

# YOU, US AND THEM: THE MULTIPLE PROJECTS OF THE NEW SOUTH WALES LAW SOCIETY

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*This article examines the ‘true’ nature of a contemporary professional association, reporting on an interview study of the New South Wales Law Society. Once the central symbol of professionalism, there is little empirical research on the workings of associations today. Existing research questions both the propriety and the enduring strength of associational power. Associations have been shown to prioritise their professional ‘projects’, or strategies to secure status rewards, over public functions. Recent writing has argued that, as ‘inflexible’ organisations, associations have been unable to adapt to changing conditions in order to continue their collective enterprise. This article provides a wholistic account, showing that the association is a hybrid organisation with several distinct sets of features, values and outcomes — even contradictory ones. The findings reveal an association challenged to defend its role in professional knowledge, group cohesion, government relations and regulatory autonomy. However, we capture its new and renewed ‘projects’: a membership project with a profit-seeking orientation, as well as rehabilitated public and collective projects. The analysis contributes to the discussion on professional decline, supporting arguments for continuity, adaptation and alignment. This study suggests that contemporary associations, especially those retaining some formal regulatory power, are more complex, resilient organisations than typically depicted.*

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## I INTRODUCTION

‘The Law Society is a complicated beast.’<sup>1</sup>

— New South Wales Law Society leader

A core part of the discussion on the meanings of professionalism centres on the ‘true’ nature of professional associations and what roles they play — and are able to play in face of dramatic change. Professionalism is a special type of work arrangement establishing autonomy, legitimacy based on ethics and expertise, and a public commitment to high quality and care.<sup>2</sup> Historically, associations have been professions’ chief institutions for professional self-regulation, community and cooperation.<sup>3</sup> For decades now, writers have questioned the realities of the association’s (and the profession’s) public commitment: instead of (or at least second to) serving clients and the public, associational activity serves a ‘professional project’ to attain and advance the financial rewards, work autonomy and status of its members.<sup>4</sup> ‘Project’ emphasises the agency in the processes by which professional groups gain privileges.<sup>5</sup>

A more recent scholarship interrogates whether associations have any real enduring authority given drastic changes to their status and to the professions more broadly.<sup>6</sup> Because associations failed in their public role, their capacities have been greatly reduced by government. Driven by twin agendas of

1 Interview with 5L.

2 Mirko Noordegraaf, ‘Hybrid Professionalism and Beyond: (New) Forms of Public Professionalism in Changing Organizational and Societal Contexts’ (2015) 2(2) *Journal of Professions and Organization* 187.

3 Emile Durkheim, *Professional Ethics and Civic Morals*, tr Cornelia Brookfield (Routledge, 2003) 7 [trans of: *Leçons de Sociologie Physique des Moeurs et du Droit* (1950)].

4 See, eg, Tracey L Adams, ‘Self-Regulating Professions: Past, Present, Future’ (2017) 4(1) *Journal of Professions and Organization* 70, 72; David B Wilkins, ‘Who Should Regulate Lawyers?’ (1992) 105(4) *Harvard Law Review* 799; William T Gallagher, ‘Ideologies of Professionalism and the Politics of Self-Regulation in the California State Bar’ (1995) 22(2) *Pepperdine Law Review* 485.

5 Magali Sarfatti Larson, *The Rise of Professionalism: Monopolies of Competence and Sheltered Markets* (Routledge, 2017).

6 The professional ‘change’ and ‘decline’ literature includes: Richard L Abel, *The Legal Profession in England and Wales* (Basil Blackwell, 1988); RG Lee, ‘From Profession to Business: The Rise and Rise of the City Law Firm’ (1992) 19(1) *Journal of Law and Society* 31; Hilary Sommerlad, ‘Managerialism and the Legal Profession: A New Professional Paradigm’ (1995) 2(2–3) *International Journal of the Legal Profession* 159; John Flood, ‘Megalawyering in the Global Order: The Cultural, Social and Economic Transformation of Global Legal Practice’ (1996) 3(1–2) *International Journal of the Legal Profession* 169; Hilary Sommerlad, ‘“I’ve Lost the Plot”: An Everyday Story of Legal Aid Lawyers’ (2001) 28(3) *Journal of Law and Society* 335; Herbert M Kritzer, ‘The Professions Are Dead, Long Live the Professions: Legal Practice in a Postprofessional World’ (1999) 33(3) *Law and Society Review* 713; Richard L Abel, *English Lawyers between Market and State: The Politics of Professionalism* (Oxford University Press, 2003) (*English Lawyers between Market and State*); Iain Campbell and Sara Charlesworth, ‘Salaried Lawyers and Billable Hours: A New Perspective from the Sociology of Work’ (2012) 19(1) *International Journal of the Legal Profession* 89; Gerard Hanlon, ‘A Profession in Transition?: Lawyers, the Market and Significant Others’ (1997) 60(6) *Modern Law Review* 798.

competition and consumer protection,<sup>7</sup> the trend has been to strip associations of all or some of their regulatory functions, replacing them with government and/or quasi-government bodies. Sometimes the associations and these governmental bodies enter co-regulatory arrangements<sup>8</sup> in which the division of power over and responsibility for admission, practice and discipline is formally or tacitly agreed upon.<sup>9</sup> In addition, governments have taken away associations' ability to require compulsory membership, reducing associations' influence. Along with deregulation, there has been re-regulation, state-sanctioned regulation as well as standardisation and supervision or forms of managerialism within professional practice. New layers of regulation have been introduced, such as meta-regulators with responsibility for an entire sector<sup>10</sup> and which oversee the regulator bodies within it. There has also been regulatory expansion, with new forms of regulation at the international level.<sup>11</sup>

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 added danger.<sup>12</sup> Entry to the profession is increasingly determined by higher education institutions, which, by controlling enrolments, can affect the potential field of professionals.<sup>13</sup> Professional workplaces may increasingly supplant practitioners' 'professional' arrangements and values with managerial and commercial ones.<sup>14</sup> Further, as so-called 'inflexible' organisations,<sup>15</sup> it seems professional associations have not been able to adapt to these changing conditions in order to continue to protect and advance their professions. In his 2004 study of the Law Society of England and Wales, Francis concluded that in pursuit of its professional project, or its collective, status enterprise, the association is no longer effective.<sup>16</sup> Further, it was structurally incapable of articulating a new role in the 'redefined professional

7 For a broad analysis of these changes, see John Flood, 'The Re-Landscaping of the Legal Profession: Large Law Firms and Professional Re-Regulation' (2011) 59(4) *Current Sociology* 507 ('The Re-Landscaping of the Legal Profession'); Justine Rogers, Dimity Kingsford Smith and John Chellev, 'The Large Professional Service Firm: A New Force in the Regulative Bargain' (2017) 40(1) *University of New South Wales Law Journal* 218.

8 Andrew Boon, 'The Regulation of Lawyers and Legal Services' in Andrew Boon (ed), *International Perspectives on the Regulation of Lawyers and Legal Services* (Hart Publishing, 2017) 1, 19.

9 *Ibid* 12.

10 *Ibid* 18.

11 Adams (n 4) 70.

12 Roger Burritt, James Guthrie and Elaine Evans, 'Professional Associations: Past Contributions, Present Tensions and Future Opportunities' in James Guthrie, Elaine Evans and Roger Burritt (eds), *Relevance and Professional Associations in 2026* (Chartered Accountants Australia and New Zealand, 2016) 9, 11–12.

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

14 *Ibid* 325.

15 *Ibid* 347.

16 *Ibid*.

landscape'.<sup>17</sup> The association was, as he put it, 'out of touch and out of time'.<sup>18</sup>

For others, the significance of associations' decline is that it further corrodes their capacity for public service. Abel's narrative studies of the profession in England and Wales show in dramatic detail what he sees as the 'worsening crises of self-regulation': how declining conditions and the associations' own resource problems further diminish the associations' abilities to observe and correct misconduct,<sup>19</sup> never mind their will to 'champion the oppressed against injustice'.<sup>20</sup> His work shows how the activities of the solicitors' and barristers' associations are aimed at protecting their special privileges. During the process, they fight or otherwise ally with each other, their members, the branches of government, the law schools, insurers and other third-party payers, employers, competitors, the media and academic commentators.<sup>21</sup>

This article reports on an empirical study of the Law Society of New South Wales ('NSW'), an association that is distinguished from England and Wales most strikingly from the outset because it retains a (co-)regulatory function.<sup>22</sup> The aim of the article is to present a wholistic account of a contemporary professional association, with multiple projects and purposes, to contribute to the wider discussion of professional decline versus continuity and adaptation.<sup>23</sup> The findings draw on interviews with Law Society leaders, and in that way align with other scholarship that considers professional organisations, including associations, as groups that can facilitate, resist or adapt to processes of change.<sup>24</sup> However, our findings also include interviews capturing the perceptions and experiences of the NSW legal regulator and everyday Law Society members, to get a clearer understanding of a contemporary association, where the tension points and threats really are or how they are perceived in practice; and to provide a somewhat more objective view. Our study provides a close-up examination of the association and its forms of failure and renewal.

17 Ibid.

18 Francis, 'Out of Touch and Out of Time' (n 13).

19 Abel, *English Lawyers between Market and State* (n 6) 488–91.

20 Ibid 498.

21 Abel, *The Legal Profession in England and Wales* (n 6); Abel, *English Lawyers between Market and State* (n 6).

22 The systems in England and Wales, and NSW, have been treated the same as co-regulatory arrangements: see, eg, Anita Indira Anand, 'Governance Gone Wrong: Examining Self-Regulation of the Legal Profession' (2018) 21(2) *Legal Ethics* 99. However, the NSW Law Society has retained a disciplinary function, shared with the Office of the Legal Services Commissioner, while the England and Wales Law Society has lost that function to the Solicitors Regulatory Authority ('SRA'), a formal arm of the Law Society, but operationally independent and headed by non-lawyers. The SRA is in a shared regulatory arrangement with the Legal Ombudsman.

23 Eliot Freidson, *Professionalism: The Third Logic* (Polity Press, 2001); Daniel Muzio and Stephen Ackroyd, 'On the Consequences of Defensive Professionalism: Recent Changes in the Legal Labour Process' (2005) 32(4) *Journal of Law and Society* 615.

24 Muzio and Ackroyd (n 23) 618.

The findings confirm that the associations face serious threats to their ‘collective’ professional project, and show the dynamics and perceptions of this decline in four ‘historically necessary’ association roles: control over professional knowledge; managing intra-professional competition; negotiation with state and society; and regulatory autonomy.<sup>25</sup> Nevertheless, as we show, the NSW Law Society is also retaining and actively expanding its authority in certain of these areas.

Moreover, we are not simply concerned with the association’s collective function but allow for other associational purposes and their adaptations, including public ones — commitments Abel rejects as fictitious and shallow.<sup>26</sup> If ever a complete picture, associations may no longer solely concern themselves with the classic leavers of professional control. In his study, Francis of course recognised the multiple and convoluted priorities of an association but subsumed them under the collective enterprise (or assumed they could all be).<sup>27</sup> As a result, some of the workings, adaptations<sup>28</sup> and alignments<sup>29</sup> of the association were inevitably missed. There is then an incomplete picture of the association’s authority or value, especially for one with continued regulatory power. The association is, or can be, a hybrid organisation with several sets of features, objectives and values; even contradictory ones.<sup>30</sup>

Indeed, and finally, today’s associations may also be transforming into profit-seeking businesses. These are businesses that must serve their members and the government as *their* customers in order to protect the association itself, and not directly to protect the profession or the public. To this end, like other professional organisations,<sup>31</sup> associations would appear to be adopting increasingly more managerialist, commercialist and entrepreneurial principles and structures. Instead of equating the association with the profession as the literature tends to, the association should potentially be regarded as an organisation with its own interests. This trend was predicted by Abel, who believes that this role will eclipse the others; associations will, he says, become dominated by ‘bureaucrats focused on delivering services to members rather than by politicians representing the profession’s interests to the state. Apathy will grow’.<sup>32</sup> The membership itself was recently described by an association leader in the building industry, quite pointedly, as one of three of the associations’ ‘masters’ (along with government

25 Francis, ‘Out of Touch and Out of Time’ (n 13).

26 Abel, *English Lawyers between Market and State* (n 6) 497–8.

27 Francis, ‘Out of Touch and Out of Time’ (n 13).

28 Muzio and Ackroyd (n 23).

29 Michel W Lander, Pursey PMAR Heugens and J van Oosterhout, ‘Drift or Alignment? A Configurational Analysis of Law Firms’ Ability to Combine Profitability with Professionalism’ (2017) 4(2) *Journal of Professions and Organization* 123.

30 Hybridisation tends to refer to a professional organisation’s forms and practices being characterised by traditional (‘professional’) as well as managerial and entrepreneurial logics: Noordegraaf (n 2) 188.

31 *Ibid.*

32 Abel, *English Lawyers between Market and State* (n 6) 493 (citations omitted).

and the public).<sup>33</sup> A separate strand of writing on professional organisations reveals how different purposes and arrangements within an organisation can be more or less well-aligned; either competitive and contaminating or integrated and mutually supportive.<sup>34</sup> Our paper demonstrates an association trying to adapt to contemporary conditions and re-articulate its role, and along multiple lines simultaneously — not working solely or even primarily for the advancement of the collective profession, but instead seeking openings in other areas where it may be able to develop and exercise its strengths.

