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**PROFESSIONALISATION, ETHICS AND INTEGRITY
SYSTEMS: SUMMARY ACCOUNT**

REPORT FOR THE PROFESSIONAL STANDARDS COUNCIL

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**CHARLES STURT
UNIVERSITY**



THE UNIVERSITY OF
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SECTION 1 – INTRODUCTION

The Professional Standards Council (PSC) assists in the preparation of, approves and monitors *Cover of Excellence* schemes that require occupational groups who choose to participate in them to raise their professional standards and provide better protection for consumers. These schemes involve the provision of limited liability to the participating occupational groups.

Participating occupations in these PSC schemes are required to have or develop (among other things) a code of ethics, a complaints and discipline system and a program of professional development.

The PSC's role is one of meta-regulation. For it has a monitoring and accountability role in relation to self-regulatory procedures, including the afore-mentioned complaints and discipline systems, codes of ethics, and so on.

Ethico-Professional Standards

Professionalism and professional standards are not all about ethics. Technical standards and expertise need to be distinguished from ethical standards and moral virtues. For example, an accountant may properly be thought of as doing her job 'professionally' when she accurately prepares a very complex and detailed tax return in accordance with the tax laws and the rules of arithmetic.

Moreover, professional standards also include commercial and market based principles, e.g., anti-monopoly principles that are not *overtly* ethical in character.

However, our focus in this report is on professional standards that are also ethical standards. These ethico-professional standards (as we will call them) obviously include overtly ethical standards such as honesty, respect for privacy, and avoidance of conflicts of interest.

However, it needs to be stressed that some technical and market-based standards are not only professional standards, but also ethical standards. Avoiding engaging in insider trading is a market-based principle enshrined in the law; as such it is a professional standard for company directors and the like. However, it is also an ethical standard for members of the relevant occupational groups. Similarly, technical safety standards are professional standards for engineers; but they are also ethical standards, given the moral significance of, for example, loss of human life due to failure to comply with safety requirements.

Moreover, there are a number of broad-based ethical goals that indirectly underpin some technical, legal and/or commercial standards. Such ethical goals include the public interest and consumer protection. Thus the specific tax laws constraining the professional practice of the above-mentioned accountant reflect, or should reflect, the

application of principles of fairness and the public interest in relation to the tax to be paid by different income groups.

Given that many professional standards are also ethical standards, and given that professional standards often serve ethical goals such as consumer protection, a key concern of the PSC is necessarily the promotion of ethico-professional standards.

Distinguishing the Traditional Professions from Market-based Occupations

Over the first seventy years of its existence as an autonomous state Australia developed a unique form of state-mediated capitalism, with state intervention in many areas of economic activity, from the imposition of tariffs on imported goods, to the setting of wage levels. As in other English speaking liberal democracies, the influence of neo-liberal doctrines over the past thirty years has seen a reaction against such state intervention, with the 'free market' held up as an ideal, which actual arrangements should be moving towards and, as far as possible, approximating.

A free market in this sense can be seen as a place where a number of potential sellers – people in possession of a good, which they are prepared to exchange for some sum of money – and buyers – people who want the good and have a sum of money they are prepared to exchange for it – come together. Each of these market actors has the following features: they are rational – they will act in the way that most effectively leads to the satisfaction of their wants; they are self-interested in that their wants do not include the satisfaction of the wants of others; and they are independent in that none can or will force any other to satisfy their wants. Given their possession of these features the only way in which any market actor will be able to get what they want is by engaging in a trade – that is, a voluntary exchange of goods. Preliminary to trade, market actors engage in offers, to find out at what price other market actors are prepared to engage in trade. Finally, market actors are fully informed, in the sense that the offers made can be inspected by each of the market agents.

Competition is the force that animates the market. Each buyer wants to pay as little as possible for their desired good, so there is pressure on each seller to undercut the price offered by other competitors. Competition among sellers, then, tends to drive prices downwards. At the same time competition among buyers to obtain a limited number of goods, tends to drive prices upwards. Prices tend to stabilise at the point at which it is (just) worthwhile for sellers to offer goods for sale – 'market price'.

A properly functioning free market is held to be economically efficient in at least two respects. A free market both ensures that consumers get the things they want and more of what they want than otherwise would be the case.

Ultimately, of course, the appeal to economic efficiency relies on a moral claim – that it is good for people to be able to get what they want; so a system in which they get more of

what they want is to be preferred to one in which they get less. Though not unexceptionable, we take it that this claim has a good deal of *prima facie* plausibility.

In the neo-liberal view, the role of the state in an ideal free market economy would merely be to set and enforce ‘the rules of the game’: to determine the nature of property rights (how do people come to have rights over goods, and what is the limit of those rights), contract (what kinds of agreement will have binding force), and restitution (what penalties will be imposed for the violation of property rights or breach of contract). However, as all concede, any actual economy will fall short of the ideal in a number of ways. For example, many purchasers will lack the data they need to be able to make properly informed decisions, others will lack the resources required to participate in the market for goods which they desire, and so on. In the actual world, then, the state (government) will also need to act to rectify and compensate for the points at which the market is less than ideal.

While this picture does, in our view, illuminate the role of the state and its agents (such as the PSC) in much of its dealings with occupational groups, we also see it as importantly incomplete. In particular, it needs to be supplemented by a more fine-grained understanding of the difference between different kinds of occupations.

Occupations can be individuated according to their ultimate purposes. Firstly, we should distinguish between legitimate and illegitimate occupations. Legitimate occupations have as their defining purpose or end the production of socially valuable, or at least acceptable, goods. Hence furniture making is a legitimate occupation since furniture is a social good, while heroin dealing is not a legitimate occupation since it produces significant social evils – even if there is a market demand for heroin.

Within the class of legitimate occupations we draw a distinction that we think provides a fundamental point of contrast to better identify and understand the nature of different occupational groups. It is also, therefore, central to better understanding how we might promote desirable relations between occupational groups and the public, and reconfigure the role of the state and its agents (such as the PSC) in this regard. The distinction we draw is between the primarily commercial, *market-based occupations* and occupations, such as lawyers and doctors, which are not properly understood as primarily commercial, market-based occupations, i.e. the so-called *traditional professions*.

Market-based occupations are those occupations whose defining purpose can be best achieved through the workings of a market of the kind outlined above. Think, for example, of tomato growing. The desire for tomatoes is likely to be best satisfied by allowing farmers to decide to plant tomatoes when they judge that it is advantageous for them to do so, and compete with other growers to sell their tomatoes to potential buyers. Such occupations exhibit the following defining features. Firstly, although they are legitimate occupations in virtue of their pursuit leading to the achievement of a socially acceptable or valuable end their members are not – or at least need not be – primarily motivated by the desire to achieve that end. Rather, they are – and may rightly be – motivated by narrowly self-interested goals, in particular the desire to maximise

economic return on their activity. (Of course, constrained by relevant ethical market norms)

By being so motivated they help to ensure the existence of the second defining feature of market-based occupations, competition for customers. It is this competition (along with competition between potential customers to obtain their favoured goods) that produces the economic benefits pointed to in the discussion of the market above. Finally, the relationship between members of such occupations and those who consume their products can be seen as a straightforward trading relationship. Each has something that the other wants, and they will exchange goods on agreed, mutually beneficial terms.

Traditional professions differ from market-based occupations at each of these points. Firstly, members of professions are not – or at least ought not be – primarily motivated by narrowly self-interested goals, in particular the desire to maximise economic return on their activity. Rather they ought to be primarily motivated by the desire to achieve the defining end of their occupation. Thus, the defining end of medicine is the preservation and restoration of health, and doctors should be motivated to achieve this for their clients. Accordingly, to the extent that such professionals were primarily guided by the former self-interested economic goals at the expense of the latter they would be failing in their roles.

Secondly, the primary relationship between different members of the same profession is *cooperative* rather than competitive in nature. Cooperation is necessary in order for members of a profession to best achieve their defining end. In order, for instance, for doctors to promote the community's health it is necessary that they freely share information about advances in treatment, etc.

Thirdly, the relationship between professional and client cannot therefore, simply be conceived as a trading relationship. Such professionals must cooperate with one another, in particular, share knowledge and expertise and may be obliged to place the interests of their client above their own self-interest (in financial gain) to achieve the goals of their profession and of their relationships with clients. They are not, therefore, simply engaged in trading relationships where (even ideally) each gets what they want from the other in mutually beneficial terms. Further, these relationships are also often open-ended, with the professional assuming a range of non-specific responsibilities for their client.

A final point to be made in relation to the traditional professions pertains to professional autonomy. If members of a traditional profession, say lawyers, are to adequately realise the ends of their profession (justice) then they need to possess both expert technical knowledge (of the law) and a capacity to exercise discretionary judgment – including discretionary ethical judgement - in the application of this knowledge. Accordingly, they require a high degree of professional autonomy not necessarily required by other occupational groups.

These differences between the traditional professions and market-based occupations should be seen as idealised pictures of reality (which is not to say that they are not based,

or do not apply to, reality). There are a number of factors in modern societies that complicate this picture. For one thing, market-based occupations are, in many cases, seeking to ‘professionalise’ by, for example, engaging in self-regulation and developing integrity (and so ‘ethical’) systems. For another, traditional professions, of course, now operate in a commercial environment and, in many cases, professionals are also business operators. So while the distinction is a sharp one, many occupational groups present some ‘mix’ of features from both sides of the contrast.

The Project to Professionalise Broadly Across Occupations

The principal impetus for the introduction of Professional Standards Legislation was to improve the accessibility and affordability of professional indemnity cover. With the insurance crisis of the mid-990s, professional indemnity premiums were sky-rocketing and, as a result, professionals were tending to underinsure or go without insurance. At the same time there was a growing awareness of the need for more effective regulation of occupations and the promotion of ethical occupational cultures.

This need pertains across a broad class of primarily commercial occupational groups, which, for various reasons, have either sought to ‘professionalise’ or been subject to ethico-professional pressures – such as, e.g., the application of the *Property, Stock and Business Agents Act (NSW) 2002* to the real estate industry in NSW. The concern for more effective regulation and better ethical cultures has also applied, in different ways, to the more traditional professions. In the case of the legal profession, for example, lawyers are increasingly practising in new settings, such as incorporated multi-disciplinary legal practices. With this shift has come, for instance, new uncertainties about what constitutes legal work in various cases. Accordingly, the role of the PSC became in large part to assist in the general project to professionalise broadly across occupations.

As we have indicated, this general project to professionalise broadly across occupational groups does *not* imply that we ignore this contrast between the ‘traditional professions’ and primarily commercial occupational groups. On the contrary, one key theoretical contribution we make in this report is to develop an account of this contrast and show the importance of this account to better understanding ethico-professional standards, and so how they might be better promoted.

This does not mean however, that the primarily commercially based occupations that do not possess these features of the traditional professions, or do so in less notable ways, cannot professionalise, or cannot do so in ethically significant ways, such as by developing codes of ethics, undertaking professional development programs and establishing complaints and discipline systems.

Nor does the contrast between market-based occupations and the ‘traditional professions’ mean that the latter should not therefore be subject to, or less subject to, consumer and market accountability mechanisms. The traditional professions are practised as commercial pursuits and any distinctive responsibilities, and related high degree of

professional autonomy that may also characterize their work should not be thought to license, say, anti-competitive or anti-consumer practices.

