male	13
	Female	11
Practice area	Generalist	5
	Corporate/commercial	9
	Personal – family, wills, property	1
	Administrative	2
	Media	1
	Criminal	3
	Non-practising	3
Practice structure	Large firm	2
	Small-medium practice, part of large firm group	3
	Small-medium firm	6
	Sole practitioner	2
	In-house	3
	Government	5
	Non-practising	3
Geography	Inner-city	17
	Suburban	2
	Regional/rural	5
Membership status	Leader/committee member or professional leader	8*
	Regional society leader	4*
	Regular member	13

* one participant was a leader in both the NSW Law Society and a regional Law Society; hence n = 25 here

APPENDIX 3: DISCIPLINE FLOWCHART

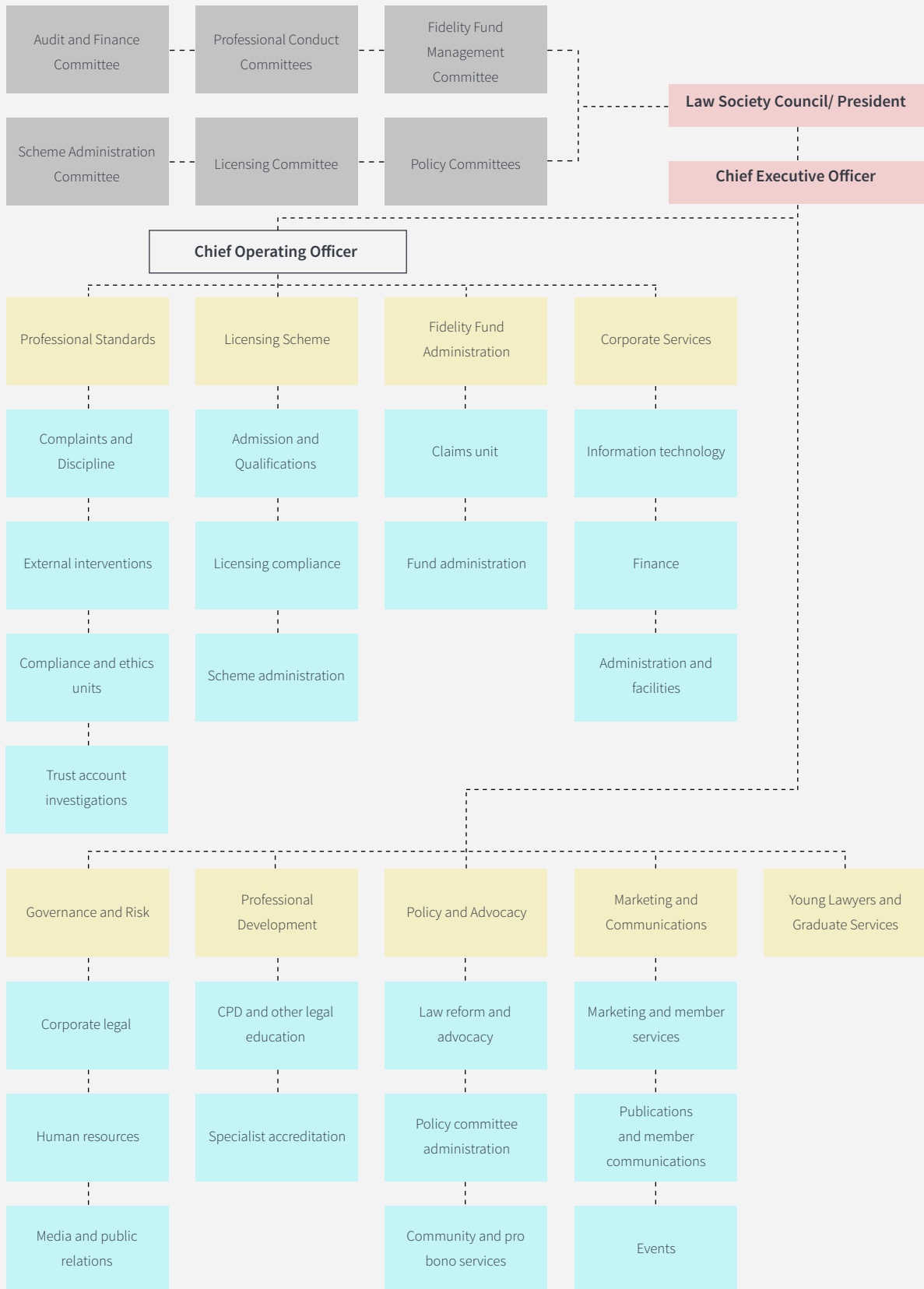
The following flowchart is an expanded reproduction of that provided on page 8 of the Professional Standards Department, Law Society of New South Wales, 'Professional Standards 2017 Annual Report' (2017). The Sections referred to are from Chapter 5 of the *Legal Profession Uniform Law 2014* (NSW).



***Section 277 Closures:** after a preliminary assessment of the complaint has taken place, the Professional Conduct Committee may close the complaint for a number of reasons, including: if the complaint lacks substance; if the complainant has not responded to requests for further information; if the complaint is better dealt with by another body; or if it is in the public interest to close the complaint. A full list appears in Section 277 (1).

APPENDIX 4: ORGANISATIONAL FLOWCHART

The following diagram was kindly provided by the Law Society of New South Wales as an aid to understanding this study. It illustrates the structure of the Law Society's executive, committees, and operational departments. The diagram depicts Law Society committees (comprising members), at left, reporting to the Law Society Council and President; a flow through from the Council and President to the Chief Executive and Chief Operating officers; and eventually, Law Society functions being carried out by the relevant departments.



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