The article is organised as follows. We first provide our research design including to establish the transferability of our findings. Our findings that follow expand upon the theory and contextual background just outlined as applied to the NSW Law Society. Part III illustrates the association under threat, an organisation whose collective ‘project’ is diminishing. It is increasingly: losing control over professional knowledge; losing its handle on intra-professional competition; losing authority as a negotiator with the state and society; and losing regulatory autonomy. In Part IV we expand the picture and look to the association’s adaptive moves — its new and renewed ‘projects’. These include a ‘membership project’, where the association acts as a business, serving members as ‘customers’ in order to protect its own interests, and a ‘public project’, where the association emphasises ‘traditional’ values and pursues public functions to maintain its legitimacy. Finally, we analyse the association’s collective, ‘whole profession’ functions to demonstrate that it may not in fact be ‘out of time’; regulatory capacity has not been totally lost, and the homogeneous, unified profession, as an image, is not necessarily as far from the association’s grasp as others have suggested.

## II THE NSW LAW SOCIETY AND THE STUDY’S METHODOLOGY

The Law Society was informally established in the 1840s in response to the ‘problem of rogue practitioners’<sup>35</sup> and ongoing attacks from the media and the government.<sup>36</sup> From a membership of 33 in 1860,<sup>37</sup> the Law Society gradually established its reputation and accrued statutory powers, including in 1935

33 Chris Blythe, ‘Foreword’ in Chartered Institute of Building, *Understanding the Value of Professionals and Professional Bodies* (2015) 3.

34 Elizabeth Goodrick and Trish Reay, ‘Constellations of Institutional Logics: Changes in the Professional Work of Pharmacists’ (2011) 38(3) *Work and Occupations* 372; Maria Blomgren and Caroline Waks, ‘Coping with Contradictions: Hybrid Professionals Managing Institutional Complexity’ (2015) 2(1) *Journal of Professions and Organization* 78; Noordegraaf (n 2); Lander, Heugens and van Oosterhout (n 29).

35 Michael Pelly, ‘Convicts, Press Wars and Australia’s First Lawyers: A History of the Law Society of New South Wales’ [2015] (June) *Law Society of New South Wales Journal* 34, 34.

36 *Ibid* 36.

37 *Ibid*.

the powers to inspect trust accounts,<sup>38</sup> enforce ‘character’ requirements,<sup>39</sup> and discipline solicitors — whether members or not.<sup>40</sup> These powers were reconfigured but largely reinforced throughout the middle of the 20<sup>th</sup> century. In the 1990s power began to shift. First, the legal profession lost its monopoly over conveyancing,<sup>41</sup> and by the early 21<sup>st</sup> century (2004), membership of the Law Society was no longer mandatory.<sup>42</sup> Despite this, the Law Society has more than 30,000 members<sup>43</sup> — around 87% of all solicitors in NSW.<sup>44</sup>

Nonetheless, the Law Society today is part of a regulatory network, each covering different aspects of admission, practice and discipline. There is now a Legal Services Council (‘LSC’) and Commissioner for Uniform Legal Services Regulation who oversee the operation of the *Legal Profession Uniform Law* scheme, the new statutory regime governing legal practice. In 2009, the Council of Australian Governments had ‘sought to create a common legal services market across Australia by providing a single legal regime for the legal profession. The program culminated in the current regime, the *Legal Profession Uniform Law* (‘*Uniform Law*’), which commenced in July 2015’.<sup>45</sup> The scheme applies only to NSW and Victoria, though therefore almost three quarters of Australian lawyers.<sup>46</sup> The LSC comprises five members from NSW and Victoria.<sup>47</sup> As a significant part of the shift away from self-regulation, the LSC, not the Law Society, for example, has the power to set the rules and policy to underpin the *Uniform Law*.<sup>48</sup>

To complete the formal picture, the role of the Commissioner for Uniform Legal Services Regulation is to ensure that the *Uniform Law* is applied consistently and effectively across participating states (NSW and Victoria). An Admissions Committee appointed by the LSC develops the Admission Rules used by local

38 *Legal Practitioners (Amendment) Act 1935* (NSW) s 4 (‘*Legal Practitioners (Amendment) Act*’), inserting *Legal Practitioners Act 1898* (NSW) s 65 (‘*Legal Practitioners Act*’).

39 *Legal Practitioners (Amendment) Act* (n 38) s 5, inserting *Legal Practitioners Act* (n 38) s 71.

40 *Legal Practitioners (Amendment) Act* (n 38) s 6, inserting *Legal Practitioners Act* (n 38) s 75(1).

41 Professional Regulation Task Force, Law Society of New South Wales, *Report of Professional Regulation Task Force* (Report, May 1997) [16]–[20].

42 Gordon Salier, ‘The Choice Is Yours’ [2004] (April) *Law Society Journal* 56, 56.

43 ‘Better Together’, *The Law Society of New South Wales* (Web Page) <[www.lawsociety.com.au/become-a-member](http://www.lawsociety.com.au/become-a-member)>.

44 There were 34,600 admitted solicitors as at 30 June 2019: Law Society of New South Wales, *Annual Report 2019* (Report, 2019) 18.

45 Rogers, Kingsford Smith and Chellew (n 7) 222 (citations omitted).

46 For explanation on why only NSW and Victoria make up a ‘national’ scheme: see Rogers, Kingsford Smith and Chellew (n 7).

47 The Council comprises one member recommended by the Law Council of Australia; one recommended by the Australian Bar Association; two recommended by the Standing Committee of Attorneys General ‘on the basis of their expertise’ in legal practice, consumer protection, legal professional regulation, or financial management; and one appointed as chair on consultation with the Law Council of Australia and the Australian Bar Association: *Legal Profession Uniform Law 2014* (NSW) sch 1 item 2(1) (‘*Legal Profession Uniform Law*’). Members are, as far as practicable, to ‘reflect a balance of participating jurisdictions and a balance of expertise’: at sch 1 item 2(3).

48 The power to make rules is held by the LSC, established under legislation: *ibid* ss 394, 419.

admission boards (for NSW, the Legal Profession Admission Board). Officially, this leaves registration and certification, trust accounts, compliance audits and management systems directions to the Law Society (or Law Society Council) as ‘local regulatory authority’.<sup>49</sup> Consumer complaints and discipline are the formal domain of the Legal Services Commissioner — though, as we later see, this is also not exactly how responsibilities are shared in practice, with the Law Society retaining a larger disciplinary role.

The purpose of this study is to understand the Law Society as an apparently complex organisation within a labyrinthine regulatory landscape.<sup>50</sup> An interview study is appropriate to gain the multiple perspectives and experiences<sup>51</sup> of the Law Society to find ‘patterns of regularity’ that explain what it is doing and why, and its influence.<sup>52</sup> We conducted 24 semi-structured, in-depth interviews in person and over the phone. The interviews lasted between 50 minutes and 2.5 hours.<sup>53</sup> Participants were asked the following:

- when and why they became members of the Law Society and why they remain members;
- to detail any formal involvement with the Law Society (eg as committee members);
- to describe how they engage with the Law Society (as practitioners);
- to describe benefits from Law Society membership (or generally);
- to identify the Law Society’s activities and their perceptions and experiences of them (including its disciplinary and regulatory activities; its public interest and profession-promoting, advocacy activities; and the functions — like education, mentoring and guidance services — that offer benefits to members directly);
- to provide facts and examples of involvement and influence;<sup>54</sup>

49 The Law Society Council governs the Law Society. It consists of 21 elected councillors from across the profession (seats are reserved for two councillors each from corporate, government and large firm sectors) and community (seats are reserved for two councillors each from the country, suburbs, and city; one seat is reserved for a young lawyer): ‘Law Society Council’, *The Law Society of New South Wales* (Web Page) <[www.lawsociety.com.au/about-us/organisation-and-structure/council](http://www.lawsociety.com.au/about-us/organisation-and-structure/council)>.

50 This article draws on the findings of a broader research study of the value of contemporary professional associations, which included an interview study of the Law Society of NSW: Justine Rogers and Deborah Hartstein, *The Value of Contemporary Professional Associations* (Report, 2018) <[www.psc.gov.au/research-library/value-professional-associations](http://www.psc.gov.au/research-library/value-professional-associations)>.

51 Colin Robson, *Real World Research: A Resource for Users of Social Research Methods in Applied Settings* (Wiley, 3<sup>rd</sup> ed, 2011) 24.

52 Earl Babbie, *The Practice of Social Research* (Cengage Learning, 14<sup>th</sup> ed, 2016) 11, 13.

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

54 This is a classic method of validation: Robson (n 51) 280.

- to share their attitudes towards the Law Society;
- to identify challenges for the Law Society and barriers to effectiveness;
- to suggest improvement strategies and ideas for enhanced effectiveness;
- to describe other (non-Law Society) forms of support they receive as a professional; and
- to reflect on how the Law Society fares compared to an ‘ideal’ association.

The 24 participants included: the legal regulator, 10 Law Society or regional society leaders,<sup>55</sup> and 13 regular Law Society members. Participants’ details were found through the websites of the Law Society and regional societies.<sup>56</sup> Most ordinary member interviewees were found online (by searching for a specific practice type and/or location), while some were found through the professional networks of the researchers where they represented a certain desired type of participant. The aim was to achieve a purposive sample; an interview 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 (‘negative’ or ‘deviant’ cases) in order to learn about the Law Society from multiple angles and, in doing so, enhance the study’s credibility.<sup>57</sup> The following table provides a demographic breakdown of participants and their interview identifiers:<sup>58</sup>

Identifier	Gender	Location	Practice type
1L	Male	City	Government
2L	Male	City	Government
3RL	Male	Suburban	Private — medium firm
4L	Male	City	Private — solo practitioner
5L	Female	Regional	Private — small firm
6RL	Female	Regional	Private — small firm

55 There are 28 regional and suburban Law Societies and one city Law Society recognised in NSW: Law Society of New South Wales, *Memorandum and Articles of Association* (at 26 October 2017) art 12.3. In our interviews, one participant was a leader of both a regional society and the state Law Society. This participant has been identified as a ‘regional leader’ to provide as much relevant detail as possible while preserving anonymity.

56 The Law Society itself assisted the researchers in finding the names and contact details (found online and publicly available) of potential Law Society and regional society interviewees. There was after that point no involvement by the Law Society in the recruitment of interview participants, and none of the participants’ identities have been shared with the Law Society (or anyone outside the research team).

57 Alan Bryman, *Social Research Methods* (Oxford University Press, 4<sup>th</sup> ed, 2012) 390; Robson (n 51) 159; Babbie (n 52) 187.

58 Leaders and committee members of the state Law Society are identified with the letter ‘L’; leaders of regional societies with the letters ‘RL’; ordinary members with the letter ‘M’; and the legal regulator is identified when quoted.

7RL	Female	Regional	Private — small firm
8M	Female	Regional	Private — solo practitioner
9M	Female	City	Government
10M	Female	City	In-house
11M	Male	City	Private — small firm
12M	Female	City	Private — small local office in large firm network
13M	Male	City	In-house
14L	Female	City	Non-practising
15M	Male	Suburban	Private — medium firm
16M	Male	City	Private — large firm
17M	Male	City	Private — large firm
18M	Male	City	Private — ‘New Law’ firm (small local office in overseas network)
19M	Female	City	In-house
20RL	Male	Regional	Private — small firm
21M	Female	City	Government
22L	Male	City	Non-practising
23M	Female	City	Government
Legal regulator	Male	City	Non-practising

The interview study was conducted after obtaining and according to the University of New South Wales ethics approval.<sup>59</sup> As part of this approval, all participants were given the opportunity to check the findings for any researcher inaccuracy or bias and some amendments were made to enhance reporting validity.

There are some limitations in our design. The Law Society of NSW may not be representative of other associations, in law and across other professions, nationally and abroad.<sup>60</sup> In the Australian context, the Law Society is rare in its co-regulatory arrangement with the Office of the Legal Services Commissioner (‘OLSC’), and of the eight state and territory solicitors’ associations in Australia

59 UNSW Human Research Approval No HC17757, granted 11 October 2017.

60 See, eg, ‘Explore Your Industry’, *UNSW Sydney* (Web Page) <student.unsw.edu.au/useful-links>, recording 189 professional associations; ‘Professional Associations’, *The University of Sydney* (Web Page) <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.

it is one of only three with significant formal regulatory functions.<sup>61</sup> Other Anglo-American legal professional associations are similarly varied.<sup>62</sup> Within Australia, different professional associations' contexts and histories also vary, though commonalities in roles, ideologies, and aims do exist.<sup>63</sup> While each association must be understood in its particular context,<sup>64</sup> our findings incorporate significant contextual detail, to allow readers to judge their transferability across settings.<sup>65</sup> We have also cited studies throughout the paper that draw attention to similar or illustrative circumstances in other professional and/or geographical contexts. Nonetheless, as with studies of any powerful organisation or group,<sup>66</sup> there are drawbacks. For example, these groups can be more sophisticated and evasive in their public communications, including to researchers. In addition, there are limits to interview studies without observation — which would be needed to more fully understand the Law Society's organisational arrangements and ethos.