As noted, in recent times there has been a significant movement across a broad range of primarily commercially based occupational groups in the direction of the attainment of professional status and an accompanying increase in awareness of ethico-professional standards. The trend has involved members of these occupations thinking beyond longstanding commercial and prudential imperatives, and proposing to meet relevant ethico-professional standards and goals. Among real estate agents, for example, seemingly there is a growing desire not simply to sell houses, but also to be seen not to be misleading vendors as to the market value of their property. Unquestionably, the process of professionalisation in this general sense of raising ethico-professional standards among occupational groups is something to be encouraged, and an important goal of the PSC.

More specific tasks for the PSC in this regard might include assisting such groups to identify and apply the ethical goals and ethico-professionals standards specific to their occupation that might need to be enshrined in codes of ethics and codes of conduct, and elaborated in professional development programs.

In addition, academic and other literature of the past two decades highlights various problems for the traditional professions – especially in regard ways in which managerial and commercial values are thought to be alienating the traditional professions from their proper ethical goals. Herein lies an important issue for the PSC to confront in the context of its stated commitment to the maintenance and enhancement of ethico-professional standards.

Professionalism with regard to technical competence may involve compliance with relatively simple or very complex rules and procedures; but in the case of some occupations, notably the traditional professions, it may also involve discretionary judgments and decisions that go beyond mere compliance with rules and procedures. Importantly, such discretionary judgements and decision-making may involve the application of ethical principles. Consider a solicitor confronting the ethical dilemma of either breaching client confidentiality or failing to report his client's recently disclosed (to the solicitor) past serious but undetected crime.

These contrasts between degrees of required expertise and the extent of discretionary decision-making provide guidance as to the sort of regulatory interventions that might be appropriate in relation to specific occupations. For example, the Professional Standards Council might contribute to the professionalising of some occupational groups by assisting them to develop a code of conduct which encapsulates the relatively complex set of rules and procedures that constitutes best practice for members of that occupational group. But it would not follow from this that the members of the group in question should be accorded a high degree of professional autonomy of the kind associated with the traditional professions.

Again, members of a particular occupation might suffer high levels of ethical risk in certain organisational settings (auditors working in Enron?). Such ethical risks need to be identified and reflected in the integrity systems, including regulatory mechanisms, of such occupations. Here the PSC might contribute to the professionalising of the occupational groups in question by insisting on an elaborate accountability system of a kind not necessarily insisted on in the case of other occupations. Such areas of ethical risk might or might not be confronted by occupational groups that are not (primarily) professions in the narrow sense.

A General Strategy for the Professional Standards Council

In light of the project to professionalise broadly across occupations—while maintaining a distinction between the professions in the narrow sense and other occupational groups—questions of strategy arise for the PSC; what is the best general strategy for the PSC to adopt if it is to contribute meaningfully to the project to professionalise broadly across occupations?

Any viable general strategy for promoting ethical standards, including ethico-professional standards, will need to rely on ‘sticks’, ‘carrots’ and appeals to moral sentiment and belief. The ‘sticks’ will include the possibility of punitive measures following on investigation as a result of a legal or ethical offence and/or a complaint. The carrots will include rewards, such as limitation of liability if one puts in place various processes to promote ethico-professional standards. Education programs, including professional development courses in professional ethics build on and channel pre-existing moral sentiments and beliefs.

But the general strategy also needs to involve utilising professional reputation as a key driver in promoting ethico-professional standards. A high professional reputation is much sought after by occupational groups and their members; and, correspondingly, a low reputation is to be avoided at all costs. Accordingly, the task is to mobilise the desire for a high professional reputation (and avoidance of a low reputation) in the service of increasing ethico-professional standards. Here the aim is to ensure that professional reputation aligns with actual ethical practice, i.e., that the group or individual’s high (or low) professional reputation is *deserved*. The way to achieve this is to design integrity systems in such a way that they mobilise the desire for high reputation and avoidance of low reputation.

An obvious example here are reputational indexes (and associated ethics audits). Reputational indices for a given occupational group are developed in consultation with that group and individual members; as such, these indices track the ethico-professionals standards particular to that occupation, e.g., physical safety in the case of engineers but perhaps not in the case of accountants. (There are a variety of ways in which an indice might track an ethical standard, e.g., number of criminal or civil offences in relation to safety standards upheld by the courts, number of complaints made regarding compliance with safety standards, an ethical attitude survey making use of ethics scenarios involving safety issues.) Once the reputational indices are developed, individual members,

including firms are subjected to an ethics audit based on these indices. The results are published. With their reputation on the line, occupational groups and their members are highly motivated to lift their game, ethically speaking. Here we stress that there is probably no 'one size fits all' integrity system. Doubtless, all occupations undertaking a scheme with the PSC ought to develop a code of ethics. However, it might be that published reputational indexes need to be used selectively.

At a more general level, members of occupational groups and firms might seek to gain a reputational 'award' such as the PSC's *Cover of Excellence*. This 'badge' of ethical health would only be awarded to those individuals and groups that had in place effective integrity systems, including codes of ethics, and complaints and discipline systems. Such an integrity system may well have as a constitutive element a reputational index and associated ethics audit in the narrow sense mentioned above.

If they are to be effective integrity systems need to be appropriate to particular occupational groups. A crucial distinction that is relevant here is that between clients and consumers. Integrity systems, among other things, need to protect clients *and* consumers. Hence there is our so-called professional autonomy/client trust model and our commercial occupation/consumer protection model. Some occupational groups, e.g. the traditional professions, require an integrity system in which the emphasis is on protecting members of the public as clients. Thus, there are stringent duties of care and service to clients that are not present in the more competitive relationship that obtains between sellers and consumers in the marketplace. Other occupational groups, namely, commercially based occupations, require an integrity system in which the emphasis is on protecting members of the public as consumers. (We note that the choice is not an either/or one between these two models; rather since typically one and the same person is both a client and a consumer, it is a matter of emphasis in relation to the application of both models.)

This general strategy suggests ways in which the PSC can mobilise the desire for a high reputation and avoidance of a low reputation among occupational groups to strengthen its Cover of Excellence schemes, and further contribute to integrity systems for particular occupations, e.g., by developing codes of conduct (as well as codes of ethics) reputational indexes, and emphasizing the protection of clients (as opposed to consumers, or vice-versa in the case of market-based occupations).

SECTION 2 – KEY THEORETICAL DEVELOPMENTS

Based on a review of the literature, current theoretical models and empirical research undertaken for this report (of which more below), a number of important innovative theoretical arguments and models have been developed. Three are especially salient, namely: Holistic Integrity Systems; the Commercial/Consumer Model of Protection and the Professional Autonomy/Client Trust Model of Protection, and; The Triangle of Reputation, Self-interest and Ethical Worth.

Integrity Systems

Regulatory frameworks contrast with integrity systems. A regulatory framework is a structured set of explicit laws, rules or regulations governing behaviour, issued by some institutional authority and backed by sanctions. It may serve to ensure compliance with minimum ethical standards (namely those embodied in a law, rule or regulation), but this is only one of its purposes. There are numerous laws, rules and regulations that have little or nothing to do with ethics. An integrity system, by contrast, is an assemblage of institutional entities, mechanisms and procedures, the purpose of which is to ensure compliance with minimum *ethical* standards and promote the pursuit of *ethical* ideals.

In describing a model integrity system for occupations, we need to distinguish two trends that would underline the need for improving such a system. Firstly, the trend towards ethico-professionalisation across, what are, primarily commercial groups. In this case, integrity systems will focus primarily on ethical considerations related to the commercial nature of these groups – notably, market concerns of fair competition and consumer protection and empowerment.

Secondly, the trend towards the re-evaluation of practice in the traditional professions – and the rehabilitation of practice in terms of the ethical or social ideals that originally provided their rationale. Integrity systems here will need to go beyond the norms and ideals of good commercial practice, and focus on distinctive professional responsibilities and claims to professional autonomy, which serve the delivery of notable ethical or social goods.

But we need to get clearer about integrity systems. The term ‘integrity system’ has recently come into vogue in relation to what is in fact a very ancient problem for organisations, occupational groups and, indeed, whole polities and communities, namely the problem of promoting ethical behaviour and eliminating or reducing unethical behaviour.

Here the term ‘system’ is somewhat misleading in that it implies a clear and distinct set of integrated institutional mechanisms operating in unison and in accordance with determinate mechanical, or at least quasi-mechanical, principles. However, in practice integrity ‘systems’ are a messy assemblage of formal and informal devices and processes,

and they operate in often indeterminate, unpredictable and sometimes even conflicting ways.

The term ‘integrity’, as used in the expression ‘integrity system’, is also problematic in that it appropriates a moral notion normally used to describe individual human agents, and applies it to organisations and other large groups of individuals. Roughly speaking, individual human persons have integrity if: (1) they possess the full array of central moral virtues, such as honesty, loyalty, and trustworthiness, and (2) they exercise rational and morally informed judgment in their adherence to any given virtue, including when the requirements of different virtues might seem to come into conflict.

For example, persons with integrity would not allow themselves to act dishonestly out of a misplaced sense of loyalty, notwithstanding the importance of loyalty as one of the virtues possessed by a person with integrity.

By contrast with the notion of an individual person’s integrity, integrity used in the context (we are employing here) of an ‘integrity system’ for the professionalising of an occupational or associational group applies to the representative bodies of the particular group and the large set of individual role occupants within the group (whether or not they are members, say, of representative occupational associations), and also to the structure, function and culture of the group.

The integrity of an occupational or associational group is in large part dependent on the individual integrity of its members, and therefore an integrity system is in large part focused on developing and maintaining the individual integrity of these members. Nevertheless, these groups are not simply the sum of its members, and so determining the integrity levels for these groups is not simply a matter of summing the levels of integrity of the individuals who happen to be its members.

In the first place, the individuals who comprise professions are role occupants, and the responsibilities and virtues required of them are somewhat different from, and in some respects greater than, those required of ordinary individual persons not occupying such roles. So, for instance, scrupulous attention to numerical detail might be a constitutive virtue of the role of an accountant but not of the role of a husband. And, of course, the technical competencies for which the lawyer, medical doctor or engineer are responsible are not typically required of ordinary individual persons not occupying such roles.

Moreover, what counts as a professional responsibility or virtue, both in terms of technical and ethical competencies, varies greatly across different professional and occupational groups. The technical competencies for which the lawyer, medical doctor or engineer are each responsible are not common *across* these groups. Similarly, the virtues are often role specific.

While, arguably, the ‘zealous advocacy of one’s clients interests’ might be a critical virtue to the role of a lawyer or barrister in our legal system, it is clearly not a critical virtue for the engineer. So what counts as integrity in an individual professional role

occupant is neither captured by what counts as integrity in an ordinary person or what counts as integrity in some other occupational role. One important task then, for specific professional areas, is to determine what precisely the constitutive virtues of the individual role-occupant are, and devise strategies to ensure that these virtues are developed and maintained in the members of that occupational or associational area.