We are also mindful of the fact that we do not capture 'outsider' views, including from members of the public or government, and that these views are only partially

- 61 The Australian Capital Territory's Law Society, for its far smaller membership of around 2,470 (Law Society of the Australian Capital Territory, *Annual Report 2017–18* (Report, 2018) 18–19) retains somewhat greater formal regulatory power — including complaints-handling powers and the ability to make binding professional conduct rules: *Legal Profession Act 2006* (ACT) s 585; Law Society of the Australian Capital Territory, *Legal Profession (Solicitors) Conduct Rules 2015* (at 1 January 2016). The Northern Territory Law Society, with a far smaller membership of around 500, shares complaints-handling responsibility with an independent Disciplinary Tribunal: 'About the Society', *Law Society NT* (Web Page, 5 November 2019) <lawsocietynt.asn.au/about-lsnt/the-law-societys-role-4.html>; *Legal Profession Act 2006* (NT) ss 447–78, 481–2, 496, 499, 670; Law Society Northern Territory, *Annual Report 15|16* (Report, 2016) 33, 50. The Queensland Law Society does have a statutory complaints-handling power, but in 2015 it relinquished this role to an independent Commission: *Legal Profession Act 2007* (Qld) ss 435–9; 'Our Role', *LSC Queensland* (Web Page, 1 May 2018) <www.lsc.qld.gov.au/about-us/our-role>.
- 62 See, eg, Anand (n 22) for a description of Law Society of Ontario and its (now unusual) regulatory role; Adams (n 4) for a comparison of self-regulation, and therefore self-regulating associations, in the United Kingdom ('UK'), United States of America ('US') and Canada; Andy Boon and Toni Fazaali, 'Professional Bodies and Continuing Professional Development: A Case Study', in Sue Crowley (ed), *Challenging Professional Learning* (Routledge, 2014) 31, 41–2 for a discussion of significant changes to the structure and functions of the UK's solicitors' association.
- 63 For example, the Australian Association of Social Workers ('AASW') has a relatively stable membership of around 11,500, made up of practitioners in government, private and non-government practice — a smaller, more geographically dispersed membership than the Law Society's, but still a large and comparably varied one. The AASW has existed since 1946 and so has necessarily faced (and continues to face) many of the same changes as the Law Society. The AASW also has similar profession and membership functions, like offering optional credentials; advocating for both the profession and the public; producing publications; and organising research and networking symposia: Australian Association of Social Workers, *Annual Report 2017–2018* (Report, 2018) 8–27. For another example, the Royal Australasian College of Physicians (an association with over 25,000 members, in existence since 1938, with aims to 'educate', 'advocate' and 'innovate' for the profession and the public) describes facing emerging contextual challenges that are, as we will see below, similar to the Law Society's: '[r]apid technological advancement, increasing complexity in professional requirements and a 24/7 culture means our Fellows and trainees expect their College to provide comprehensive real world and online support and educational resources': Royal Australasian College of Physicians, *Annual Report 2018* (Report, 2018) ii, 4, 8. For lists of other Australian professional associations see above n 60.
- 64 Muzio and Ackroyd (n 23) 618.
- 65 Bryman (n 57) 392; Egon G Guba, 'Criteria for Assessing the Trustworthiness of Naturalistic Inquiries' (1981) 29(2) *Educational Communication and Technology* 75, 81.
- 66 For methodology when studying powerful groups, including the legal profession, see Rosanna Hertz and Jonathan B Imber (eds), *Studying Elites Using Qualitative Methods* (Sage Publications, 1995); Justine Rogers, 'Shadowing the Bar: Studying an English Professional Elite' (2010) 36(3) *Historical Reflections* 39.

represented by the NSW legal regulator. To go some way to address this limitation, we have included additional historical information and publicly available data, where relevant. We also note that we do not include views of solicitors who are non-members, which likely would have improved our understanding of the ‘deviant’ attitudes and irregular behaviours (and perhaps shown at least some of these to be, in fact, normal). This was primarily a function of not being able to find any non-members within the research time period, given their very small number and with limited direct recruitment options. Nonetheless, we were able to glean rich and varied data through the 24 in-depth interviews and, as described, employed means to validate them. We now present our findings.

### III AN ASSOCIATION IN DECLINE

We first consider the Law Society’s ‘decline’ in its roles classically associated with the ‘professional project’ and collective advancement: control over professional knowledge; managing intra-professional competition; negotiation with state and society; and regulatory autonomy.<sup>67</sup> These roles together can be seen as an idealised four-stage process. First, the association defines the profession’s ‘domain’ (the services it offers, and thus the knowledge it requires).<sup>68</sup> Then, acting as the primary organ of professional ethics,<sup>69</sup> it constructs and maintains ‘intra-professional agreement’<sup>70</sup> and normative values among members.<sup>71</sup> It then solidifies and publicly portrays<sup>72</sup> the profession’s ‘unified identity’<sup>73</sup> as a means of staking a ‘claim upon jurisdiction’.<sup>74</sup> Finally, the profession secures a monopoly over that jurisdiction, which the association must protect through its (continually scrutinised) role as an independent, autonomous regulator;<sup>75</sup> the

67 Francis, ‘Out of Touch and Out of Time’ (n 13).

68 Royston Greenwood, Roy Suddaby and CR Hinings, ‘Theorizing Change: The Role of Professional Association in the Transformation of Institutionalized Fields’ (2002) 45(1) *Academy of Management Journal* 58, 61–2.

69 Durkheim (n 3).

70 Greenwood, Suddaby and Hinings (n 68) 62; Francis, ‘Out of Touch and Out of Time’ (n 13) 340.

71 Aimei Yang and Maureen Taylor, ‘A Global Perspective on Public Relations Professionalism: Mapping the Structure of Public Relations Associations’ International Networks’ (2014) 91(3) *Journalism and Mass Communication Quarterly* 508, 509.

72 Rogers, Kingsford Smith and Chelley (n 7) 225.

73 Yang and Taylor (n 71) 509.

74 Greenwood, Suddaby and Hinings (n 68) 62. This process, and subsequent grant of monopoly, is sometimes termed the ‘regulative bargain’: ‘[t]he 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’: Roy Suddaby, David J Cooper and Royston Greenwood, ‘Transnational Regulation of Professional Services: Governance Dynamics of Field Level Organizational Change’ (2007) 32(4–5) *Accounting, Organizations and Society* 333, 337. For a discussion of the genesis of the term and its applications, see Rogers, Kingsford Smith and Chelley (n 7) 218 n 1.

75 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, 38 (‘The Concept of Professionalism’), citing Larson (n 5).

‘custodian’ of professional traditions<sup>76</sup> or the ‘coordinator’ of the profession’s ethical commitment.<sup>77</sup>

## A Declining Control over Professional Knowledge

Historically, the Law Society may have been able to shape the profession’s ‘domain’ by influencing professional knowledge in two distinct arenas: in pre-admission education; and in post-admission practice. As to pre-admission education: Australian undergraduate legal education changed in the late 1900s from a ‘traditional “trade school” approach, “towards the classic, liberal model of university education”’.<sup>78</sup> Association activity attempting to influence pre-admission knowledge is therefore increasingly targeted towards university degrees.<sup>79</sup> In Australia, perhaps in fact because of universities’ so-called ‘subservience to the legal profession’ in their course design, the content of undergraduate legal education is now largely settled (or ‘resistan[t] to change’).<sup>80</sup> In light of this stasis, the more dynamic current challenge to association ‘control’ comes at the post-admission stage, from workplaces, as sources — and disruptors — of professional knowledge.

Firms, operating increasingly within markets characterised by globalisation, specialisation, changing business structures and competition, have helped broaden the meaning of ‘professional knowledge’ beyond associations’ ‘traditionalist’ purview.<sup>81</sup> Practitioners working in large, global and multidisciplinary practices are moving ‘away from the core of the profession’s abstract knowledge’, no longer reliant on ‘pure, traditional academic legal knowledge’ or ‘any notion of one profession itself’,<sup>82</sup> and are becoming increasingly ‘detached from national professional regimes’.<sup>83</sup> Their firms blur disciplinary boundaries and incorporate non-legal knowledge in their practices, and no longer need an association-

76 Mark S Frankel, ‘Professional Codes: Why, How and with What Impact?’ (1989) 8(2–3) *Journal of Business Ethics* 109, 114.

77 Noordegraaf (n 2) 190 (professional authority is based on expertise and ethical commitment). Parker and Rostain point out that Durkheim’s conception did not single out the special expertise of professions as making them suitable to a professional mode of organisation: Christine Parker and Tanina Rostain, ‘Law Firms, Global Capital, and the Sociological Imagination’ (2012) 80(6) *Fordham Law Review* 2347, 2357.

78 Mary Keyes and Richard Johnstone, ‘Changing Legal Education: Rhetoric, Reality, and Prospects for the Future’ (2004) 26(4) *Sydney Law Review* 537, 549, quoting Michael Chesterman and David Weisbrot, ‘Legal Scholarship in Australia’ (1987) 50(6) *Modern Law Review* 709, 718.

79 See, eg, Francis, ‘Out of Touch and Out of Time’ (n 13) 331, who describes how associations adapted to changes to lawyer education in the UK — away from articulated clerkships, where associations had greater influence, to university education — by shifting their attention to influencing the content of law degrees.

80 Kate Galloway and Peter Jones, ‘Guarding Our Identities: The Dilemma of Transformation in the Legal Academy’ (2014) 14(1) *Queensland University of Technology Law Review* 15, 20, citing Keyes and Johnstone (n 78).

81 Francis, ‘Out of Touch and Out of Time’ (n 13) 327.

82 *Ibid.*

83 James R Faulconbridge and Daniel Muzio, ‘Professions in a Globalizing World: Towards a Transnational Sociology of the Professions’ (2011) 27(1) *International Sociology* 136, 143.

backed monopoly over legal knowledge to find a place for their work: they ‘are not ... arguing that their *legal* knowledge is most applicable for the resolution of a particular task’ — they operate as competitors in a generalised market for services.<sup>84</sup> This commercialisation is linked to a growing ‘managerialism’ in the profession, a logic that demands organisations deliver products for customers to satisfy their wants and needs. Instead of autonomous professionals, managerialism envisages employees with clear roles and responsibilities to turn organisational inputs effectively and efficiently into tangible results for customers; organisations must prove these results to critical stakeholders.<sup>85</sup> ‘Both hierarchical and market principles make this possible.’<sup>86</sup> Recent research indicates that organisational workplaces and sectors have become more important sources of standards and ethics than the wider profession,<sup>87</sup> and certain areas of professions derive professional norms less from associations, and far more strongly from seniors, clients, and insurers.<sup>88</sup>

Some Law Society members we interviewed, including some who practise outside large commercial firms, described how their work has become less connected to ‘core’ professional attributes. As one family law practitioner put it, it’s less ‘a lawyer going to court’, and more ‘going out to PR functions, getting clients ... getting referrals’.<sup>89</sup> For some members, the Law Society’s continuing education offerings failed to acknowledge the importance of these business skills and how they interact with professional obligations.<sup>90</sup> Instead, members turned to education offered by their workplaces. Some explained how these in-house programs were better quality and more relevant to their practice than the Law Society’s, including because programs were concertedly tailored to meet the firm’s specialised needs.<sup>91</sup> And while these groups turn inward to build and reinforce their professional knowledge, the association’s own adherence to ‘traditional’ values may further limit its field of influence. This generates tension, something reflected in comments from a Law Society leader, who thought that to incorporate ‘business’ or ‘commercial’ knowledge at all would be to contradict the profession’s core values (treating clients as consumers ignores the fiduciary duties integral to the lawyer-client relationship).<sup>92</sup> Finally, some in-house

84 Francis, ‘Out of Touch and Out of Time’ (n 13) 328 (emphasis in original).

85 Noordegraaf (n 2) 191–2.

86 Ibid 191.

87 See, eg, Julia Evetts, ‘The Management of Professionalism: A Contemporary Paradox’ in Sharon Gewirtz et al (eds), *Changing Teacher Professionalism: International Trends, Challenges and Ways Forward* (Routledge, 2009) 19; Julia Evetts, ‘A New Professionalism? Challenges and Opportunities’ (2011) 59(4) *Current Sociology* 406; Flood, ‘The Re-Landscaping of the Legal Profession’ (n 7).

88 For one such piece, and a summary of other research in this vein, see Leslie C Levin, ‘The Ethical World of Solo and Small Law Firm Practitioners’ (2004) 41(2) *Houston Law Review* 309, 316–18.

89 Interview with 3RL.

90 Interview with 15M.

91 Interview with 9M; interview with 10M.

92 Interview with 2L.

continuing education events (those one member described as ‘big, [and] sort of fancy’)<sup>93</sup> create additional normative forces that the Law Society cannot override or replicate: clients are often invited to or are even the targets of these events, so practitioners are reminded, in an ‘educational’ context and surrounded by their superiors and peers, that a key corollary of professional work is the ability to network and build client relationships.

Francis argues that expanded in-house training efforts (referring to large United Kingdom (‘UK’) law firms) aim to advance individual firms or sectors, rather than the profession as a whole,<sup>94</sup> again conflicting with associations’ collective project. In our interviews, we saw that as particular groups crystallise their own knowledge, they have increasingly less in common and less ‘impetus’ (to use the word of one Law Society member interviewed)<sup>95</sup> to associate with the broader profession.<sup>96</sup> As one participant said, the ‘identity’ is with the workplace, not the profession.<sup>97</sup>

## B *Intra-Professional Competition*

While competition within the solicitors’ profession has always existed,<sup>98</sup> changes to legal practice since the 1980s (including the growth in international and multi-disciplinary practice, discussed above, and legislative reforms affecting the profession’s monopoly and autonomy, discussed further below) have exacerbated existing tensions.<sup>99</sup> Associations’ abilities to maintain professional cohesion — or at least the ‘myth of collegiality’ — are in question.<sup>100</sup> And without this ‘collegiality’, the profession’s internal ‘agreements’ about behaviour and boundaries,<sup>101</sup> and individual practitioners’ senses of ‘professional’ pride (and the

93 Interview with 10M.

94 Francis observed some large firms opting out of their association’s standard educational program and developing their own commercially and globally oriented training: Francis, ‘Out of Touch and Out of Time’ (n 13) 332.

95 Interview with 10M.

96 Interview with 9M.

97 Interview with 5L.

98 Francis, ‘Out of Touch and Out of Time’ (n 13) 335.

99 Intra-professional competition has often been an aim of regulatory reform. Australia’s reforms of this nature are discussed below: see below n 138 and accompanying text. Elsewhere, this aim has been more explicit. For example, the UK’s *Legal Services Act 2007* (UK) introduced as a ‘regulatory objective’ the aim of ‘promoting competition in the provision of services’ (at s 1(1)(e)), forming part of a set of objectives that ‘underscore the need to promote the rule of law, provide consumer protection, and ensure access to justice, which are objectives that are not always readily understood as being a purpose of legal profession regulation’: Laurel S Terry, Steve Mark and Tahlia Gordon, ‘Adopting Regulatory Objectives for the Legal Profession’ (2012) 80(6) *Fordham Law Review* 2685, 2701. Terry, Mark and Gordon describe this objective as ‘controversial, [though its] underlying goal — encouraging greater access to justice — is a laudable one’.

100 See, eg, Julian Webb, ‘Turf Wars and Market Control: Competition and Complexity in the Market for Legal Services’ (2004) 11(1–2) *International Journal of the Legal Profession* 81, 84–9.

101 Greenwood, Suddaby and Hinings (n 68) 62.

‘individualized self-regulation’ that pride entails)<sup>102</sup> are at stake. Changes have affected areas of the profession differently. Some face competitive pressures directly<sup>103</sup> and must deal with the dissatisfaction and disheartenment that competitive price-cutting can entail.<sup>104</sup> These lawyers and firms increasingly see each other as competitors, rather than peers, and have less need for the association as a hub — or a place to ‘associate’.<sup>105</sup> Groups whose work is less susceptible to competitive forces, including regional and government practitioners, have increasingly less in common with their commercial, urban peers. This disparity, a secondary effect of the different forms of intra-professional competition and one we discuss below, further ‘threatens the sense of a collective profession’ and the association’s pursuit of the professional project.<sup>106</sup>

Our interviews showed signs of intra-professional (or intra-sector) competition among commercial urban lawyers and firms. One participant described commercial firms as ‘vicious competitors in a highly competitive market’; for professionals operating as ‘a good business’, the need to establish a reputation among clients (rather than among peers) and so to ‘differentiate [themselves] in the crowded market’ was what motivated doing better work than the perceived minimum standards that professional values require.<sup>107</sup> These commercial motivations and the performance indicators they entail can also produce competitive work cultures, driving practitioners to dedicate ever more hours to their work,<sup>108</sup> and that commitment can hamper member engagement with — and interest in — the association or the broader profession. One member we interviewed explained the simple calculus: 200 work emails per day means no time to even unwrap (and/or no interest in reading) the *Law Society Journal*.<sup>109</sup> This disconnection is exacerbated by the fact that, as discussed above, large firms

102 Evetts, ‘The Concept of Professionalism’ (n 75) 37.

103 Many writers have noted that the makeup of contemporary legal markets affects corporate and personal practice areas differently. See, eg, Garoupa, who examines the effects of globalised legal practice and argues that globalisation has promoted ‘segmentation between corporate and personal markets around the world’, increasing competition between global and local firms in the corporate sector, while insulating (and perhaps instigating reregulation for) personal legal services markets: Nuno Garoupa, ‘Globalization and Deregulation of Legal Services’ (2014) 38 *International Review of Law and Economics* 77, 78. Deregulation aimed at promoting local (corporate and/or multi-jurisdictional) firms’ competitiveness can therefore further this segmentation. See, eg, Lark Hill, noting that country-specific regulatory reforms, including the *Uniform Law* in Australia, can be designed to reduce regulatory impediments to competitiveness on national and global stages: Louise Lark Hill, ‘Alternative Business Structures for Lawyers and Law Firms: A View from the Global Legal Services Market’ (2017) 18 *Oregon Review of International Law* 135, 153–4.

104 Francis, ‘Out of Touch and Out of Time’ (n 13) 335–6.

105 Ibid 336.

106 Ibid 335.

107 Interview with 15M.

108 See, eg, Maryam Omari and Megan Paul, ‘“Shut Up and Bill”: Workplace Bullying Challenges for the Legal Profession’ (2014) 20(2) *International Journal of the Legal Profession* 141, with general overview at 144–6. The authors suggest that professional associations have scope to provide effective research and guidance to ameliorate some of these issues on a broader scale: at 154–6. See also Christine Parker and David Ruschena, ‘The Pressures of Billable Hours: Lessons from a Survey of Billing Practices inside Law Firms’ (2011) 9(2) *University of St Thomas Law Journal* 619, 623–4.

109 Interview with 16M.

increasingly construct their own specialised professional knowledge and build communities around that knowledge, rather than with the profession as a whole.

This competitive culture among commercial firms and within their markets, and the decline in association utility it entails, may be less relevant to practitioners outside urban centres or not in those firms. One regional participant explained that regional practitioners were unlikely to be able to sustain the kind of ‘specialised’ practice that symptomises (and is seen as a suitable response to) increasing intra-professional competition for urban and large firm lawyers.<sup>110</sup> In a context of declining monopolies, a context detailed later on, he said: ‘We definitely have to generalise more. It’d be lovely to just do one section of the *Stamp Duty Act*, but it’s not going to happen.’<sup>111</sup> Non-competitive (or more ‘professional’) practices are shaped — or perhaps constrained — by the community setting: ‘You know you will run into your client downtown. You don’t want to have to cross the street ... The client’s real, as is the client on the other side ... I think that’s the difference, is here they’re real. In the city, we could hide.’<sup>112</sup> Regional practitioners also often did not have access to in-house education programs, relying much more on the Law Society and regional societies (and the practitioner communities they represent) for practice updates, education, and networking opportunities.<sup>113</sup> A government lawyer also spoke of a less competitive work environment than that in commercial practice — government practitioners don’t need to ‘find work’, so don’t need to build reputation or self-promote in the same way;<sup>114</sup> ‘collective’, non-competitive professionalism might have some hope among government lawyers. However, this member also felt that the lack of need to network with the profession meant that government lawyers didn’t need the Law Society — or any form of broader professional community — at all.<sup>115</sup> Forces of competition can therefore not only drive disconnection within sub-sectors of the profession, but between them. This parallel process of segmentation, whereby differences in interests and values between sectors within the profession are exacerbated and entrenched, will be difficult for any association to halt.

110 Francis, ‘Out of Touch and Out of Time’ (n 13) 329.

111 Interview with 7RL.

112 Ibid.

113 Ibid; interview with 20RL.

114 Interview with 21M.

115 Ibid. One in-house practitioner we interviewed did not share this view and thought it was ‘necessary to remain a member ... to keep in touch with the profession’: interview with 10M. As we expand upon below (see n 241 and accompanying text), the Law Society appears to have been aware of the potential divergence of these groups from the ‘community’ for some time. In 2012, for example, it commissioned a report surveying in-house and government lawyers’ working arrangements, including their ability to access formal and informal mentoring and other forms of practitioner interconnection: Law Society of New South Wales, *Inside In-House Legal Teams: Report on a Survey of Corporate and Government Lawyers* (Report, March 2013) <[www.lawsociety.com.au/sites/default/files/2018-04/In%20house%20legal%20teams%20report.pdf](http://www.lawsociety.com.au/sites/default/files/2018-04/In%20house%20legal%20teams%20report.pdf)>.

## C Negotiation with State and Society

To succeed in the ‘professional project’, a profession must appear (sufficiently) ‘unified’ for its association’s claims to effective representation and regulation to be plausible.<sup>116</sup> The association’s relationship with government (and therefore the public) also determines whether any ‘negotiations’ on behalf of the profession will succeed. Weisbrot argues that the Law Society’s past ability to resist degradation of the profession’s monopoly<sup>117</sup> required ‘carefully drawn’ submissions that both downplayed internal rifts and projected ‘professional unity’ — unity then maintained by ‘shared adherence’ to professional values and substantial shared collective interests.<sup>118</sup> Without those common bases, such convincing advocacy on behalf of the profession may be increasingly difficult.<sup>119</sup>

### 1 Declining Homogeneity and Claims to ‘Representativeness’

In the previous subsections we have seen how changes to the nature of professional knowledge and practice priorities risk driving sectors within the profession, and individual firms and practitioners, apart. Aside from knowledge source and practice context, professional status is or has been also served by ascriptive criteria (race; gender; class) and related informal qualities, such as ways of self-presenting and other affinities.<sup>120</sup> These characteristics can, again, be defined pre-admission (personal qualities; educational background) or during practice (specialisation; geography). For example, one of our interview participants, a regional lawyer, considered lawyers’ increasingly different educational backgrounds (as law schools grow in number) as a ‘threat to [the profession’s] collegial spirit’.<sup>121</sup> This comment does not appear to reflect a desire for the return to an elite profession where members must have attended a certain number of prestigious universities, but it does reveal how growing diversity means lawyers are less likely to know one another before practice, and how this strains professional identity and community.

116 Greenwood, Suddaby and Hinings (n 68) 62; Francis, ‘Out of Touch and Out of Time’ (n 13) 340.

117 During the 1980s–90s reforms that dismantled aspects of the profession’s monopoly, further reform recommendations — including the NSW Law Reform Commission’s calls for ‘abolishing all restrictive practices, fusing the [barristers and solicitors as one] profession, and taking away all self-regulatory functions’ — were not adopted, perhaps as a result of successful negotiation in the form of ‘strong resistance from the profession’: Edward Shinnick, Fred Bruinsma and Christine Parker, ‘Aspects of Regulatory Reform in the Legal Profession: Australia, Ireland and the Netherlands’ (2003) 10(3) *International Journal of the Legal Profession* 237, 243.

118 David Weisbrot, ‘Competition, Cooperation and Legal Change’ (1993) 4(1) *Legal Education Review* 1, 4–5.

119 See, eg, Elizabeth Chambliss and Bruce A Green, ‘Some Realism about Bar Associations’ (2008) 57(2) *DePaul Law Review* 425, 432–3; Francis, ‘Out of Touch and Out of Time’ (n 13) 340–1.

120 Abel, *The Legal Profession in England and Wales* (n 6); Justine Rogers, ‘Representing the Bar: How the Barristers’ Profession Sells Itself to Prospective Members’ (2012) 32(2) *Legal Studies* 202 (‘Representing the Bar’); Hilary Sommerlad, ‘The “Social Magic” of Merit: Diversity, Equity, and Inclusion in the English and Welsh Legal Profession’ (2015) 83(5) *Fordham Law Review* 2325.

121 Interview with 20RL.

One consequence of demographic and educational divergence, moreover, is an increasingly heterogeneous set of practitioners' views and values. Members and leaders we interviewed spoke of viewpoint diversity in general (particularly contrasting regional and metropolitan practitioners) and the potential for divisiveness within the association ('every single [lawyer in NSW] would have a different view' on policy).<sup>122</sup> A past President of the Law Society explained this practice: when constructing a 'representative' view on behalf of the profession, the association does not 'canvass' members' views, but instead represents them 'through its committees, ... drawn from its membership';<sup>123</sup> that representation is, as a member we interviewed said, a basic purpose of committees.<sup>124</sup> Whether this succeeds will depend greatly on the proactive engagement of members — a situation which, for reasons including the competitive pressures and divergences discussed above, has become increasingly perilous. Proactive association engagement requires time and energy that a number of our interview participants said they were simply too busy or disinterested to expend.

In practice, the association's struggles to maintain and project 'collective' values have driven internal divisions and generated public controversy. In our interviews, many participants discussed the Law Society's participation in debates about same-sex marriage reform,<sup>125</sup> and how the Law Society's public position (that same-sex marriage legislation should be introduced, as a matter of equality before the law)<sup>126</sup> met with backlash from some members of the Law Society.<sup>127</sup> These members collected a 250-signature requisition seeking resolutions 'that the Law Society be "censured" for "incorrectly holding out that all solicitors in NSW had united in supporting the marriage equality laws"'.<sup>128</sup> The Law Society's then-President publicly clarified that the views were those of a majority of the Law Society Council, rather than members;<sup>129</sup> a meeting to obtain members' views 'and the debate it would generate ... would have been divisive and potentially distressing to many of [the Law Society's] members'.<sup>130</sup> As one of our interview

122 Interview with 8M.

123 'A Message from the President of the Law Society of NSW', *The Law Society of New South Wales* (Web Page) <[www.lawsociety.com.au/advocacy-and-resources/news-and-media/message-from-the-president](http://www.lawsociety.com.au/advocacy-and-resources/news-and-media/message-from-the-president)>.

124 Interview with 8M.

125 Interview with 2L; interview with 3RL; interview with 4L; interview with 7RL.

126 'Barristers, Solicitors and Doctors Unite to Support Marriage Equality Laws' (Media Release, 19 August 2017) <[www.lawsociety.com.au/advocacy-and-resources/news-and-media/uniting-on-same-sex-marriage](http://www.lawsociety.com.au/advocacy-and-resources/news-and-media/uniting-on-same-sex-marriage)>.