In the second place, the integrity of a profession is not simply a matter of the integrity of the individual role occupants who comprise it, since the integrity of a profession is partly a matter of the structure, function and culture of the profession. Consider structure, both legal and administrative. In a profession possessed of integrity the administrative processes and procedures in relation to, for example, promotion or complaints and discipline, would embody relevant ethical principles of fairness, procedural justice, transparency and the like.

Now consider function. In a profession possessed of integrity the organisational goals actually being pursued would align closely with the morally legitimate functions of the profession, such as, for example, the promotion of public safety for engineers or of human health for doctors, rather than purely commercial guidance. Finally, consider culture. In a profession possessed of integrity, the pervasive ethos or spirit, i.e., the culture, would be one that was, for example, conducive to high performance, both technically and ethically, and supportive in times of need, but intolerant of serious incompetence or misconduct.

In looking at options to promote integrity and combat ethico-professional failures it is very easy to leap to a particular single ‘magic bullet’ solution, like increasing penalties or giving more intrusive powers to investigative agencies, and doing so without considering the full array of implications, including the demonstrable (as opposed to hoped for) benefits (which of these measures has been tested and, as a consequence, is *known to work?*), and the costs in terms of resources, damage to ethico-professional ethos, and so on.

Moreover, ‘magic bullet’ solutions are often offered in relative ignorance of both the actual nature and causes of the problems they are supposed to address. The truth is often in the detail.

So, for instance, many professions stand accused of being too tolerant of apparent cases of serious incompetence or misconduct and of being so for self-interested reasons of protecting professional reputation. Moreover, these self-interested reasons come at the expense of the legitimate interests of consumers or the public. One of our findings, however, was that in *some* cases, while there may well be an apparent tolerance of serious incompetence or misconduct and while this may well come at the legitimate interests of the consumer or the public, it need not be because of reputational self-interested concerns nor aimed at deceiving the consumer or public.

In the engineering case, for instance, at least two other significant factors are commonly at play: namely, the difficulty of making judgments in some cases, especially ‘unique’

cases, and second, the highly litigious nature of the area. Unless therefore, the nature of the problems, in particular their causes, are first identified there is little hope of finding a solution to such problems.

Moreover, in attempting to determine the causes of unethical professional practices there are a number of preliminary questions that need to be addressed. One set of questions pertains to the precise nature of the unethical practice at issue, and the context in which it occurs. What is the motivation? Are there, for example, as above, some compelling practical facts that explain the practice? What other pressures and opportunities might there be for the unethical practice in question? Another set of questions concerns the extent of the corruption or unethical practice: Is it sporadic or continuing, restricted to a few 'rotten apples' or widespread within the area? Here, as elsewhere, rhetoric is no substitute for evidence-based conclusions.

Even when the answers to these questions have been provided there will arise further questions in relation to any remedies proposed. For example, any contemplation of mechanisms to redress ethico-professional misconduct that will require the expenditure of energy and resources – and may well impinge on individual freedom – needs to be justified in terms of the seriousness and extent of the misconduct to be successfully combated.

Second, and more importantly, understanding the causes of ethico-professional misconduct and failures and the tailoring of remedies to address them will involve considering and distinguishing between three sorts of motivation for compliance with moral principles.

One reason for compliance is the fear of punishment; hence the use, or threatened use, of the so-called 'big stick'. So, e.g., agent A does not steal from agent B because A fears s/he will get caught and locked up. A second reason for compliance arises from the benefit to oneself. Hence the possible utility of the so-called 'carrot' approach. So, e.g., B pays B's workers reasonable wages because by doing so the workers are healthy, work productively, and B makes good profits. These two reasons are essentially appeals to self-interest. Taken in combination they constitute the 'stick-carrot' approach much loved by many contemporary economists. However, there is a third reason for compliance. This is moral belief or desire to do what is right. A refrains from stealing because A believes that it is morally wrong to steal; B pays B's workers reasonable wages because B desires to be fair.

Here we need first to note the contrast between appeals to moral beliefs and appeals to self-interest. Acting from a concern to do what is right or good does not turn on whether or not it is one's self-interest. It may or may not be in one's own self-interest to, say, be honest or fair. Moreover, the notion of persons acting out of moral rectitude is completely at odds with the essentially manipulative approach of those who advocate *only* sticks and carrots.

That said however, there are also important connections to be highlighted and promoted between ‘self-interest’ and ‘moral interest’ so that these conceptions are more in balance and integrated and less at odds. First, of course, the appeal to moral interest must be balanced by the appeal to self-interest. If, e.g., it is at great cost to self to be, say honest or fair, then one may have sufficient reason to not be honest or fair. Indeed, the reason need not be purely self-interested but also count as moral. So, e.g., if it means my livelihood and that of my family, then I may have significant reasons from both prudence and morality to, say, steal.

It is evident that widespread and ongoing compliance typically requires appeals to self-interest (sticks and carrots) but also appeals to moral beliefs. Ideally, integrity systems should have penalties for those who do not comply, should enable benefits to flow to those who do comply, and should resonate with the moral beliefs of the people thus regulated, e.g., laws and regulations should be widely thought to be just.

Thus, institutional design which proceeds on the assumption that self-interest is the only human motivation worth considering fails. It fails because it overlooks the centrality of moral beliefs in human life, and therefore does not mobilise moral sentiment. On the other hand, institutional design that proceeds on the assumption that self-interest can be ignored, and that a sense of moral duty on its own will suffice, also fails; it fails because self-interest is an ineradicable and pervasive feature of all human groups. (As we argue below, deserved reputation has a pivotal role to play in the convergence of self interest and ethical concerns.)

Reactive and Preventive Integrity Systems ¹

Integrity systems can be thought of as being either predominantly reactive or predominantly preventive. Naturally, the distinction is somewhat artificial, since there is a need for both reactive elements, e.g., a complaints and discipline system, as well as preventive elements, e.g., ethics training and transparency of processes, in any adequate integrity system. At any rate, integrity systems can be considered under two broad headings, reactive and preventive.

Reactive Integrity Systems

The reactive way of dealing with ethico-professional misconduct is the one that first comes to mind. The logic is direct: the activity is defined as one that is not acceptable; an individual engages in that activity and therefore, as a direct result, should be held to account for the misconduct and, if found guilty, disciplined in some way. The rationale for the reactive response for dealing with unethical behaviour, including criminality and corruption, is twofold: offenders are held to account for their actions, and; offenders get their just deserts.

¹ Derived in part from Seumas Miller, Peter Roberts and Ed Spence *Corruption and Anti-corruption* Chapter 7 (Prentice Hall, 2005).

Reactive mechanisms for dealing with unethical behaviour are fundamentally linear: setting out a series of offences (usually in legislation or regulations), waiting for an individual to transgress, then investigating, adjudicating, and finally taking punitive action. *Complaints and discipline systems* are basically reactive mechanisms.

The weaknesses of a purely reactive approach are manifest. One obvious weakness is the passivity of the approach; by the time the investigators swing into action, the damage has been already done. Another problem stems from the fact that unethical behaviour is often secretive, e.g., as abovementioned, professional associations may ‘close ranks’ to protect the reputation of the group.

Yet a further problem stems from the inadequacy of the resources to investigate and successfully prosecute; investigation and prosecution is resource intensive. Finally, if the chances of being caught or complained about are relatively slight due to under-resourcing, the deterrent effect is undermined, which in turn means there are an even larger number of offences and offenders with which investigators must deal.

Of course, the effectiveness of a reactive approach requires that significant detection mechanisms are available. Those who engage in ethico-professional misconduct then have at least two good reasons to fear exposure; first, detection may lead to legal or associational sanctions, such as fines, suspension or expulsion from the industry and second, it may lead to moral sanctions emanating from work colleagues, community and from significant others, e.g., friends and relatives. Nevertheless, there are a number of sources of information in relation to most forms of ethico-professional misconduct. One of the most important is fellow-workers who may report such conduct or suspicious activity to superiors, or even blow the whistle.

Preventive Integrity Systems

A preventive integrity system will typically embrace, or act in tandem with, a reactive integrity system. However, we can consider preventive mechanisms for dealing with ethico-professional misconduct independent of any reactive elements. If we do so, we see that they can be divided into three categories:

- mechanisms for promoting an environment in which integrity is rewarded and, as a consequence, unethical behaviour is discouraged; this is an attempt to reduce the desire or motivation to act unethically, so that opportunities for unethical behaviour are not pursued or taken, even when they arise;
- the array of institutional mechanisms which limit (or eliminate) the opportunity for unethical behaviour. Such mechanisms include corporate governance mechanisms such as separating the roles of receiving accounts and paying accounts to reduce the opportunity for fraud, and;
- those mechanisms which act to expose unethical behaviour, so that the organization, or community can deal with them. The term ‘transparency’ may be used to characterize these mechanisms.

We accept that this threefold distinction is somewhat artificial, and that some institutional mechanisms will in fact come under more than one heading, and indeed that some, e.g., regulations, have both a reactive, as well as a preventive role.

Of particular note for the PSC is the first category above in our breakdown of prevention mechanisms, i.e., those institutional processes that exist to promote ethical behaviour. This category is made up of those components of an integrity system that engage with the individual's desire to do what is morally right and avoid what is morally wrong, and to be morally approved of by others for so acting. These institutional instruments include *codes of ethics* and *professional development programs*.

Holistic Integrity Systems

Thus far in our analysis of integrity systems, we have looked at integrity systems and mechanisms under the headings of reactive systems and preventive systems. It is evident that in most societies, jurisdictions, and indeed organisations, the attempt to combat unethical behaviour involves both of the above.

That is, integrity-building strategies involve reactive systems as well as preventive systems, and within preventive systems there are mechanisms that promote ethical behaviour, there are corporate governance mechanisms with, e.g., anti-fraud or corruption functions, and there are various transparency mechanisms.

Moreover, it seems clear that an adequate integrity system cannot afford to do without reactive as well as preventive systems; and that preventive systems need to have all the elements detailed above. This suggests that there are two important issues. The first is the adequacy of each of the elements of the above systems, e.g., how adequate is the complaints and discipline processes including the investigative capacity? or how effective are the mechanisms of transparency? The second issue pertains to the level of integration and complementarity between the reactive and the preventive systems; to what extent do they act together to mutually reinforce one another?

In this connection, it is worth noting that many jurisdictions have 'watch-dog' agencies, such as the Office of Fair Trading in relation to the real estate industry in New South Wales. Such bodies are established by statutes that also define a range of offences, have powers to investigate and refer matters to the courts for prosecution. However, it is notable that these 'watch-dog' agencies also involve themselves in prevention programs involving the development of preventive mechanisms; they no longer see their role as merely that of a reactive agency.

So, for instance, the Office of Fair Trading regards its investigations in to many cases of misconduct within the real estate industry as importantly educative. Thus, e.g., (as reported to us) they were often more concerned to help develop better office 'checklist' systems with agents aimed at avoiding repeat offences, than they were in taking a purely punitive approach to offences committed. Often, they said, facilitating an apology to the

client and strengthening procedures to avoid the problem in the future was the best solution to the problem.

We should think of (better) integrity systems therefore, as holistic in character, and conceive of specific integrity building mechanisms as elements of a holistic integrity system. In looking at the set of integrity building processes as a holistic system, we need first to remind ourselves what is presupposed by an integrity system.