127 These events were reported in the mainstream news: see Michaela Whitbourn, 'Law Society Faces Fresh Row over Same-Sex Marriage', *The Sydney Morning Herald* (online, 21 September 2017) <[www.smh.com.au/national/nsw/law-society-faces-fresh-row-over-samesex-marriage-20170921-gylqvc.html](http://www.smh.com.au/national/nsw/law-society-faces-fresh-row-over-samesex-marriage-20170921-gylqvc.html)>. These reports included online comments from the Law Society's Facebook page such as '[a]nd who asked the members for their opinion?'.

128 Michaela Whitbourn, 'Law Society Backs Down in Same-Sex Marriage Row', *The Sydney Morning Herald* (online, 5 October 2017) <[www.smh.com.au/national/nsw/law-society-backs-down-in-samesex-marriage-20171005-gyv09f.html](http://www.smh.com.au/national/nsw/law-society-backs-down-in-samesex-marriage-20171005-gyv09f.html)>.

129 'A Message from the President of the Law Society of NSW' (n 123).

130 Whitbourn, 'Law Society Backs Down in Same-Sex Marriage Row' (n 128).

participants said, the Law Society was in ‘a difficult position’.<sup>131</sup> Believing itself obliged to comment on important socio-legal/rule of law issues,<sup>132</sup> (a belief many interview participants supported, and one which we examine further later),<sup>133</sup> the Law Society spoke in its capacity as the profession’s ‘custodian’, outwardly projecting homogeneity only to exacerbate internal divisions.

## 2 *Losing Government Favour*

Aside from the practical challenges discussed above, a number of our leader-participants simply felt that the government had a negative opinion of the legal profession.<sup>134</sup> The strongest comments came from a regional leader, who — in a deliberately overly-dramatic tone — said that government wished for ‘the destruction of anyone called a lawyer’ and was concertedly redefining ‘legal work’.<sup>135</sup> Other participants, including the legal regulator, also felt that ‘government respect for law’ as a profession has diminished over time. While these ‘government views’ cannot be verified, consumerist reforms to professional practice, like those affecting the Australian legal profession since the 1980s, have widely been acknowledged as aimed at dismantling professions’ monopolies and their ‘protectionist and anti-competitive’ practices.<sup>136</sup> Australia’s reforms saw solicitors lose protection over many areas of their work and guaranteed sources of income: conveyancing was opened to non-solicitors (‘over the bitter opposition of the Law Society’);<sup>137</sup> barristers could take on clients without the need for a solicitor; advertising prohibitions and other price-stabilising measures (including the prohibition on conditional cost agreements, allowing ‘no win, no fee’ arrangements) were lifted.<sup>138</sup>

131 Interview with 7RL.

132 ‘A Message from the President of the Law Society of NSW’ (n 123).

133 Of course, it is not necessarily the case that all association members believe associations should take ‘political’ positions at all: see, eg, Sue Kamm, ‘To Join or Not to Join: How Librarians Make Membership Decisions about Their Associations’ (1997) 46(2) *Library Trends* 295, 299.

134 Interview with 1L; interview with 2L.

135 Interview with 20L.

136 See summary in Rogers, Kingsford Smith and Chellew (n 7) 237. See also Shinnick, Bruinsma and Parker (n 117) 242.

137 Weisbrot (n 118) 7. The actual impact of lost monopoly on lawyer job protection is difficult to measure: see, eg, Kevin McDougall and Reid Mortensen, ‘Bush Lawyers in New South Wales and Queensland: A Spatial Analysis’ (2011) 16(1) *Deakin Law Review* 75 — who argue that there is no evidence that the maintenance of a monopoly over conveyancing in Queensland, as opposed to the introduction of non-lawyer conveyancers in NSW, in fact ensured ‘better support for the provision of legal services’ in Queensland than NSW: at 103. The authors acknowledge that while many of the conditions in the two states were comparable, provision of legal services — therefore, protection of lawyer jobs — may have been bolstered in NSW, or hindered in Queensland, by factors for which their analysis could not control: at 103–8. Its differential effects on individual lawyers may hinder the association’s efforts to reinforce the profession’s interests and collective values and advocate on that basis. One of our interview participants described how the loss of conveyancing monopoly disproportionately affects practitioners (in this participant’s example, regional practitioners) who rely more on that work as a source of steady income, and so contributes to heterogeneity within the profession.

138 Rogers, Kingsford Smith and Chellew (n 7) 237–8.

In 1993, a NSW Law Reform Commission (“NSWLRC”) investigation into complaints against lawyers found that the legal profession’s self-regulation (via the Law Society and the NSW Bar Association) ‘did not serve the needs of complainants, the practising profession, or the community at large’,<sup>139</sup> including that there was a ‘profound gap between what angers clients (and others) sufficiently to go to the trouble of complaining, and what lawyers and their professional associations see as important enough to merit serious attention, disciplinary action or compensation’.<sup>140</sup> In response to the report and alongside fears that lawyers were self-interested and in a position to take advantage of clients’ vulnerabilities, the proposed reforms sought reduction in self-regulation by the associations.<sup>141</sup> At the time, the Law Society’s Council had

wide statutory powers (some of which [were] delegated to committees) to: receive, investigate, and assess complaints ...; to dismiss complaints ...; and to refer appropriate complaints for hearing before the Legal Profession Standards Board [for ‘unsatisfactory professional conduct’ matters] or the Legal Profession Disciplinary Tribunal [for ‘professional misconduct’ matters].<sup>142</sup>

The Law Society was resistant to significant change, and its preliminary submission to the NSWLRC’s report included that the existing system was ‘fundamentally sound’, though ‘accountability and lay review’ could be strengthened, and there should be less ‘emphasis on the adversarial system’ and greater ‘flexibility [to achieve] redress for complainants’.<sup>143</sup> The Law Society was in favour of a ‘Lay Observer’ role, an informal dispute resolution scheme (within the Law Society), and for the Legal Profession Disciplinary Tribunal (which at that time would have comprised two solicitor members and one lay member)<sup>144</sup> to have capacity to make a broader range of available remedial orders.<sup>145</sup> Following the report and legislative implementation in 1994, as mentioned, the NSW legal profession became co-regulated, by the OLSC alongside the Law Society and the NSW Bar Association.<sup>146</sup> In the case of solicitors, the OLSC receives complaints and refers a portion (typically those ‘involving the more complex conduct issues’) to the Law

139 Steve Mark, ‘The Office of the Legal Services Commissioner: Consumer Protection’ (2009) 90 *Precedent* 12, 13.

140 New South Wales Law Reform Commission, *Scrutiny of the Legal Profession: Complaints against Lawyers* (Report No 70, February 1993) 4 (‘*Scrutiny of the Legal Profession*’).

141 Chris Edmonds, ‘Misconduct of Australian Lawyers under Legislation Based on the National Model: Aligning the Common Law Tests with the New Statutory Regime’ (2013) 39(3) *Monash University Law Review* 776, 779. Similar situations have arisen elsewhere — Adams outlines the social context for change in the US: Adams (n 4) 75.

142 *Scrutiny of the Legal Profession* (n 140) 13 [2.19].

143 *Ibid* 11 [2.7].

144 *Ibid* 104 [4.173].

145 *Ibid* 11 [2.8].

146 ‘History’, *Office of the Legal Services Commissioner* (Web Page, 13 August 2018) <[www.olsc.nsw.gov.au/Pages/lsc\\_aboutus/olsc\\_history.aspx](http://www.olsc.nsw.gov.au/Pages/lsc_aboutus/olsc_history.aspx)>. Disciplinary decisions can also be appealed to the Supreme Court: *Civil and Administrative Tribunal Act 2013* (NSW) ss 82 (1)(c), 82(3)(a), 83. See also *Legal Profession Uniform Law* (n 47) s 314(3).

Society's Professional Standards Department.<sup>147</sup> The proportion of complaints handled by the Law Society is, compared to its prior primary role, vastly reduced: of the 2,645 complaints received in 2017–18, the Law Society handled 481.<sup>148</sup> As outlined in Part II, this arrangement is now part of a wider regulatory system, overseen by the LSC.

Although the Law Society's formal powers have certainly diminished, our interviewees' comments on the effects of these changes were mixed. One of the Law Society leaders said that outsiders needed to understand that the Law Society was only one 'cog' in the regulation of lawyers: 'At the end of the day ... government owns the system'.<sup>149</sup> These comments evoke Abel's claim that association-regulators are positioned to act as scapegoats for government when there are regulatory failures.<sup>150</sup> One member-participant did feel that the OLSO sounded 'more serious' as a regulator than the Law Society, perhaps reflecting the views that led to its establishment. However, this participant also said the Law Society's regulatory role was unique in its capacity to provide 'protective' regulation — like, she said, 'a parent disciplining a child'.<sup>151</sup> Later, we discuss how the Law Society has adapted to its co-regulatory position, and the regulatory 'toughness' it has developed perhaps as a means of safeguarding the role and the trust that it has.

#### IV ADAPTATIONS: THE ASSOCIATION'S NEW AND RENEWED PROJECTS

Although the picture of 'decline' strongly suggests that the association's ability to maintain its collective professional project is waning, associations on the whole are no longer such narrowly focused entities. In this Part we present findings that suggest that the Law Society is pursuing not just the profession's collective advancement, but also its own survival as a corporation (with an emphasis on maintaining membership), as well as its 'traditional', public interest ethos. Alongside its pursuit of these 'new' projects, the association has also developed new strategies to advance its contemporary collective project — renewing its identity as a regulator in the face of legislative rearrangements; targeting its efforts at practitioners and groups to rekindle the profession's unified community; and looking outward to reimagine the 'collective' profession on a national and global scale. What we see in these findings isn't a shifted emphasis so much as a diversified one; membership and public projects are seen as independent

147 Law Society of New South Wales, *Professional Standards: 2017 Annual Report* (Report, 2017) 9.

148 Law Society of New South Wales, *Professional Standards Department Annual Report 2017/2018* (Report, 2018) 8, 10.

149 Interview with 1L.

150 Abel, *English Lawyers between Market and State* (n 6) 492.

151 Interview with 12M.

of collective advancement, albeit with significant overlaps, and many points of potential synergy, or conflict, between projects.

## **A Membership Project**

Associations are becoming businesses with their members as their customers, especially where membership is no longer compulsory, as is the case for the NSW Law Society. Associations must be, as one Law Society leader put it, ‘very focused on understanding [their] membership and their different needs’ and targeting services to them.<sup>152</sup>

Overall, member and leader interviewees felt both that the Law Society had improved its services for and representation of members across demographics,<sup>153</sup> and that this was precipitated by the change to voluntary membership. In robust terms typical of lawyers, a regional leader described this as the Law Society having ‘worked out that they’re actually a member-driven association, not just there to keep [their premises at] Philip Street’.<sup>154</sup> We did not have an ‘inside’ view of the Law Society’s organisational or managerial arrangements, and so cannot comment on whether its business processes are keeping pace with external changes.<sup>155</sup> However, our interviews suggested that some proactive adaptations are taking place, and that the Law Society is taking on a more ‘corporate’ character, in addition to maintaining the committee and consensus elements that has historically defined its ‘professional’ structure.<sup>156</sup> These adaptations are discussed below under three broad categories: member perks; personalised services; and mediated change.

### **1 Member Perks**

At the most basic level and somewhat removed from their profession- and public-serving activities, associations work, like any commercial business, to appeal to practitioners as consumers. Associations have accepted that in order to maintain their voluntary member base, offering some tangible ‘inducements’ to membership is important.<sup>157</sup> The Law Society provides a number of consumer and commercial ‘perks’ to members: gym memberships; childcare; deals on hotels, airfares, and car rentals; online shopping offers; and special personal (not

152 Interview with IL.

153 This adaptation can also be seen as part of the Law Society’s renewed strategy for collective advancement of the profession, discussed further below.

154 Interview with 7RL.

155 For a recent analysis of the association’s governance model in the Canadian context, see Anand (n 22).

156 Lander, Heugens and van Oosterhout (n 29) 129.

157 See, eg, Mary Frances Kordick, ‘Influences on Membership in Professional Nursing Associations’ (PhD Dissertation, George Mason University, 2002) 52.

professional) insurance rates.<sup>158</sup> The Law Society's physical premises in Sydney's CBD also serves as something of a member perk, offering venue hire (including for specified mediation and arbitration purposes) and a library collection.<sup>159</sup> These activities — which many in our interviews noted were important benefits they derived from membership<sup>160</sup> — are the simplest manifestation of the Law Society's corporate character.

## 2 Personalised Services

As one Law Society leader noted, the association's member services go beyond 'providing free pens and pencils',<sup>161</sup> and address members not simply as consumers in the activities discussed above, but also as individual professionals.<sup>162</sup> The Law Society is increasingly trying to personalise services to reach every member in every practice area. These efforts form part of its '2016–2019 Strategic Plan': to '[u]nderstand and prioritise the diverse needs of the profession'; to '[d]evelop and enhance legal communities across private, corporate, government and regional practice'; and to '[a]dapt and evolve [its] services to changing member needs'.<sup>163</sup> Its existing committees also cover a range of practice and special interest areas.<sup>164</sup> As one leader we interviewed explained, these initiatives are based on an understanding that 'every section [of the profession] needs to be communicated to in a different way' and involve specific attention to certain groups: '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.'<sup>165</sup> This approach extends to the Law Society's regulation of law firms, through trust accounts and other compliance measures, where it acknowledges that each firm's circumstance is unique and that there is no universal answer to the profession's issues: 'We work with the firms. We don't knock down what they're saying, we build on that.'<sup>166</sup>

Others also spoke of how the state Law Society is working to improve integration and coordination with its satellite city, suburban and regional Society branches,<sup>167</sup>

158 'Member Benefits Program', *The Law Society of New South Wales* (Web Page) <[www.lawsociety.com.au/become-a-member/member-benefits-program](http://www.lawsociety.com.au/become-a-member/member-benefits-program)>.

159 'Law Society Library', *The Law Society of New South Wales* (Web Page) <[www.lawsociety.com.au/about-us/library-and-shop](http://www.lawsociety.com.au/about-us/library-and-shop)>.

160 Interview with 7RL; interview with 12M; interview with 16M; interview with 17M.

161 Interview with 4L.

162 These represent more than mere perks which Abel suggested were going to be mindlessly handed out: Abel, *English Lawyers between Market and State* (n 6) 493.

163 Law Society of New South Wales, *Annual Report 2017* (Report, 2017) 33.

164 At present, the Law Society has 28 committees: *ibid* 5.

165 Interview with 5L.

166 Interview with 22L.

167 There are 28 regional and suburban Law Societies and one city Law Society recognised in NSW: Law Society of New South Wales, *Memorandum and Articles of Association* (n 55) art 12.3.

including via its ‘Regional Co-Ordinator’ office.<sup>168</sup> A regional leader in our interviews described how the Co-Ordinator shares relevant state Society materials with regional leaders, who then approach their community to see ‘if there’s interest, and if [the regional members] want to push a certain perspective on something’, allowing them to coordinate a position within the region to bring back to the state Society.<sup>169</sup> This may in turn foster a sense among regional members that they are an important part of the profession and that their contribution is meaningful: the increased integration with regions was preventing the association from becoming ‘big city-centric’.<sup>170</sup> The Law Society has also, according to regional practitioners in our interviews, been increasingly responsive — ‘coming out to the regions more. It appears if we’re proactive, they’re proactive. We just needed to actually tell them we wanted them.’<sup>171</sup> For regional practitioners, another felt, the Law Society’s efforts ‘to involve the regions’, particularly by improving regional members’ access to state Law Society materials (including via its ‘roadshows’ to update members on changing legislation) were ‘terrific’;<sup>172</sup> another described the Law Society’s ‘webinar’ education programs as ‘amazing’ for members — like regional members — who may be unable to attend in person.<sup>173</sup> As we will see below, these functions also have benefits for fostering the profession’s ‘unified’ community as part of the association’s pursuit of the collective professional project.

### 3 *Mediator of Change*

Another key role in the ‘business’ of the association is as a ‘mediator’ of change — interpreting and reconfiguring changing conditions to help professionals, their organisations, and their sectors, adapt. As we will see, these activities can also align with associations’ other functions by maintaining stability and advantage for the profession (its collective project) and high standards of competence and ethics (its ‘public service’ role). One Law Society leader in our interviews said: ‘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’.<sup>174</sup> A number of participants described the Law Society’s approaches to upholding this responsibility. Two specific examples given were its ‘Thought Leadership’ program<sup>175</sup> — which includes regular events

168 ‘Regional Solicitors’, *The Law Society of New South Wales* (Web Page) <[www.lawsociety.com.au/legal-communities/regional-solicitors](http://www.lawsociety.com.au/legal-communities/regional-solicitors)>.

169 Interview with 6RL.

170 Ibid.

171 Interview with 7RL.

172 Interview with 8M.

173 Interview with 7RL.

174 Interview with 5L.

175 Interview with 4L.

like panel discussions and symposia to address pressing professional issues<sup>176</sup> — and its ongoing Future of Law and Innovation in the Profession (‘flip’) project,<sup>177</sup> whose first output was a report and recommendations, in implementation, for responses to emerging challenges associated with change.<sup>178</sup> One Law Society leader described this project as ‘an enormous initiative ... to try to equip lawyers for the future’.<sup>179</sup> All of these efforts, another leader explained, are an attempt to put the Law Society ‘at the forefront of changes and developments to better inform members of the profession, to peer over the horizon’<sup>180</sup> — again reinforcing this (internal) view of the Law Society as a well-resourced, prescient guide with its members’ interests at heart.

Some participants noted specific emerging challenges facing members where the Law Society had an especially important role to play. For example, many leaders spoke of the growing prominence of the powerful corporate client, and the increasing commercial and business pressures on members. In response, the Law Society was said to be working to ensure members see the association as their ‘traditional’, professional guide. One leader explained the association’s role as one to support members in ethical practices that, as professionals, they are inherently striving to maintain — a role therefore of particular importance when commercial pressure seems to be working the other way:

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 ... 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.<sup>181</sup>

One member-participant related a story of how the Law Society’s routine trust account audit was similarly valuable (and tailored to particular contexts) as a ‘backbone’, particularly for new practices: ‘[The audit] focuses our mind and ensures we’re on top of everything that we need to be — and [the Law Society is] also very helpful and supportive, you know, appreciating that the law firm is just

176 Law Society of New South Wales, *Annual Report 2017* (n 163) 3.

177 Interview with 1L; interview with 4L; interview with 5L; interview with 7RL.

178 Law Society of New South Wales, *Annual Report 2017* (n 163) 11. In November 2017, the Law Society entered into a five-year research partnership with UNSW Law to generate a stream of research responding to the issues raised by the FLIP report, such as ‘legal technology, clients’ needs and expectations, new ways of working, community needs and legal education, artificial intelligence and the practice of law and technological solutions to facilitate improved access to justice’: ‘Collaboration with UNSW: FLIP Stream’, *The Law Society of New South Wales* (Web Page) <[www.lawsociety.com.au/about-us/advocacy/flip/UNSW-collaboration-FLIP-stream](http://www.lawsociety.com.au/about-us/advocacy/flip/UNSW-collaboration-FLIP-stream)>. It held its first annual FLIP conference in September 2018, and has begun hosting ‘Behind the Buzz Words’, a bimonthly series on a range of industry buzz words: ‘The FLIP Inquiry Series: Behind the Buzz Words’, *The Law Society of New South Wales* (Web Page) <[www.lawsociety.com.au/about-us/Law-Society-Initiatives/flip/inquiry-series-behind-buzz-words](http://www.lawsociety.com.au/about-us/Law-Society-Initiatives/flip/inquiry-series-behind-buzz-words)>.

179 Interview with 1L.

180 Interview with 4L.

181 Interview with 14L.

getting started and that there was a learning curve involved<sup>182</sup>.

A Law Society leader explained how part of the Law Society's guidance initiative has involved responding to changes in professional practice, making its services (in this case its 'Ethics Assistance Line')<sup>183</sup> not only more 'responsive', but also more relevant: 'We can't hide behind anything ... we need to be very responsive because [our members] need the answer [to their ethical dilemmas] and they need it now'.<sup>184</sup> To that end, the Law Society now uses email and its website to maintain its 'policy [that] all matters are at least dealt with on the day ... we've shortened the time required to provide that assistance',<sup>185</sup> and, by reference to its own data about complaints and general 'knowledge about how the profession is working',<sup>186</sup> develops its educational offerings for members 'in tandem with what the profession needs'.<sup>187</sup>

At the same time, others suggested that the Law Society's approach was not to simply remodel its existence according to the very commercial pressures it aims to help its members resist (or at least, handle). For these participants, the Law Society's value to members as a professional association was inextricably linked to the professional principles it upholds.<sup>188</sup> One regional leader explained that the membership requires a guiding body driven by something other than market forces, which, as we saw above, already shape members' behaviour via their work.<sup>189</sup> A member agreed: market forces are incapable of 'ensuring that people have an incentive to stick within the ethical boundaries' and cannot be the sole source of a practitioner's identity and reputation, to be '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'.<sup>190</sup> A leader also agreed that the association's purpose was to be something of a stabiliser in members' professional ecosystems:

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

182 Interview with 18M.

183 The Law Society's Ethics Unit, staffed by 'a team of experienced ethics solicitors', runs the 'ethics assistance line', offering 'practical and confidential guidance to resolve ethical dilemmas and to help avoid complaints from clients or colleagues': 'About the Ethics Unit', *The Law Society of New South Wales* (Web Page) <[www.lawsociety.com.au/practising-law-in-nsw/ethics-and-compliance/ethics/about](http://www.lawsociety.com.au/practising-law-in-nsw/ethics-and-compliance/ethics/about)>. It is free to all solicitors via email and phone from 9am to 5pm, Monday to Friday.

184 Interview with 14L.

185 Interview with 22L.

186 Interview with 14L.

187 Interview with 22L. 'What the profession needs' might also in this case align with what individual members need, or want: one member, for example, said 'it would be worthwhile maintaining membership' in the Law Society for the ethics assistance line alone: interview with 10M.

188 Cf Abel, who predicts, as mentioned, a bureaucratic role for the professional association: Abel, *English Lawyers between Market and State* (n 6) 493.

189 Interview with 20RL.

190 Interview with 13M.

that the values of being a legal practitioner are upheld, so that professional standards are upheld ... The association has a different function to a law firm.<sup>191</sup>

In light of the increasing prominence of workplaces and sectors as ‘sites and sources’ of professionalism<sup>192</sup> and the growth of intra-professional competition, at least in certain areas, members recognised that some ‘professional’ oversight was (more than ever) necessary. One member, a practitioner in a large commercial firm, explained that because firms are becoming increasingly competitive and less likely to share resources, the association plays an important ‘Switzerland neutrality role’.<sup>193</sup> Another participant, a government practitioner, 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 developing standards of practice and ethics.<sup>194</sup> Several participants also agreed that leaving regulation to the market, even with legislation in place, would allow practice to ‘slide too far’<sup>195</sup> toward competition at the expense of ethical, high-quality, ‘professional’ practice; clients should not be seen by professionals as merely ‘commodities to make money’ or transact.<sup>196</sup> Even if standards were externally imposed (eg with legislated mandatory continuing professional development (‘CPD’) 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’.<sup>197</sup>

In this way, these practitioners want their association to offer some guidance other than what they can get from their workplaces, and also value the association’s ability to perhaps temper some of the competitive behaviour that, as we saw above, is becoming increasingly challenging for members. The association’s survival as a business depends on its ability to resist external forces and to continue giving members what they want. And as will become relevant again below, the association’s ‘mediator’ role and its ability to maintain members’ individual ‘professional’ identities can also be critical to its success in pursuit of the collective advancement of the profession.<sup>198</sup>

191 Interview with 5L.

192 See above Part II(B). See also Flood, ‘The Re-Landscaping of the Legal Profession’ (n 7); Rogers, Kingsford Smith and Chellew (n 7).

193 Interview with 17M.

194 Interview with 9M.

195 Interview with 3RL.

196 Interview with 2L.

197 Interview with 21M.

198 See, eg, Greenwood, Suddaby and Hinings (n 68) 58–62.

## **B Public Project**

Traditional images of associations depict a typically formless institution dedicated to its profession's public commitment. The association has specific roles for the public directly, including the two we focus on below, advocacy and regulatory functions. These serve the profession in its collective project and indeed represent an important part of the association's own survival as a membership organisation, but are not necessarily designed with these secondary purposes in mind.

### **1 Public Interest Advocacy**

As was foreshadowed above in the same-sex marriage example, a number of interviewees expressed a belief that the Law Society had a duty, as a non-government body, to advocate on behalf of the public, and to protect democratic values. As one member put it:

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 ... [The government doesn't] have that particular interest, or bias towards the public — they have an interest in policy.<sup>199</sup>

Others agreed that the Law Society had value for the public as something of a 'check' on government:<sup>200</sup> 'I mean somebody's got to keep the government on their toes about [law reform that affects individuals' rights]'.<sup>201</sup> This characterisation aligns with the suggestions we saw earlier that the Law Society's relationship with government is increasingly adversarial — and these views suggest that the Law Society is sometimes willing to put its duty as public defender above the profession's own interest in a settled relationship with government. Of course, this characterisation of the relationship with government was not unanimously felt, and others maintained that the Law Society's efforts were valued: 'We're certainly seen as trusted advisors to government';<sup>202</sup> 'We're the canary in the mine, essentially — as an association that's our role'.<sup>203</sup>

This law reform, oversight role was described by some participants as 'free advice' for the government (and therefore the taxpayer): 'We spend money out of our own members' pockets [to inform our submissions on legislation] ... and then we convince the government';<sup>204</sup> 'If you've got a committee of 25 expert [practitioners taking time off work] ... That's a two-hour committee meeting,

199 Interview with 8M.

200 Interview with 1L; interview with 2L.

201 Interview with 6RL.

202 Interview with 5L.

203 Interview with 3RL.

204 Interview with 2L.

once a month, plus reading papers ... So if you multiply that [by the number of committees] you start getting a notion of how much value we put into law reform, for free'.<sup>205</sup>

## **2 Public Interest Regulation**

As we discuss further below, the Law Society continues to exercise disciplinary power, now shared, and as we soon describe, it remains involved in standard-setting, albeit through the Law Council of Australia ('LCA'), a joint body of Australian law societies and Bar associations.<sup>206</sup> Though clearly relevant to the advancement of the profession, some of the interviewees' beliefs also promote the notion that association self-regulation is, on balance, beneficial for the public interest. Many of the interviewees felt that the profession's own 'experience' and 'expertise' was necessary to set and enforce meaningful professional standards:<sup>207</sup>

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'.<sup>208</sup>

The value of self-regulation for the public was also said to stem from the association's commitment to 'deeper' values than those government pursues in its own regulatory efforts. On a general level, the association's regulation was seen as connected to basic democratic values ('a system that underpin[s] our social being'),<sup>209</sup> rather than to a particular policy-driven aim (such as government might pursue). This point was most poetically expressed by a Law Society leader in relation to the content and enforcement of codes of ethics and conduct:

[Although now legislated], the conduct rules don't emanate from the government. Those ethical standards have their genesis from the days of Cicero ... 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.<sup>210</sup>

This notion of an overarching 'professional ethics', albeit perhaps not one so

205 Interview with 5L.

206 'Home Page', *Law Council of Australia* (Web Page) <[www.lawcouncil.asn.au](http://www.lawcouncil.asn.au)>.