First, and most obviously, there must be some shared moral values in relation to the moral unacceptability of specific forms of behaviour, and a disapproval of those who engage in such behaviour. That is, there needs to be a framework of accepted moral norms.

Second, there needs to be a broadly shared conception in relation to what needs to be done to minimise it, e.g., should it be simply criminalised or should the response include restorative elements?

Third, there needs to be present some capacity to create and implement mechanisms which deal with the issue of unethical behaviour, and this presumes some form of legal or regulatory system and organisational structure. Here considerations of efficiency and effectiveness are important.

Finally, there needs to be some source of authority whereby sanctions can be applied to individuals who engage in unethical behaviour.

Two Models: Commercial Occupations/Consumer Protection and Professional Autonomy/Client Trust

Here we set out our account of two models for ethico-professional standards and promoting the interests of the public: the commercial occupation/consumer protection model and the professional autonomy/client trust model.

As we have signalled, a basic, general contrast that can be applied across occupational groups concerns the ultimate purposes that govern the groups. For the primarily commercial occupations, commercial imperatives are forefront. It is appropriate then, that ethico-professional standards and promoting the interests of the public will focus on market and consumer protection concerns. However, a significant marker of professions, perhaps most notably and widely recognized in the traditional professions, such as law and medicine, is that members of the public are not just consumers of their services but are also *clients* of their services. Of course, as a client one does consume these services, but one is not simply a customer or consumer. So what is the distinction?

We have mentioned a number of relevant points to the contrast. The traditional professions – and some emerging professions, but not all occupations – necessarily require the inculcation of a body of expert knowledge and skill and a high degree of professional autonomy for effective use and development of this body of expert

knowledge and skill (and, therefore, an associated high degree of accountability and liability). Second this expertise and professional autonomy is put in the service of, and guided by, the promotion of some, often significant, human or ethical good – such as the delivery of just process for the legal profession, or human health for medicine. And third, this service is (typically) undertaken by the professional role occupant in *advocacy of such interests* (legitimate, and often significant) *of their client*, i.e., a particular individual or organisation.

On account of this *advocacy* role played, for instance, by your lawyer or your general practitioner in regard your interests (legal and medical respectively) you are their client and not simply their customer or the consumer of their services as you are when you go to the shop or bank.

Of course, your bank offers, e.g., financial advice and management services and as a consumer of these services the bank would advocate your (financial) interests. To this extent then, they might also be thought to treat you as a client. Moreover, as, say, with your G.P., you might well have an ongoing relationship with your bank as their client. Indeed, perhaps, albeit in weaker, more limited ways, you might be the client of your local shopkeeper and not just their customer, and so, e.g., they note to keep in stock the sort of bread you regularly buy.

Contrariwise, there has also been a significant shift toward certain occupational groups, such as those involved in human service industries, including health and welfare, and significant aspects of the legal profession, toward conceiving of relations with the public on the model of customers or consumers. The central point of this shift has been to empower the *choice* of the public as consumers of these services.²

Thus, for instance, in the case of the medical profession, as a norm of best practice nowadays, your medical practitioner, whether treating you as a ‘one-off’ exchange in a public hospital or as your G.P., will typically take a good deal more time explaining your situation and where appropriate offering the information required for making certain choices than was typical a few decades ago.³

To some extent we may be *both* client, in the sense of advocacy of our (legitimate) interests, and consumer, in the sense of empowerment of one’s choices, in regard the services offered in *both* the traditional profession case, such as medical practitioners, or the non-traditional case, such as motor car mechanics or real estate agents.

The asymmetry of knowledge is a fundamental feature of the professional-client relationship. Short of extraordinary efforts, principally, a number of years of study and

² Thanks to Kylie Williams for developing, in discussion with the authors, the relevance of choice as crucial to the contrast between consumer/client.

³ For a philosophical treatment of the professional role morality of the medical (and legal) professions, see Justin Oakley and Dean Cocking, *Virtue Ethics and Professional Roles*, (Cambridge University Press, Cambridge, U.K. 2001), especially chapter 4 in regard the shift from the perceived paternalism of the traditional professional-client model prevalent in medicine decades ago.

training, one could not put oneself in the position of being able to make informed choices and judgments in regard one's medical, legal, etc needs – at least with any comprehensive or deep understanding and authority.

It is appropriate, therefore, that in certain relationships between the public and professionals there is an asymmetry of knowledge and expertise, where the consumer becomes a client of the professional in the sense that it becomes the latter's responsibility to provide understandings and choices based upon their discrete expertise, i.e., not shared by their client, on behalf of, and in promotion of, their client's legitimate interests – medical, legal, etc. Since promoting consumer choice here is limited both practically and in terms of what is desirable or worthwhile, promoting ethico-professionalism here is not about promoting consumer choice.

The vulnerability to the public to be addressed, on account of the asymmetry, is not a lack of knowledge or skill the public (generally speaking) expects, wants or should have in pursuing their interests as the client of professionals. So the solution is not (to this extent) to ratchet up consumer choice and so limit or eradicate the asymmetry. Rather, the overall integrity system for professional standards would here focus on promoting conditions for the proper and improving exercise of a professional's duty of care and special responsibility to act in their client's interests *on account of the asymmetry*.

One's capacities to make informed choices is, of course, important to promote, including with respect to occupational areas involving a substantial, complex or discrete body of knowledge or skill. Thus, for instance, it is important that one's lawyer or doctor provide us with understandings of our legal or medical situation and its related options and costs, upon which *we* can then make decisions.

A good recent example of the recognition of the value of promoting informed choices in such areas is the development, in the U.S., Europe and currently now in Australia, of the advent of surgeon report cards, i.e., providing data accessible to 'consumers' reporting on the performance of surgeons across relevant surgical procedures.

Nevertheless, we also need to be able to put ourselves in the hands of professionals who are experts in a body of knowledge and skill we could not reasonably be expected to share or possess ourselves, and the focus here is not to empower our choices as consumers, but to promote good client-professional relationships where professionals have a special responsibility in regard the discharge of their discrete expertise in the promotion of their client's relevant (legitimate) interests.

The consumer protection model therefore, with a focus on consumer empowerment understood in terms of the promotion of consumer choice (through the reduction of asymmetries of relevant knowledge in the professional-consumer relationship), does not fit *this* characterising feature of professional-client relationships. The asymmetry of knowledge is not *only* a problem that needs to be addressed through empowering the knowledge base and so the capacity for choice of consumers.

The professional has a duty of care *qua advocate* not in relation to empowering *consumer choice*, but in relation to empowering *client trust*.

As part of the development of integrity systems for the promotion of ethico-professional standards, we suggest that attention be given to determining the extent to which an occupational or associational area may properly be thought of as having consumer or client relationships (as we have distinguished them) with the 'laity'. As the discussion directly above indicates, in most, perhaps almost all, cases, there will be a mix. However, the 'mix' may vary greatly across occupations with groups classed and so contrasted as being more in one direction than the other.

Thus, for instance, for many occupational or associational groups empowerment of consumer choice would be the appropriate model for much of the territory of their work. In particular, where asymmetries of knowledge, such as was often the case in the real estate industry, e.g., regarding the actual market value of one's house or actual bidders on one's house, are *not* grounded on knowledge or skill one could not reasonably expect the consumer to share (because the knowledge or skill required, say, years of specialised training) and too often worked against the consumer's interests *as a consumer*.

Recent laws forbidding 'dummy' bidding and prescribing much greater disclosure of information to consumers in the real estate industry are examples of empowerment of consumer choice (since the knowledge, etc is relatively accessible and material to the consumer pursuing their interests) and commitment to this on the part of the professional.

The integrity mechanisms of the PSC undertaken in conjunction with occupational and associational groups – principally the development of codes of ethics and conduct, complaints and discipline procedures and professional and ethical development and education programs -, should reflect the contrast marked by our two models and develop the relevant focus as applicable to particular groups.

So, for instance, the ethico-professional standards of real estate agents would be less concerned with looking after their 'clients' interests on account of discrete expert knowledge and skills properly not shared by the public, and so the codes of ethics for real estate agents would primarily be directed by the consumer protection model rather than the client trust model.

The implications of getting clearer about these two models are very significant both for understanding ethico-professionalism and related integrity systems in general and the PSC's role in particular.

Accountability for those groups, such as real estate agents, for which the market concerns of fair competition and consumer protection are at centre stage, is primarily market driven. The market, properly conceived and effectively operating, where commercial integrity is about consumers and suppliers being restored to relative equals in power, knowledge, etc, would thereby be the proper grounds for and provide the sort of accountability required for (most of) the occupational territory of these groups.

However, the market cannot provide the sort of accountability we require for the professional's duty of care to their clients. This duty of care is not about, e.g., making profit in fair ways and commitment to consumer choice. So the effective delivery of this duty of care across an area will require a much greater and quite strong governance role for professional oversight bodies and associations.

Accordingly, in formulating the 'mix' of ethical goals that apply to different groups, i.e., commercial and otherwise, generic and particular, we recommend the PSC:

- **Adopt Both Consumer Protection and Client Trust Models**

Consequently, the PSC should be concerned to both:

- **Empower Consumers.** It should not be assumed that the duty to 'protect consumers' can be reduced to fulfilling the duty to 'facilitate improvement in the standards of service provided by those members', as distinct from *increasing* consumer choice. And;
- **Empower Clients.** On the other hand, it should not be assumed that protecting, much less empowering, clients can be secured by increasing consumer choice. Client protection and empowerment needs to be distinguished and addressed by strengthening professional accountability in the exercise of the professional duty of care to clients.

The Triangle of Reputation, Self-interest and Ethical Worth

The third key theoretical development is the development of an account of *professional reputation* and its singular importance to effective integrity systems – and to the PSC's role as a statutory authority conferring 'deserved professional reputation'.

The PSC's *Cover of Excellence* accreditation scheme is its sole meta-regulatory tool. However, a strong and consistent finding throughout the empirical studies of specific occupational groups conducted as part of this project was that the incentive of affordable indemnity cover, via participation in a scheme, was often less important than the attraction of being conferred ethico-professional status or reputation itself. This was especially true of commercial occupations not traditionally thought of as professions. Therefore, a key current and future policy direction of the PSC is the expansion of the application of the *Cover of Excellence* schemes broadly across occupational associations. The capacity of the PSC to make good use of this incentive will depend upon how well it maintains and improves the credibility of the *Cover of Excellence* brand.

Of course, the PSC then becomes especially vulnerable in so far as its conferring of reputation is shown to be undeserved – for example, by exposure to the unethical conduct of members of an association to whom a scheme applies. *It is thus crucial that the PSC's meta-regulatory mechanisms can be reasonably expected to deliver the result that the good reputation that they confer is deserved or justified.*

As mentioned above, a high professional reputation is much sought after by occupational groups, and a low one to be avoided at all costs. Accordingly, there is an opportunity to

mobilize this reputational desire in the service of promoting ethical standards. Here the aim is to ensure that professional reputation aligns with actual ethical practice, i.e., that a group or individual's high or low reputation is deserved. The way to achieve this is by designing appropriate integrity systems. Key elements of an integrity system track compliance with rules, e.g., accountability. The additional thought here is that key elements of an integrity system should track features of occupational groups that determine or should determine reputation. Most explicitly, the above-mentioned reputational index could be constructed whereby an ethics audit awards scores in relation to specific ethico-professional standards. At a more general level the PSC could award its Cover of Excellence to occupational groups and individuals that had appropriate integrity systems in place, as in fact it already does. However, greater emphasis could be placed by the PSC on this aspect of its activities, and integrity systems could be strengthened, fine-tuned and tailored to the needs of specific occupational groups.