207 Interview with 2L; interview with 4L; interview with 7RL; interview with 15M.

208 Interview with 22L.

209 Interview with 14L.

210 Interview with 22L.

ancient, has been verified to some extent empirically across professions.<sup>211</sup> Others have reported association leaders' and members' views that association regulation is simultaneously in the interests of both the profession and the public.<sup>212</sup> We explore this perspective further below.

Finally, many participants made the simple point that the association's regulatory role saves significant government (and therefore taxpayer) money and resources. Many noted that the Law Society's regulatory functions were carried out by its committees of volunteers and the 'huge saving' this represented:<sup>213</sup> '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'.<sup>214</sup> This cost element, across its activities, is perhaps an understated feature of associational continuity.

We now see, when we look at the Law Society's revived regulatory stance, these arguments and examples are not the Law Society's only claims to effective and efficient professional regulation and legitimate authority, and other elements have perceived public benefits too.

### **C Collective Professional Project**

We return now to the collective project analysed above to demonstrate that despite pervasive challenges, some of its elements remain intact. Indeed, the above public-serving adaptations are certainly relevant to the Law Society's ability to authoritatively negotiate with government, one of the strands of collective status, and its member-facing adaptations are relevant to its ability to influence professional knowledge (via its close relationship with members), another part of its traditional control. Furthermore, as we discuss in this Part, the evidence indicates that in the NSW Law Society's case, 'decline' in relation to regulatory autonomy and community/homogeneity functions is not unambiguous.

211 Barry and Ohland, in a 'wide-ranging descriptive survey of the literature related to ethics' in the engineering, health, business and law professions, found that while each profession's ethics evolved differently depending on context, there was a 'common recognition that engineering ethics, medical ethics, business ethics, and legal ethics are, in fact, professional ethics', with certain aspects 'common among many disciplines': Brock E Barry and Matthew W Ohland, 'Applied Ethics in the Engineering, Health, Business, and Law Professions: A Comparison' (2009) 98(4) *Journal of Engineering Education* 377, 377, 384.

212 See, eg, 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(1) *International Journal of the Legal Profession* 5, 7; Francis, 'Out of Touch and Out of Time' (n 13) 338; Susan Margaret Henczel, 'The Impact of National Library Associations on Their Members, Employing Organisations and the Profession' (PhD Thesis, RMIT University, 2016) 266.

213 Interview with 2L; interview with 4L; interview with 5L; interview with 6RL; interview with 18M; interview with 23M.

214 Transcript 1L.

## 1 Retaining and Strengthening Regulatory Power

As we saw above, the Law Society no longer enjoys full regulatory autonomy. However, the picture is not explicitly one of decline. Though the uniform legislative reform has created a hierarchical regulatory framework (with the Law Society toward the bottom), in practice, the LSC's control over practice and conduct standards is less exclusive than its formal authority would indicate.<sup>215</sup> The LCA, mentioned earlier and of which the NSW Law Society is a member, is permitted to play an ongoing role in practice and conduct rules. That said, the LCA must engage in consultations (with the LSC, the Commissioner and the public) for any amendments to be made.<sup>216</sup> A final draft is presented to the LSC, which may approve the draft before submitting it to a Standing Committee of NSW and Victoria Attorneys-General, which holds ultimate authority to veto rules or require further consultation or consideration.<sup>217</sup>

However, turning to the profession's declining disciplinary autonomy: while the OLSC is an independent statutory body, it is not state-funded; its regulatory function is, though independent of the profession, also still independent of the state.<sup>218</sup> From the perspective of a number of the participants, this avoids some potential problems with state regulation including that government would be a 'partial' regulator, and that its expectations of lawyers were uninformed and its standards set too low.<sup>219</sup> While some participants felt that the profession was being 'attacked' by government, there was a general sense of confidence in the association's regulatory role and of respect from the OLSC as co-regulator: 'There's been a good relationship [with the OLSC] right from the beginning ... and that relationship of trust and cooperation is really vital'.<sup>220</sup> Many participants felt that the co-regulatory arrangement was successful and rigorous, and in fact more resource-efficient than self-regulation via the association alone.<sup>221</sup> The data suggests that the OLSC and Law Society do apply standards uniformly in

215 In addition, the approach of the 'Uniform Commissioner' introduced in Part II, seems to be hands-off in practice. Their role is to 'promote compliance with [the] requirements' of the legislation; 'ensure the consistent and effective implementation' of the disciplinary process in both states, including via 'the development and making of appropriate guidelines': *Legal Profession Uniform Law* (n 47) ss 398(2)(a)–(b). To date, the Uniform Commissioner has issued one guideline in respect of complaints and discipline, which sets out factors that local regulators may take into account when exercising their absolute discretion in relation to internal reviews of complaints decisions: Commissioner for Uniform Legal Services Regulation, *Internal Review of Decisions of Local Regulatory Authorities* (Guideline, 26 October 2016).

216 *Legal Profession Uniform Law* (n 47) ss 427(1)–(5).

217 *Ibid* ss 427–8. All of the LSC's work is overseen by this Standing Committee.

218 The OLSC is funded by the Public Purpose Fund (derived from interest earned on lawyers' trust funds), and its decisions are not reviewed by government: 'FAQs', *Office of the Legal Services Commissioner* (Web Page, 3 July 2019) <[www.olsc.nsw.gov.au/Pages/lsc\\_faqs.aspx](http://www.olsc.nsw.gov.au/Pages/lsc_faqs.aspx)>.

219 Interview with 1L; interview with 9M; interview with 20RL; interview with 21M.

220 Interview with 5L. There were some conflicting views on the levels of cooperation in the past (interview with 3RL), but participants were in agreement about the positive relationship with the OLSC today.

221 Interview with 5L; interview with 6RL; interview with 14L; interview with 22L. See above n 146 and accompanying text for the most recent disciplinary data and the Law Society's contribution.

making their decisions: complaints that are handled by the Law Society can be reviewed by the OLSC, and in 2017–18 none of the OLSC’s 42 reviews resulted in a change from the Law Society’s original decision.<sup>222</sup> Members also supported the association’s retention of (shared) regulatory power. Many felt that it was important for a professional regulator to be ‘in touch’ with the profession, and that even within a large and diverse profession, standards carry the weight of peer opinion and the risk of peer sanction, and are more meaningful, when set by the profession — via the association — itself.<sup>223</sup> The Law Society retaining some regulatory responsibility seems to have kept these perceptions alive, even if its role overall is reduced. These comments suggested that what one participant called the ‘cooperative relationship’<sup>224</sup> between the OLSC and the Law Society has led to little material difference between perceptions of self-regulatory autonomy and this qualified form of ‘co-regulatory autonomy’.

Further, while the Law Society may be responsible for a comparatively smaller proportion of professional discipline, it is not clear that additional layers of regulation have in fact hampered its regulatory efforts. If anything, the Law Society appears to have renewed its identity as a rigorous regulator. Several participants said they saw the Law Society as a ‘tougher’ regulator, enforcing and espousing higher and more stringent standards than the government (in legislation) or the courts (when reviewing decisions).<sup>225</sup> While these comments acknowledge the presence of the state in professional regulation, they still allow for the prospect of a strengthened association role. Legislated terms and standards (eg what constitutes ‘unsatisfactory professional conduct’ in a disciplinary context)<sup>226</sup> are left largely open to interpretation by courts,<sup>227</sup> and are — as a result of consumer protection legislation reform — more expansive than definitions were at common law (and in a time of association self-regulation).<sup>228</sup> The legislation’s broadened

222 Law Society of New South Wales, *Professional Standards Department Annual Report 2017–2018* (n 148) 17. Some commentators might see this as a result of the Law Society being ‘too dominant in the power-sharing arrangements’: Christine Parker and Adrian Evans, *Inside Lawyers’ Ethics* (Cambridge University Press, 3<sup>rd</sup> ed, 2018) 93.

223 Interview with 5L; interview with 10M. A couple of interviewees said it did not matter who did the regulating and, as detailed at the end of this section, one said it would be better if discipline was not handled by the association.

224 Interview with 5L.

225 Interview with 1L; interview with 2L; interview with 3RL; *ibid*; interview with 11M; interview with 16M.

226 *Legal Profession Uniform Law* (n 47) s 296 (emphasis in original), containing an inclusive definition: ‘For the purposes of this Law, *unsatisfactory professional conduct* includes conduct of a lawyer occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer’.

227 See, eg, a recent appeal decision on the identically worded provisions in the *Legal Profession Act 2004* (NSW) ss 496–8, in *Potkonyak v Legal Services Commissioner [No 2]* [2018] NSWCA 173. ‘Although unsatisfactory professional conduct and professional misconduct are defined in the legislation, the terms, as defined, are open-ended, thus requiring the decision-maker to make an evaluative determination’ as to whether the conduct meets the requisite definition: at [143] (Beazley P). These open-ended definitions were deliberate legislative choices: see Edmonds (n 141) 784, 788.

228 See, eg, Edmonds (n 141) 788, which also argues that courts have not, despite changing legislative schemes and objectives, abandoned the pre-reform common law definitions.

range of conduct that can be deemed punishable leaves room for regulators to be ‘harsher’, and gives courts greater scope to agree with punishments imposed. If the Law Society intends to be (as both members and leaders in our interviews said it was) ‘tough on [its] own [members]’,<sup>229</sup> it should now, if anything, have greater ability to do so. Of course, that these decisions are capable of being overturned at all — and, as a Law Society leader explained in our interviews, when ‘too tough’ they sometimes are<sup>230</sup> — is a sign of a lack of regulatory autonomy. But, as the existence of over a century of case law attests,<sup>231</sup> this itself is hardly new.

Many participants described how the Law Society’s ‘toughness’ was a means to serve the profession’s collective interests<sup>232</sup> (‘You get one rotten apple, it ruins it for everybody’;<sup>233</sup> ‘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 unforgiving in my opinion’),<sup>234</sup> and acknowledged that this was necessary to preserve the association’s own existence (‘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’).<sup>235</sup> One leader explicitly linked the public benefits of association regulation to the survival of the association and the membership:

[The Law Society] 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.<sup>236</sup>

Francis’s study showed the same, ultimately unsuccessful, adaptive response from the Law Society of England and Wales: keen to ensure that it is ‘seen as a “model regulator”’, it is ‘tightening standards ... [to] comply with the renegotiated “social contract” offered by the government’.<sup>237</sup> The Law Society was at that time at imminent risk of losing power, which it then did a few years later.<sup>238</sup>

Of course, a ‘tough’ disciplinary approach may mean the association as a business struggles to maintain its members’ loyalty. In Francis’ study, practitioners saw

229 Interview with 5L.

230 Ibid.

231 See Edmonds (n 141) 789, citing *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750 as the ‘source of the common law concept of professional misconduct’.

232 Interview with 11M; interview with 16M.

233 Interview with 2L.

234 Ibid.

235 Interview with 5L.

236 Interview with 3RL.

237 Francis, ‘Out of Touch and Out of Time’ (n 13) 338.

238 Regulatory control was transferred, in 2007, to the Solicitors’ Regulatory Authority (‘SRA’), an independent and operationally separate ‘arm’ of the Law Society, headed by non-lawyers, as well as, in 2010, a Legal Ombudsman, not affiliated with either the SRA or the Law Society.

their Law Society's tough regulation as 'a hindrance on [lawyers'] ability to earn a living. ... They do not see the Law Society doing anything to help them; they see it simply in terms of its policing and punitive functions'.<sup>239</sup> One participant we interviewed felt similarly: 'I consider the Law Society to be my regulator, rather than my professional helper ... [it felt] like the policeman that was waiting for me to do something wrong'.<sup>240</sup> For some, like this participant, the incongruity of the membership association with regulatory power may have an alienating effect and undermine the association's membership functions discussed above. Others felt, meanwhile, that the Law Society's disciplinary sanctions were 'harsher for some', 'dependent on who you know'.<sup>241</sup> Losing members' faith can then dampen the association's efforts to preserve the professional community, discussed below.

## **2 Traditional Professional Community**

At the same time as it shores up its regulatory function, especially discipline, the Law Society is also reinforcing its role as hub for a unified, 'traditional' professional community. By emphasising the identity benefits of membership and the professional values it serves for otherwise separate or even isolated groups, the Law Society is attempting to bring those groups back into its fold. At the same time, facing external challenges and changing circumstances, the Law Society is trying to change what that 'fold' is, and redefine a new inclusive professional community. As we have illustrated, there are risks that differences between practitioners are only becoming more entrenched. However, the Law Society's increased attention to diverse views and representation of all sectors — a form of 'managed heterogeneity'<sup>242</sup> within the association — may go some way to maintaining members' faith that they are a part of 'the profession' that the association represents.