It is worth noting that many of the objections against professionalism – lack of accountability through transparency, self-interested behaviour (commercially) at the expense of others (notably, consumers or the public generally) – provide indices against which the legitimacy of an occupation's claim to professionalism may be impartially or objectively judged and so correspondingly against which professional reputation may be rated.

Deserved reputation represents an important nexus between self-interest and concern about others, and so for our purposes here, between the self-interest of commercial occupational or associational groups and concern about consumers, clients or the public generally. Here there are three elements in play: (i) reputation; (2) self-interest, and; (3) ethical requirements, such as particular ethico-professional standards, but also more general desiderata such as client/consumer protection. (Hence, our reference to a triangle.) The idea is that these three elements need to interlock in the following way.

First, reputation is linked to self-interest; this is obviously already the case – individuals, groups and organizations desire high reputation and benefit materially and in other ways from it. Second, reputation needs to be linked to ethics in that reputation ought to be deserved; as already mentioned, the integrity systems are the means to achieve this. Third, and as a consequence of the two already mentioned links, self-interest is linked to ethics; given robust integrity systems that mobilize reputational concerns, it is in the self-interest of individuals, groups and firms to comply with ethico-professional standards. We should also reassert that we do not believe that self-interest is the only or ultimate motivation for human action; the desire to do the right thing is also a powerful motivator for many, if not all people. Accordingly, the triangle is further strengthened by the motivation to do right.

As we have implicitly assumed, one's good reputation and one's motivation for good reputation are different things. I may have a good reputation as a sportsman, philosopher or real estate agent, but whether or not I am motivated by the concern to maintain or improve this reputation is a separate question. I may, e.g., simply be motivated by my interest in playing sport, doing philosopher or selling real estate.

It is also a separate question as to whether my good reputation is deserved. I may have a good reputation, but it may or may not be deserved. Perhaps, e.g., I am an academic fraud but have largely gotten away with my plagiarism. Thus, good (or bad) reputation may or may not be deserved and the having of good (or bad) reputation may or may not be motivationally significant for me.

And, of course, as we have indicated the reputation of professionals may, for certain groups, be primarily and directly about technical competence, considered quite apart from ethical considerations. Our focus in this report has been on integrity systems and so ethico-professional standards, and so accordingly it is on deserved reputation within this sphere.

In any case, the gap between good (or bad) reputation and deserved reputation marks the failure of proper reputational indices effectively applying in an area.

While the use of financial and more broadly prudential (dis)incentives can no doubt provide significant motivation for conformity to ethico-professional standards – especially in the case of market-based occupations – it is doubtful that they could – or should – by themselves.

The Labor Senators sitting on the Senate Economic Legislation Committee (SELC) review of the Treasury Legislation Amendment (Professional Standards) Bill 2003 put the worry this way:

Most fundamentally, we are disturbed by the fact that some need an incentive in the form of capping in order to lift professional standards. Labor Senators endorse the view expressed in the Government's CLERP 9 paper in September 2002 which stated: "While the objective of improving professionals standards, including the introduction of compulsory professional indemnity insurance and risk management programs is admirable, professional bodies should be implementing such measures as a matter of best practice and should not require the incentive of a capping regime to achieve them."⁴

We note three ways in which reliance on self-interest may be inadequate to ensure compliance with ethico-professional standards.

First, if the reasons for compliance are purely prudential there may be circumstances in which it is prudent not to comply. For instance, it may be financially less onerous to flout compliance and be prepared go to court where it is unlikely that clients will be able or willing to take expensive legal action. Perhaps most significant of all are the time costs of compliance – as many of the occupational groups we interviewed in the empirical study undertaken as part of this project have pointed out. A cost-benefit

⁴ Senate Economics Legislation Committee, "Provisions of the Treasury Legislation Amendment (Professional Standards) Bill 2003, Senate Printing Unit, Parliament House, Canberra, May 2004, Minority Report by Labor Senators, p 40.

(Although, at the Second Reading of the Bill in the House of Representatives, the Labor Member for Kingston, Mr Cox, stated: "Labor acknowledges, however, that state and territory governments have come to the conclusion that professional standards schemes involving caps are necessary to improve protection for consumers through the introduction of compulsory insurance and improved disciplinary measures for professionals." *Hansard*, House of Representatives, 16 June 2004, p30482.

analysis that factors in the costs of compliance might yield non-compliance as a rational policy.

Second, however well targeted and comprehensive one's laws, regulations and rules may be, there will always be cases that 'fall between the cracks' and so require other compliance mechanisms, namely relevant ethical norms, than mere prudence if one is to achieve ethical or best practice.

Third, in so far as the misconduct of one member of an occupational group affects the reputation of the group, the group has self-interested reason to ignore or cover up the misconduct so that it does not do damage in the public arena.

In defence of a degree of reliance on self-interest, it can be said that so long as compliance and other costs are not too onerous and given the real possibility of scrutiny followed by penalties for non-compliance, then self-interest can provide an important incentive to comply. Here it is important that compliance costs do not discriminate significantly against smaller or relatively poorly resourced firms and as a result give a competitive advantage to those better positioned to absorb such costs.

As noted, reputation and the risk of damaging or losing it provides a significant prudential reason in favour of ethical compliance. Moreover, as recognised by all, a model of compliance by ethical conscience, in terms of reputational risk of failure, crucially relies on there being an external regulator with teeth, i.e., able to expose malefactor's failure to comply. For without such external legal sanction there may be little or no reputational risk involved in failures of ethical compliance.

(Consider, for instance, the case of a 'self-regulating' profession that conducts disciplinary procedures (when it does) behind closed doors and seeks to avoid the facts of breach having occurred coming to light. In such cases, the profession can maintain the 'clean' image of the profession and avoid reputational risk, not by having a conscience but by secrecy.)

The PSC reporting requirements, of course, aim at greater transparency, and in doing so this would also serve the purpose of putting reputational risk back into the picture.

The provision of well-targeted, compelling and well publicized reputational indices for the deserved reputation of particular groups provides a way to develop and educate the self-interest of commercial occupational groups toward an alignment with the relevant legitimate interests of consumers/clients, and provides significant relief from the temptation to maintain appearances – whether one is guilty of misconduct or not. Moreover, the fundamental feature of a holistic model integrity system that it provide both reactive and preventative mechanisms that work together to reinforce the overall effort toward ethico-professionalism addresses both the incentive of self-interest and aims to develop an 'immersion' of professionals in the ethico-professional issues of their work.

On the latter, consider, e.g., how a professional will need to exercise professional judgment or discretion where the rules don't give guidance. For example, the *Property Stock and Business Agent Act* requires that real estate agents be *honest* in their dealings with the public. However, what this means is sometimes unclear and a matter of interpretation. Does, e.g., an agent have to tell a buyer that someone was murdered in the house-for-sale? (As we were asked by an industry representative.)

The general prescription 'Be Honest' requires some further clarity concerning what it is that one must be honest about. On the other hand it is doubtful that one could provide an exhaustive list of such considerations. Presumably, we could say that one should be guided by those considerations it would be reasonable to think may be material to a person's decision to buy the house and the fact that someone was known to have been murdered in the house would count as such a consideration.

But if an agent is to be guided in this way, given that an exhaustive list of such considerations could not be provided to cover all such possibilities, we would seem to require that ethico-professional conscience be the driver or mechanism for compliance when such possibilities arise.

That is, we would seem to require that the professional's approach is guided by a genuine commitment to the ideal that they ought to be honest and transparent about considerations it would be reasonable to think may be material to a consumer or client's decision.

The preventative aspects of an integrity system, such as ethical and professional development programs, seek to immerse professionals in the relevant ethical issues and problems in their field and so develop such commitments.

SECTION 3 – KEY ELEMENTS OF HOLISTIC INTEGRITY SYSTEMS FOR OCCUPATIONAL GROUPS

As we have seen integrity systems make use of a variety of processes and instruments, including both reactive and preventative ones. In this section we review a number of key ones, namely, codes of ethics/codes of conduct, complaints and discipline systems, professional development programs, self-assessment instruments, reputational indexes, ethics audits, online forums, evidence based data collection/analysis tools (e.g., profiling).

Occupational Codes of Ethics

Some key points in relation to occupational codes of ethics are as follows.⁵

In undertaking many, if not all, occupations individuals accept professional obligations, but some of these obligations are also ethical or moral obligations. These moral obligations are additional to the moral obligations that they had prior to entering the occupation; they are internal to the occupation. These obligations should form the core elements of the occupations code of ethics.

By contrast, codes of ethics ought not to address ethical or moral issues that are irrelevant to, or outside the sphere of, the duties, tasks and role of the occupation in question. For example, a practitioner's lawful sexual practices ought not to be an issue addressed in most codes of ethics.

Codes of ethics refer not only to moral principles, but also to ideals of the good, e.g., an engineer might insist on load bearing standards well above what the law requires because of his commitment to the ideal of safety.

Where members of an occupation have distinctive rights e.g., the autonomy of surgeons in relation to whether or not to operate, these should be stressed in their codes of ethics.

The achievement of the institutional status of a professional brings with it a set of rights and duties which are, in a variety of ways, anomalous in comparison to those held by other workers: this anomalous status is in part a consequence of the legal privileges and requirements extended to the profession, e.g., lengthy accredited university based education. Moreover, given the role of the professional associations, the code of ethics of members of the professions will need to have sanctions built into them.

Since practical knowledge of ethical principles and ideals, and practical knowledge of their application, is not a static thing – ethical problems and the solutions to them undergo change – there is a need for ongoing revision of the code of ethics, ongoing education in relation to changes to the code of ethics, and especially ongoing education in

⁵ From Seumas Miller *Model Code of Ethics Principles* (Professional Standards Council, 2002).

relation to the application of the principles and ideals expressed in the code of ethics. The code of ethics, and associated ethical education, ought to be an important element in initial formal and informal education programs, and also in continuing education programs.

Codes of ethics prescribe and proscribe specific actions, and many of them attach sanctions to non-compliance. So codes of ethics have a regulatory function, in addition to their educative and cultural integration functions. Often the main regulatory role of a code of ethics is actually played by an associated code of conduct or practice. The code of ethics is a basic presentation of principles and ideals; the code of practice or conduct is a detailed description of the specific actions that are to be performed and not performed under given conditions, and of the sanctions that attach to non-performance.

Codes of ethics – and their associated codes of practice or conduct – should exist in an occupational environment in which the systems of reward and of punishment are perceived to be fair and reasonable. Moreover, codes of ethics need to exist in an occupational environment in which they are ‘owned’ by the members of the occupation in question.

Individual members of an organisation or occupation have ethical responsibilities in relation to the behaviour of individuals other than themselves. For example, a practitioner who becomes aware that one of his or her peers is incompetent or engages in serious wrongdoing that is in contravention of regulations or laws may have an obligation to report the conduct. Certainly, there is an obligation to do something about this situation. This individual obligation (say) to report, exists by virtue of a collective responsibility to ensure that the minimum standards enshrined in the code of ethics are complied with.

There are a number of different processes that might be gone through in order to develop a code of ethics. Here is the outline of one such *process* for developing a code of ethics for an occupation.

1. Establishment of Ethics **Committee** Phase

Establish an ethics committee to take responsibility for drafting the code. The committee should involve at least two members from outside the occupation, including a philosopher with expertise in occupational ethics, and at least one person ‘representing’ the occupation’s client group.

2. Examination of **Issues** Phase

The Ethics Committee should among other things:

- a) Examine the main goals, activities and context (including organisational context) of the occupation.
- b) Outline the role of members of the occupational group.
- c) Detail the main ethical requirements of members of the occupational group.
- d) Identify the main ethical problems likely to be confronted.

3. **Research Phase**

The document prepared by the Ethics Committee should be used in the research process of determining the views, attitudes and so on of the members of the occupation and members of salient other groups, e.g., clients.

4. **Drafting of Code of Ethics Phase**

In light of the research findings a draft code of ethics and accompanying material should be prepared by the Ethics Committee.

5. **Consultation Phase**

All registered members to be sent the draft code of ethics together with a questionnaire to gauge their response in general and to specifics.

6. **Ratification of Code of Ethics Phase**

The code should be circulated for the purposes of final comment and ratification by members of the occupation or by the relevant representative occupational bodies.

7. **Review of Code of Ethics Phase**

There should be a formal review of the code of ethics at set intervals by the Ethics Committee.

Complaints and Discipline Procedures

A well-structured complaints and discipline system is an integral part of a properly functioning integrity system. Such a system plays a number of functionally discrete roles in an integrity system:

Conflict resolution – on occasion, disagreements or misunderstandings between clients and professional are best resolved through mediation by a disinterested and well-informed third party.

Professional development – complaints may reveal areas in which a professional needs (re)training, such as client relationships, professional/personal boundaries. etc.

Sanctioning and restitution – complaints may reveal behaviour constituting a serious violation of professional standards and which merits sanctioning of the professional and/or restitution to the client.

Norm setting/reinforcement – the operation of a complaints and discipline procedure will contribute to the setting and reinforcing of professional ethical norms, by demonstrating the kinds of behaviours the profession sees as unacceptable, apt for sanctioning etc. The treatment of complainants by the disciplines and complaints procedure itself sends important messages about the appropriate attitude to take to clients, and to client/professional relationships.

Intelligence gathering and analysis – information gathered through the operations of the complaints and discipline system can be used to gather information about individual professionals and the profession. Against the background of data for the profession as a whole (or relevant sub-groups thereof) information about individuals can be used to identify, e.g., those who are ‘at risk’ (who have, say, an unusual number of low-level complaints made against them) and action such as professional development, monitoring etc taken. Aggregated data can be used for such purposes as identification of areas in which professional education is needed, or in which a public communication strategy needs to be developed or refined (in, e.g., cases where many complaints are shown to be based on a misunderstanding of the role of the professional), or in which the code of ethics needs to be reconsidered. The intelligence gathering function of a complaints and discipline system is an important source for information for a profession’s Ethics Audit (discussed further below in the section ‘Ethics Audit and Reputation Index’.) It is also central to the overall integration of both the codes of ethics and professional development mechanisms, supplying hard data for the development and improvement of both. Correspondingly, the standard of complaints and discipline procedures is one of the key dimensions of ethical performance at the macro level to be used in the Ethics Audit.

There are practical difficulties in constructing complaints and discipline systems that embody all these functions. Some of these difficulties are generic. For example, there is a tension, at least, between the ‘conflict resolution’ and ‘sanctioning and restitution’ functions, where fear of becoming liable for serious sanctioning will act as a disincentive for a professional to, say, admit to mistakes, which in turn is likely to further fuel a client’s sense of grievance. There is a substantial body of literature discussing the kinds of institutional design which will minimise or obviate such difficulties.

Some of the difficulties facing a professional group in constructing a satisfactory complaints and discipline system, on the other hand, are specific to the group. For example, it may be unlikely that certain sorts of professional misconduct will evince complaints from clients. Think, for example, of an auditor who is colluding with a large corporate client to sign off on misleading financial statements. In such cases, it may be necessary to include an investigatory capacity in the complaints and discipline system – but that itself may be problematic for smaller and less well-resourced groups.

In the case of the complaint handling and response element of a complaints and discipline system, there is a range of legitimate expectations such as *clarity*, *simplicity* and a relatively *inexpensive* and *timely response*, which generate *required standards* of a good complaints system. The process should be relatively accessible and not overly onerous, difficult or mysterious for consumers to access. Salient information should be available for consumers and help provided by the occupational or associational group in regard understanding the rights and obligations of both consumer and supplier and the ability of consumers to act on relevant information and pursue their complaints. The system then should be *accountable through transparency* in regard its processes and the resolution of disputes and these be undertaken within a reasonable time frame and not be prohibitively expensive for consumers to pursue.

The PSC has provided a useful list of such standards in their *Complaints and Discipline Systems Report*.⁶

These standards should be developed as a *collaborative enterprise* with both the occupational or associational group in question and the participation of relevant consumer and public interest representatives. As, e.g., with codes of ethics, it is a notable function of these standards that they reflect a *convergence of values* between consumers and suppliers and that the professionalisation of the occupational group is marked by an immersion in these values, both in terms of commitment to those agreed upon and to the development and improvement of processes to better reflect appropriate values and meet the challenges of new problems in a dynamic landscape.

Crucial to this convergence of values is also that the ‘discipline’ responses are seen as *effective, fair and reasonable*. Where groups are ‘too soft’ on offenders public confidence will (rightly) be lost and scepticism prevail. Where discipline procedures are too harsh or misdirected the genuine engagement of the professionalising group will (rightly) be undermined. As noted above for codes of ethics there needs to develop a genuine sense of these standards being ‘owned’ by both parties.

Investigative research then, also needs to be undertaken concerning the nature of complaints and a group’s complaint handling processes, so that the complaints themselves are better understood and the processes for response are under review and development. *Data collection* in regard complaints and complaint handling procedures must be comprehensive and collected in accord with standards of salience and consistency applied across complaint types in order that such understanding and improvements are possible.

So, e.g., in identifying the nature of complaints it is important to identify the key elements of complaints – are they, e.g., about failures on the part of the role occupant to disclose salient information, or about conflict of interest or about both? Which, given the circumstances, is more serious? What were the causes?

It is important to make such identifications and judgments so that one may then know what the actual problems are, what their nature is and therefore be better positioned to see how one’s complaint handling processes might be developed and improved.

Ongoing education with respect to the nature of complaints and disputes and processes to handle them, is also a significant standard against which good complaints and discipline procedures are measured. The complaints and discipline procedures should not be just reactive (though, of course, as mentioned it is important that they are effectively reactive and so, e.g., not too soft on offenders) but also *preventative* – hence the need for ongoing research feeding back into improving the system and for educational growth on the part of the professionalising groups.

⁶ For the full account, see, *Complaints and Discipline Systems Report*, Professional Standards Council, 2001, p. 58-9. Points have also been substantially developed from material on pp. 62-70.

Clearly, what is most important is that practical changes are effected so as to minimize future problems, and an effective complaints systems is a crucial educative mechanism for professionalising occupations to improve their ethico-professional standards, especially in relation to the protection of consumers or the public more generally.

Self-Assessment

A key element of sophisticated integrity systems and an important means of maintaining and improving ethico-professional standards is self-assessment. Such self-assessment can take a variety of forms. For example, it might be a relatively informal and voluntary feedback mechanism administered internally, e.g., a questionnaire circulated by a manager to all staff. Alternatively, it can be a mandatory formal procedure involving an externally administered instrument and subject to external audit, e.g., the self-assessment forms circulated to legal firms by the NSW regulator, the Office of the Legal Services Commissioner (OLSC). The OLSC has power to audit any legal practitioner in NSW.

The purposes of such self-assessment are multiple. They serve as an informational or data-gathering tool, e.g., how many legal firms are complying with conflict of interest procedures? They also have an educative and promotional function, e.g., the explicit message is that ethico-professional standards relevant to this occupation include the efficient administration of justice, and the implicit message is that such standards are important and shortcomings should be addressed. More generally, they are a means of ensuring self-reflection and self-improvement, e.g., how can we improve our processes in relation to breaches of confidentiality?

Further, self-assessment can be a mechanism in the service of management. Consider, for example, the OLSC self-assessment exercise. An important part of the empirical work undertaken for this report consisted in a data analysis of the results of the self-assessment exercise undertaken by the OLSC. This data analysis was an element of a quantitative study (of which more below) undertaken for the OLSC on Complaints and Self-Assessment Data Analysis in Relation to Incorporated Legal Practices (ILPs).⁷

As discussed above, competition theory, prevalent in all Western countries today, takes economic efficiency as its key goal. This stands in stark contrast to the traditional purpose of the legal profession – the administration of justice, abstracted from concepts of profitability and economic efficiency. This tension between what might be termed the ‘profit motive’ and the perception that it conflicts with professional ethical practice is becoming more and more evident in the legal services market today as law firms are increasingly abandoning their traditional structures and choosing to incorporate.

Consequently, the OLSC, as the primary regulator of the legal profession in New South Wales in the context of an overall co-regulatory system involving also the NSW Law Society and the NSW Bar Association, is reconsidering traditional methods of regulation

⁷ Seumas Miller and Mathew Ward *Complaints and Self-Assessment Data Analysis in Relation to Incorporated Legal Practices* (OLSC, 2006)

in favour of new techniques and strategies such as an ‘education towards compliance strategy’.

The OLSC approach to regulating these new business structures is much more a ‘bottom up’ compliance strategy than the prescriptive, ‘top down’ approaches adopted by other jurisdictions. Rather than prescribing compliance strategies, the OLSC instead requires that compliance systems are developed by the firms themselves.

The OLSC, by agreement with the NSW Law Society, has in practice assumed the role of auditing ILP’s for compliance with the appropriate legal requirements.

While the design and implementation of appropriate management systems are at the heart of attempts to deal with ethical and compliance problems within ILP’s, the legislation does not define ‘appropriate management systems’. Accordingly, the OLSC has collaborated with the Law Society, the College of Law, LawCover, legal practices and other stakeholders to determine the key objectives of an appropriate management system. The approach formulated is an ‘education towards compliance’ strategy in which ILP’s must show that they have procedures in place which evidence compliance with what the OLSC considers the proper objectives of ethically sound legal practice.

To enable legal practitioner directors to assess their management systems, a standard ‘self-assessment’ document was developed and sent to all legal practitioner directors as part of the ILP review program. It is acknowledged that since ILP’s vary in terms of size, work practices and nature of operations, an approach of ‘one size fits all’ requiring the fulfilment of uniform criteria, would not be appropriate. The main findings of the OLSC’s self assessment exercise (as determined by the quantitative study mentioned above) were as follows.

Self-Assessment Forms

- 63% of self-assessment forms (SAFs) were returned with substantial comment thereon.
- 56% of ILPs were prompted to make management system changes by the self-assessment process.
- On 155 occasions some firm or other subsequently reached compliance in relation to one of the OLSC’s ten commandments, e.g., the requirement to have in place conflict of interest procedures, after initially reporting non-compliance or partial compliance in relation to that commandment.