Certain community effects arise as by-products of the Law Society's personalisation of member services, including its increased attention to practitioners who might otherwise get most of their 'professional' identity and knowledge from the workplace (in particular, large-firm, in-house and government lawyers). One leader explained that the Law Society is working hard at trying 'to help [government and in-house lawyers] feel connected to the whole profession through [the Law Society], instead of feeling like they're a silo within the profession that doesn't quite fit'.<sup>243</sup> As a result, he added, the Law Society has seen membership rates in those sectors improve. Similar attention to regional practitioners through regional Law Society branches has also had the effect of

239 Francis, 'Out of Touch and Out of Time' (n 13) 338 (citations omitted).

240 Interview with 11M.

241 Interview with 23M.

242 Francis, 'Out of Touch and Out of Time' (n 13) 345.

243 Interview with 5L.

creating a more ‘unified’ professional stance. One regional leader described this process in relation to ‘briefing days’, where Law Society leaders meet with regional society leaders, and

for example, the [Law Society’s] 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.<sup>244</sup>

There was evidence that the Law Society is seeking to produce and promote, like other associations,<sup>245</sup> a more inclusive collective identity. One of the main critiques of associations is that they have directly and/or indirectly helped maintain the exclusivity and elitism of professionalism through, for instance, formal and informal rules prohibiting the admission of women and non-citizens to the profession and, in the UK context, as illustrative, non-white men from dining at the Inns of Court, and setting intentionally high membership and qualification fees to ensure only a certain type of ‘gentlemanly’ solicitor can afford to enter.<sup>246</sup> The NSW Law Society’s founding members constituted the colony’s legal elite; their preoccupation was lobbying a government that was targeting their high fees and work.<sup>247</sup> By contrast, in our interviews, many participants noted the Law Society’s efforts to include non-traditional entrants,<sup>248</sup> for example, women lawyers through its ‘Advancement of Women Charter’ and Women’s Mentoring Program, described by one participant as ‘absolutely terrific’.<sup>249</sup> This expansion of the profession’s collective identity, if it is to be successful as a means of collective advancement, also requires exposing members to an image of an inclusive profession, characterised by diversity — rather than the image of a singular, special and distinct identity that has typically marked out a profession. Some interview participants noted how the Law Society’s publications include content designed to depict and champion a diverse profession:<sup>250</sup>

[The publications] have got bundled in like the ‘human stories’ sort of element ... they are obviously focusing on also presenting the diversity within with the

244 Interview with 6RL.

245 For example, the Inns of Court: Rogers, ‘Representing the Bar’ (n 120).

246 For an extensive historical analysis of and comparison between the ‘supply control’ mechanisms of the barristers’ and solicitors’ professions in England and Wales, see Abel, *The Legal Profession in England and Wales* (n 6).

247 Michael Pelly and Caroline Pierce, *Defending the Rights of All: A History of the Law Society of New South Wales* (Law Society of New South Wales, 2016) 20–1, 30, citing JM Bennett, *A History of Solicitors in New South Wales* (Legal Books, 1984).

248 Interview with 2L; interview with 3RL; interview with 5L; interview with 10M.

249 Interview with 12M. In a similar tone, another member described a Law Society women’s networking event as ‘really excellent’: interview with 9M.

250 Interview with 19M; interview with 21M.

fraternity ... [they have] showcased people from all different walks of life doing interesting things in the law. I think that is important to have that reinforced, [that the profession] is not cookie-cutter ... It's nice to have a Society that is representing all of us, reflecting that diversity and not just being about, you know, one black- or grey-suited way.<sup>251</sup>

### 3 *National and International Community*

While the association is still seeking collective advancement on a local-profession scale, as it always has, it is now increasingly looking at new forms of collective advancement that go beyond geographical borders. The Law Society is also forging 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. As one leader put it:

What we try to do is make everyone feel like they are part of the whole professional body of New South Wales, and Australia, and the region, and internationally — through the ways that we feed into and have relationships with the Law Council of Australia, LAWASIA,<sup>252</sup> and international bodies like the International Bar Association,<sup>253</sup> the Union Internationale des Avocats<sup>254</sup> ... those are some of the bodies that we're engaged with, and our members can become actively involved through us.<sup>255</sup>

Another participant felt that globalisation provides opportunities to evolve the profession and its practices consistently across jurisdictions, which is in turn beneficial for international practice. He felt that international integration of the legal professional community makes sense and remains possible, despite change, because lawyers' personalities and values are relatively homogenous worldwide:

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

251 Interview with 10M.

252 Law Association for Asia and the Pacific: 'LAWASIA: The Law Association for Asia and the Pacific', *LAWASIA* (Web Page) <[www.lawasia.asn.au](http://www.lawasia.asn.au)>.

253 A London-based international association for legal practitioners, Bar associations and law societies: 'International Bar Association: The Global Voice of the Legal Profession', *International Bar Association* (Web Page) <[www.ibanet.org](http://www.ibanet.org)>.

254 A Paris-based international non-governmental organisation whose motto is, in English, 'Bringing Together the World's Lawyers': 'UIA: International Association of Lawyers', *International Association of Lawyers* (Web Page) <[www.uanet.org/en](http://www.uanet.org/en)>.

255 Interview with 5L.

of course that facilitates the way legal business is being done today.<sup>256</sup>

In this way, for collective purposes, the Law Society, a state-based association, is trying to make its local community boundaryless while also extending its perimeters to include national and international associations and practitioners.

At the same time, as one of the many points of alignment,<sup>257</sup> these efforts at cultivating ‘traditional’ community, now one with different features, are connected to the association’s public function or the possibility of that function. In fostering a community, there can be the consciousness of public service commitments, supporting individual self-regulation, and the cohesion required for mentoring and peer supervision. Moreover, these efforts serve the association’s corporatist, membership agenda. Perhaps this move also reflects the rise of new regulators and other organisations that some observers say are beginning to usurp the local associations’ roles, and potentially the national meta-regulators’ too. 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 bargain<sup>258</sup> exists on an international level — now between powerful conglomerate professional service firms and ‘quasi-regulatory actors’ like transnational trade organisations.<sup>259</sup> The association must now maintain not only its collective (and membership and public) standing, but its own standing as a professional organisation, now that there are other actors on the scene. Nonetheless, as Adams has said in her recent analysis of self-regulation, associations need to be careful: the risk of national and international uniformity is that these higher-level bodies could replace local roles.<sup>260</sup> By positioning itself as central, the NSW Law Society is doing what it can to prevent that from happening.

## VI CONCLUSION

Although they are a primary symbol of professionalism, there are surprisingly few studies of contemporary professional associations, including in law. The general agreement has been that associations are failing at collective advancement, the professional project in its original form, as well as in their public regulatory functions. Our study provided evidence of the NSW Law Society’s declining control over professional knowledge and cohesion, a weakened stance in certain respects in its dealings with government, and infringements of the regulatory autonomy needed for its collective advancement.

256 Interview with 22L.

257 Noordegraaf (n 2).

258 See above n 74 and accompanying text.

259 Suddaby, Cooper and Greenwood (n 74) 354.

260 Adams (n 4) 81.

However, our article also revealed an association trying to adapt to current conditions and re-establish its role. We argued that the Law Society is not working solely or even primarily to maintain traditional forms of collective control, but instead creating and expanding opportunities in other areas. We termed and examined these adaptations as its new membership project, and its renewed public and collective projects. The term ‘project’ captures — and captured — the agency of organisations, including associations, with which they can resist, modify and expedite change. As our findings showed, many of these projects have aligned purposes and outcomes, but we saw also the association’s tense position as an organisation reacting to immense counterforces.

Regarding its membership projects, our findings confirmed and shed light on the association’s status as a business; a business needing to keep its membership.<sup>261</sup> We argued that the Law Society’s activities indicate how today’s associations, like other professional organisations, are hybrid organisations, with commercial and professional goals and practices. Contemporary associations seek to secure their own survival as business organisations with ‘professional’ features and commitments, separate to, though necessarily reliant on, the survival of the profession. We showed how the Law Society, in this pursuit, offers tangible perks and tailors services to individuals and individual sectors. It also navigates changing circumstances as a mediator and stabiliser for its members, particularly in the face of the rising influence of the workplace and powerful corporate clients. To this end, the Law Society is actively working to stay relevant.

Associations, like the Law Society, are also trying to re-establish their public compact, which is clearly a component of the collective project, but also has unique, public-serving manifestations that go beyond simply trying to further the profession’s own interests. We saw how, for example, the Law Society seems willing to maintain a difficult relationship with government in order to ‘keep it on its toes’ about law reform, and how it risks the alienation of its own membership when advocating rule of law issues in the public interest. We also heard evidence of its shortcomings, for instance, serious challenges to its influence due to workplace authority, fragmentation, and membership disengagement. The participants described their experiences of their organisations, and sometimes their specialty areas, in terms that confirm their presence as central ‘sites and sources of professional meaning’ and priority.<sup>262</sup> We also heard from some participants, continued concerns about the consistency of disciplinary enforcement.

Notwithstanding, there was evidence that members appreciate the association’s efforts and influence. In some respects, this appreciation is more keenly felt in the context of the workplace influence just mentioned, specifically, that of large

261 Abel, *English Lawyers between Market and State* (n 6) 493.

262 Rogers, Kingsford Smith and Chellew (n 7) 230.

firms and their clients over their employees, including regarding the second, their in-house counsel.<sup>263</sup> The Law Society's membership expressed strong support for an association-regulator to temper some of the features of aggressive commercialism and managerialism, dynamics that legislation and government agencies alone, they felt, are not able to influence and/or ought not, given the importance of an independent profession. Moreover, we saw how, as a regulator, the Law Society is seen as tougher than its OLSC and court counterparts. We provide a focused evaluation of the Law Society's regulatory activities and status in another article.<sup>264</sup> However, to note here, it seems declining conditions are strengthening, to a significant degree, the Law Society's public commitment to its lawyers' competence and ethics.<sup>265</sup>

We turned back to the collective project to show how it is not clear that the NSW Law Society is wholly in decline as the literature would suggest. The regulatory picture remains ambiguous and there is still a need to better understand the processes of standard-setting in the *Uniform Law* context. However, it seems like the Law Society has, if anything, blossomed in its new disciplinary role and, like other associations, exercises more authority in practice than its formal co-regulatory status and remit would suggest.<sup>266</sup> Moreover, it is able to maintain the traditional community, to a significant extent, by bringing members into the fold under the rubric of inclusivity (demographic background, geography, etc). Finally, the Law Society is turning outward, reflecting how the meaning of professional community has itself evolved to be more national- and international-looking, and is finding a central role for itself on that stage. As we showed throughout the article, these collectivist activities have public, regulatory benefits too, by maintaining a community (real and imagined) within which ethical norms make sense and individual pride and self- and peer-regulation are possible.

Further, in many contexts,<sup>267</sup> as here, governments (knowingly or otherwise) continue to rely on the normative influence and regulatory activities of professional associations for the maintenance of professional standards and ethics, via the construction of 'professionalism'. While perceived market failures and regulatory shortcomings saw the Law Society lose significant power in the competition and consumer reforms from the 1980s, the Law Society now seems to have recast itself as the solution to (the contemporary versions of) both

263 With the help of government, this influence, especially in the form of managerial practices and commercial values, has spread throughout the profession: *ibid* 236.

264 Deborah Hartstein and Justine Rogers, 'Professional Associations as Regulators: An Interview Study of the Law Society of New South Wales' (2019) 22(1–2) *Legal Ethics* 49.

265 Cf Abel, *English Lawyers between Market and State* (n 6) 488–91.

266 As another example, the New Zealand co-regulatory arrangements have been described as both 'successful' and 'genuinely co-regulatory', as well as a regime for continued association power: Selene E Mize, 'New Zealand: Finding the Balance between Self-Regulation and Government Oversight' in Andrew Boon (ed), *International Perspectives on the Regulation of Lawyers and Legal Services* (Hart Publishing, 2017) 115, 138.

267 Cf above nn 61–3 and accompanying text.

problems. Its members and leaders still consider ‘professionalism’ to be distinct from ‘business’, and see association regulation and advocacy as central to the maintenance of that distinction. And while for some participants there was a sense of general antagonism from government, as we illustrated, this seems to be providing a form of unity which may in turn reinforce the association’s public-facing, profession advancement role.

The NSW Law Society is a well-established association that might be struggling with what might eventually prove fatal threats for certain of its projects; clearly the reality of multiple purposes and demands we analysed indicates an ambiguous authority. However, by considering the association as a complex, hybrid organisation, and looking at all of its main organisational functions, we see the Law Society as a mostly resilient, confident organisation. In this way, the study supports literature showing the adaptive agency of professional organisations and their leaders,<sup>268</sup> recognising that, like other legal organisations (including law firms), associations have not been especially agile organisations. The NSW Law Society is clearly trying to maintain the collective project scholars are most interested in. But it is also trying to rehabilitate or double-down on its public-serving (rule of law) and regulatory commitments, while also transforming into a member group with a corporate, profit-seeking orientation. Our investigation has shown that without accounting for all three ‘projects’ as an overlapping, potentially chaotic or symbiotic set, any picture of an association will be necessarily incomplete.

268 Thomas B Lawrence, Roy Suddaby and Bernard Leca, ‘Introduction: Theorizing and Studying Institutional Work’ in Thomas B Lawrence, Roy Suddaby and Bernard Leca (eds), *Institutional Work: Actors and Agency in Institutional Studies of Organizations* (Cambridge University Press, 2009) 1; Muzio and Ackroyd (n 23) 641.