These findings indicate that the self-assessment process is being taken seriously and is having significant impact. Accordingly, these findings demonstrate that self-assessment is, or can be, a useful weapon in the armoury of an integrity system. As mentioned above, it can do so by: providing data/information regarding compliance with ethics assuring processes; assisting in the ethics education of practitioners; serving as a management tool in relation to the development, maintenance and promotion of ethico-

professional standards, and; contributing to inducing a culture that is self-reflective in relation to ethical matters.

Reputational Indexes and Ethics Audits

In recent years the notion of a ‘Reputation Index’ has gained currency in a number of contexts, especially in business and academic circles. The term seems to have a number of different senses. Sometimes it is used to describe a way of measuring the reputation that an organisation actually has. Since reputation exists, so to speak, ‘in the eye of the beholder’ actual reputation does not always match deserved reputation. Accordingly, sometimes the term ‘RI’ is used to describe a way of calculating the performance of an organisation on the basis of which its reputation should be founded. Sometimes it is used more broadly still as a way of describing systems for the accurate measurement of an organisation’s intangible assets (which include, but are not limited to reputation)⁸.

As we use the term here an ‘Ethical Reputation Index’ (henceforth ERI) is, in the first instance, a way of accurately measuring the ethical performance of individual or organisational members of occupational groupings, which we call an Ethical Audit. Here we stress the importance of *objective* measures of ethical performance, including gross numbers of warranted complaints, and compliance with institutional processes established to assure compliance with ethico-professional standards. However, an effective ERI should be more than simply an accurate gauge of ethical performance. Since ethical reputation should reflect the findings of the Ethical Audit an ERI should also function to align actual with deserved reputation through the accessible presentation and promulgation of the results of the ethics audit. Here we note that what is made publicly available is not necessarily a ranking of members of an occupational group or set of organizations. Rather there could be simply the statement that the minimum threshold of ethical standards had been met, e.g., by way of a Cover of Excellence ‘badge’. Alternatively, there might be, say, a five star ratings system, in which more than one practitioner or firm could get a five star rating. And there are other possible systems.

So understood, an effective ERI will consist of the following elements:

- 1) An occupation specific composite ethical performance index, consisting of a number of discrete dimensions of ethical performance both at the micro-level, such as, e.g., honesty, respect for confidentiality, avoidance of conflicts of interest, etc (and perhaps relative weightings for these different dimensions) and at the macro-level, such as, e.g., possession of a detailed and enforced code of conduct, tailored and well-functioning complaints and discipline system, and an appropriate and mandatory professional development program.
- 2) Measurable ethical performance indicators for each dimension, e.g., upheld complaints, institutional processes of ethics assurance (again, there may be a

⁸ Cravens, K., Oliver, E.G., and Ramamoorti, S. (2003) ‘The Reputation Index: Measuring and Managing Corporate Reputation’ *European Management Journal* Vol. 21, no. 2, pp.201-212.

- number of weighted indicators for a single dimension, to enable an overall performance score in that dimension).
- 3) Mechanisms for gathering data relevant to the performance indicators (such as, e.g., logged complaints, findings of disciplinary proceedings, results of self-assessment, surveys of consumer satisfaction, etc.).
 - 4) Methods for aggregating and analysing gathered data. (Elements 1)-4) jointly constitute the Ethical Audit component of the Ethical Reputation Index.)
 - 5) Presentation of findings of the Ethical Audit in accessible and meaningful form. (One issues here is the use of comparative versus absolute performance measures – should, e.g., a practitioner be rated as ‘in the top tenth percentile’ in some dimension, or ‘having a score of .62’ in that dimension, or both? Another issue concerns ‘raw’ versus ‘adjusted’ data. For instance, if a practitioner works in a high-risk area should the number of complaints against them be presented in bare numerical form, and/or in comparison with the average number, or should they be presented in a form weighted to take into account the difference between practice environments?)
 - 6) Promulgation of the findings of the Ethical Audit in a manner which is likely to reach relevant stakeholder groups (e.g., through occupational and consumer group publications and on-line forums).

A well-functioning ERI aligns actual with deserved reputation. In so doing it provides a number of benefits for both the members of an occupational group, and their clients/customers. For clients, it protects them against unethical treatment and reduces ‘transaction costs’ by enabling them to enter into a relationship with a professional without having to take elaborate precautions against unethical behaviour. For already ethically well-motivated professionals, it provides assurance that their behaviour will be recognised and rewarded. For those who are not already so well-motivated, it provides an extra incentive to act in an ethically appropriate manner, while reducing the benefits to be gained from the promotion of their (undeserved) public reputation through advertising, media appearances etc. An ERI thus can both encourage ethical behaviour and lead to an economically more rational allocation of resources.

Finally, we note that there are a variety of possible ERIs and that different ERI types might be appropriate for different occupational groups; indeed, there might be some occupational groups in relation to which no ERI is either necessary or desirable. One possibility is that ERIs are, generally speaking, more appropriate for market-based occupations than traditional professions or, at least, more appropriate for less heavily regulated occupational groups.

An Online Forum for Ethico-Professional Standards

In addition to the self-assessment mechanism and reputational indexes just described, we make a third, more general suggestion that the PSC consider introducing and developing an online forum for discussion of the ethico-professional issues and practices of different occupational fields. Such a forum could provide a significant voice for consumers, and their representatives, or the public generally, promote dialogue between occupational groups, individual practitioners and the public and a significant educative role for all groups in regard ethico-professional issues.

Consumers or the public generally do not have the resources, organizing capacities and more generally power and influence to press their interests in ways comparable to that which, say, occupational associations or firms enjoy. Concern about such asymmetries of economic and social power and influence and its negative effects for consumers or the public drive the main cluster of objections to, or queries about, the legitimacy of the professions or the process of professionalisation – especially, their legitimacy in regard protecting, much less promoting, consumer or public interests.

Certainly, if the so-called ‘hidden hand’ of the ideal market economy is to work, whereby the pursuit of the conflicting self-interest of suppliers and consumers is to promote the general good, then we need to eradicate significant asymmetries of power and influence that work in favor of suppliers, and at the expense of consumers. One significant virtue of the new computer age is that it does provide a relatively inexpensive way to give consumers or the public a potentially quite powerful voice.

Moreover, as we have argued, the good professional reputation of individuals, their firms or associations is generally a crucial incentive available for the promotion of ethico-professional standards. And we have recommended that the PSC self-understanding be broadened to develop its role in conferring good reputation through its ‘Cover of Excellence’ schemes in light of the recognition that these schemes themselves appeal to this incentive of good ethico-professional reputation.

A key problem or issue however for the effectiveness of the overall integrity systems relevant to different occupations, especially for meta-regulatory bodies such as the PSC operating within such a system, will be how to make good use of this incentive, i.e., how to have a system that can compellingly show that reputation is deserved (or otherwise) and so translate the desire for good reputation or to *appear* good or to be doing well to *actually* being good or doing well – and so being *deserved* of one’s good reputation.

And a key problem for meta-regulatory agencies here is typically limited resources, e.g., for more comprehensive reporting and monitoring systems including greater consumer or public participation. The online forum model therefore, also seems a promising instrument through which the PSC, in a relatively inexpensive way, might provide or facilitate more comprehensive systems of this sort.

An online forum system *may* provide independent, consumer/client, market indicators of the performance of occupational groups. One model of this sort is provided by the ‘e-

bay' system for buying and selling goods. On this model, suppliers and consumers provide comments and ratings of one another's commercial conduct. This is *one* way we could imagine promoting consumer power and reducing undesirable asymmetries between suppliers and consumers. If such a 'mutual comments' system were to be adopted it would need to be developed and more carefully constructed. There would need to be relevant over-sighting of comments, for instance, screening those that do not raise worthwhile concerns, or are defamatory.

But in so far as consumers or the public may rightly be able to make comment and judgment of such performance, proper reputational indices would require that they may effectively do so. And it seems clear that for many aspects of many occupations consumers or the public may rightly be able to make comment and judgment. It is just that their power to do so is typically relatively weak.

So while the simple mutual rating system 'e-bay' provides might not be suitable, a more carefully crafted supervised system may significantly help redress the relatively weak voice of consumers, or the public generally.

Thus, as with our suggestions of a 'self-assessment' instrument and a reputational index, such an online forum would add to and strengthen traditional complaints and discipline systems, i.e., by having additional assessment systems (either self-assessment or further assessment by consumers and relevant others) to develop and provide further research on the effectiveness of complaints and discipline systems.

Such a forum could also provide a voice for those 'one-off' professional-consumer cases, such as buying a house or hiring an architect, where one is not an on-going consumer of these services and so one may have little impact on suppliers of these services in virtue of one's future consumer choices.

Obviously, there are other concerns and qualifications that would need to be considered, e.g., many aspects of some professions are beyond the expertise of the average, intelligent person and many of us may not even meet this standard. So there would be roles on the system for professional oversight bodies – other independent expert adjudicators and ombudsman – especially where the delivery of the goods or services in question does involve discrete, complex and/or substantial knowledge or practical skills of a certain sort.

Moreover, and perhaps most important, an online forum would be *educative*. It could, for instance, provide a significant resource for consumers to better understand certain ethico-professional issues and realities – e.g., in some engineering or legal contexts – and clear up some misunderstandings of both suppliers and consumers in regard the goods and services they supply and consume. A good example here is the common problem of lawyer-client relations of false expectations and misunderstanding as to what the lawyer may be able to deliver their client, such as 'just outcomes', rather than merely 'just process'.

Finally, an online forum could also be used to promote and make widely available the results of a reputational index, say, for certain occupational groups.

These self-assessment, reputational index and online forum instruments are suggestions for specific, practical tools to improve integrity systems for relevant occupations, both in regard the trend toward rehabilitating, and addressing new problems facing the traditional professions, and the trend toward the broad professionalisation of primarily commercial occupational groups.

As we have indicated, we think these two trends present very different ways of understanding what professionalisation is about. Indeed, the recognition of these different trends appropriately leads one to re-think the question of what it is to be a professional, and consequently, what holistic integrity systems for particular occupations would look like.

Professional groups and primarily commercial market occupations should be encouraged to ‘immerse’ their guiding conception of their occupational practice in the relevant generic and specific ethical issues relevant to their practice, including in dialogue with consumers, or the public.

We recommend then, the general suggestion of developing an online forum for particular areas, in collaboration with occupational and consumer groups and with the involvement of relevant expert oversight and adjudication.

This would give consumers/clients a potentially powerful voice and help address undesirable asymmetries between suppliers and consumers; immerse professionals, occupational groups and actors further in the ethico-professional process; an educative/research function for the further understanding and development of salient ethical issues and problems, and; a natural setting for a reputational index.

Our suggestions of a ‘self-assessment’ regime, a reputational index (and associated ethics audit) and an ‘online forum’ provide specific practical instruments through which *transparency through accountability* may be better promoted, both with respect to the one’s professional peers, bodies and regulative agencies and consumers, clients or the public generally.

Professional Development and Ethics Education

There is a wide variety of different kinds of professional development programs; and even in relation to professional ethics (occupational ethics) there are different educational options.

However, a successful professional development educational program in occupational ethics would meet at least the following requirements.

First, it would be based on actual ethical needs. For example, it would address ethical issues identified as being relevant. Identifying these ethical issues is partly a matter of consulting occupational literature, including empirical studies. However, it might also be a matter of undertaking empirical research in relation to the specific cohort of practitioners undertaking the occupational role in the context in question, e.g., real estate agents in Sydney.

Such empirical research might consist in in-depth interviews with key informants, focus groups and/or an ethical attitude survey. It might also involve consulting a suitable analysis of complaints data.

Second, the education program should adopt an educational methodology appropriate to the practitioners in questions. One such general methodology is the Case Study-based Approach. This approach develops ethical scenarios suitable for use in training packages and courses, and in the preparation of notes for trainers, supervisors and other educators. These scenarios can be prepared on the basis of published texts, existing educational material, and newspapers and other periodicals.

These scenarios or case studies can be conveniently divided into various categories reflecting the ethical issues identified as salient, e.g., conflict of interest scenarios.

However, it is not enough to provide case studies for discussion; ethical analysis has to be provided. Ordinarily this would require input from a professional philosopher trained in ethical analysis.

This brings us to the third and final point regarding professional development programs in occupational ethics. The material used in these programs should be jointly written by a professional philosopher and an experienced practitioner. This reflects the view that integrating theoretical understanding and practical experience is highly desirable in occupational ethics education. Moreover, arguably this approach should also be used in the actual teaching of occupational ethics.

Evidence-based Institutional Design: Designing-in Ethics

Data gathering, aggregation and analysis have been frequently mentioned in the above sections on elements of an integrity system. Such data includes: (i) aggregated complaints data; (ii) data such as compliance with ethics assurance processes (extracted, e.g., from self-assessment exercises; (iii) number of investigations (and percentages of investigated complaints upheld); (iv) data from ethics attitude surveys involving ethical scenarios that elicit the ethical attitudes of practitioners; (v) data from ethics audits (perhaps used in conjunction with reputational indexes); (vi) data from online forums; (vii) qualitative data from interviews and focus groups. And there are a various other sorts of data sources that can be made use of. The general point here is that there is no substitute for actual evidence when it comes to the designing and re-designing of integrity systems. Accordingly, the business of developing, maintaining and improving ethico-professional standards should be evidence-based.

Here there are a number of key questions that need to be addressed, including the following ones. First, the identification of specific ethical issues confronting particular occupational groups. It is a mistake to think that solicitors' ethical problems are always and everywhere identical with those of engineers or real estate salesmen. Second, a determination needs to be made in relation to the seriousness and frequency of ethical transgressions in a given occupation or professional practice at a given time. Third, specific processes need to be designed and implemented in relation to such problem areas, e.g., conflicts of interest disclosure and avoidance. Fourth, audits need to be conducted to determine that processes are in place and are working. Fifth, the different working parts of the overall integrity system for an occupational group or particular professional practice need to be appropriately integrated. And there are various other important questions that need to be addressed.

However, our first fundamental point is that in relation to all these questions there is a need to investigate, to collect and aggregate data, and to analyse this data. Our second fundamental point is that the results of such evidence-based analysis needs to be deployed for the purpose of designing and re-designing integrity systems and the elements thereof. In short, we are recommending evidence-based institutional design and, in particular – given our focus is on ethico-professional standards – the practice of what we might refer to as *evidence-based designing-in ethics*.

In what follows we offer a concrete example of the utility of the recourse to evidence-based analysis. The example made use of is our above-mentioned quantitative study for the OLSC in relation to ILPs.

ILP's must show that they have procedures in place which evidence compliance with what the OLSC considers the proper objectives of ethically sound legal practice, including the following:

- Competent work practices to avoid *negligence*;
- Timely identification and resolution of the many different incarnations of *conflicts of interest*, including when acting for both parties to a transaction or acting against previous clients, as well as potential conflicts which may arise in relationships with debt collectors and mercantile agencies or conducting another business, referral fees and commissions, etc;
- Undertakings to be given with authority, monitoring of compliance and timely *compliance* with notices, orders, rulings, directions or other requirements of regulatory authorities, such as the OLSC, Law Society, courts or costs assessors, and;
- Avoiding *breaches* of the LPA in relation to trust accounts.

This empirical study (mentioned above) on *Complaints and Self-Assessment Data Analysis in relation to Incorporated Legal Practices* involved: (i) establishing an electronic database derived from existing complaints data and a set of self-assessment forms provided by ILPs as part of an OLSC self-assessment process for ILPs, and; (ii)

development of an instrument to interrogate this data base; (iii) a quantitative analysis of the data base. Here follows some of the findings of this quantitative analysis.

Characteristics of Firms

- There are a greater number of Incorporated Legal Practices (ILPs) in New South Wales with three or more solicitors than there are ILPs in NSW with one solicitor.
- The average number of complaints per solicitor per annum decreases as the size of the firm increases.
- 18% of sole practitioners are female.

Complaints (not analysed into complaint elements)

- Approximately 70% of all complaints were classed as consumer disputes and 30% of all complaints as investigations (and, therefore, classed as more serious matters).
- 75% of all complaints emanated from clients.
- Complaints emanating from practitioners, as opposed to clients, were highly likely to be classed as investigations (67% and 19% respectively).
- A significant percentage (26%) of complaints classed as investigations emanated from the regulator, indicating a proactive approach on the part of the regulator.
- Of the complaints investigated by the OLSC approximately 22% were upheld and of those investigated by the Law Society approximately 80% were upheld. (“Upheld” indicates that the legal practitioner (complainee) was found to have been in some way at fault or was required to remedy the complainant in some way.)⁹

These figures are one indicator of the high/low quality of the investigative process. They indicate a reasonably high level of quality in the investigative processes at both the OLSC and the Law Society. Moreover, since most of the investigations conducted by the Law Society are referred from the OLSC, these figures are also one indicator of success/failure in relation to the role of the OLSC in referring matters for investigation to the Law Society. The figures indicate a reasonably high level of success of the OLSC in this regard.

⁹ *The classification of complaints as ‘Upheld’ should not be taken as meaning that there was a positive finding of professional misconduct (PM) or unprofessional conduct (UPC) in a legal sense; quite the contrary: for the purposes of this report, we classed as ‘Upheld’ complaints that involved substantial allegations of misconduct but were in fact dismissed (OLSC closure codes ODIS 59 and PSDIS 60) because there was insufficient evidence for referral of the matter to the Administrative Decisions Tribunal (ADT). Our classification was a purely heuristic device and we decided that, much as it might be technically correct from an administrative point of view to class such complaints as ‘Not Upheld’, to do so would in effect be to produce ‘false negatives’, so to speak, vis-à-vis the identification of complaints pointing to ethically problematic professional behaviours.*

Complaint Elements

Complaints are categorised by the OLSC into categories and sub-categories, e.g., Ethical Matters is a category having as one of its sub-categories, Misleading or False Advertising.

In relation to the OLSC categorisation of complaint categories and sub-categories:

- The generic category of Ethical Matters involved the highest number of complaints (30% of all complaints) followed by Quality of Service (24%) and Costs/bills/agreements (22%).
- The main categories of complaint were subdivided into More Serious and Less Serious. Ethical Matters (More Serious) ranked equal first with Quality of Service (More Serious). That is, each of these two More Serious sub-category types ranked above all the Less Serious sub-category types. Ethical Matters (More Serious) and Quality of Service (More Serious) each contained approximately 22% of all complaint elements (by OLSC sub-category).

Ethical Matters (More Serious) comprises (amongst other complaint types) complaints in relation to conflict of interest, breach of confidentiality, failure to honour undertakings, acting without instructions, misleading or dishonest conduct about progress in court, and misleading advertising. Quality of Service (More Serious) comprises only complaints in relation to negligence and delay.

Complaint Elements and Self-Assessment Forms

In order to establish relationships between the complaints data and the data from the self-assessment exercise, the complaint elements into which complaints received by the OLSC are analysed, were ranked against Self Assessment Form Objectives or 'Commandments'; rank 1 indicating the Commandment to which each complaint element most directly related.

- In relation to the 184 ILPs who ranked themselves against the OLSC's 10 commandments, the average number of complaints per solicitor per annum was 0.6.
- There were 21 ILPs who ranked themselves as being compliant (not being either not compliant or only partially compliant) in respect of all 10 commandments; the average number of complaints per solicitor per annum of these 21 firms was 0.47.

Hence there is a positive correlation between very high levels of compliance with the OLSCs 10 commandments and relatively low levels of complaints.

Identification of High Complaint firms

The quantitative study made available (in anonymised form) data in relation to firms with an especially high number of complaints. More specifically, it provided:

- Top 15 ILPs by gross number of complaints.
- Top 10 ILPs by average complaints per solicitor per annum.
- Top 8 ILPs by number of upheld complaints.

Overall this quantitative study provided important evidence in relation to the identification of ethical problem areas, the general quality of investigations, the utility of the self-assessment process and the identification of firms in need of further scrutiny in relation to ethics compliance. As such, it is a vindication of evidence-based analysis. Moreover, it provides directions for further research and ultimately for redesigning elements of the integrity system for legal practitioners in NSW. In particular, it vindicates the designed-in self-assessment instrument and provides directions for improving it.

SECTION 4 – RECOMMENDATIONS

We recommend the following theoretical perspective for the future development of the PSC:

- The Project of a Broad Professionalisation Strategy for the promotion of ethico-professional standards;
- The development of tailor-made (as opposed to one-size-fits-all) Integrity Systems for particular occupations;
- The PSC's key role in improving the effectiveness of these systems.

We make the following more specific recommendations:

1. Assist in the formulation in ethical terms of the goals of occupational groups.
2. Apply an holistic (preventative and reactive) integrity system for occupations. This implies an integrated suite of mechanisms such as codes of ethics, codes of conduct, complaints and discipline systems, complaints data gathering and analyses processes, reputational indexes, ethics audits, on-line forums, ongoing professional education, and the continuous improvement of educative and other institutional processes.
3. The PSC's self-understanding should be partially shaped by a conception of what its contribution to the holistic integrity systems might be. The PSC should attempt to address the tension between protecting consumers and clients by, on the one hand, using occupational associations to raise professional standards, while, on the other hand, also addressing possible anti-competitive and anti-consumer effects of professionalisation.
4. Adopt a broad interpretation of the PSC's role regarding the promotion of ethico-professional standards.
5. Retain and strengthen the ethical service ideal as a professional trait for traditional professions – as, for instance, public safety for engineers, or justice for law, but;
 - without special privileges where this would come at the expense of consumer and/or client protection;
 - with no assumption of pure self-regulation and;
 - with safeguards against the self-serving tendencies of occupational associations.
6. Greatly strengthen the PSC's role in promoting the deserved reputation of occupations and individual firms, e.g., by use of ethics audits, selective use of reputational indexes.
7. Identify the ethico-professional standards and ideals for primarily commercial groups that are seeking to professionalise in a general sense (such as the real estate industry). We suggest:
 - a generic goal of the provision of specific ethical goods for consumers, customers and society, e.g., high quality affordable housing (in the case of real estate agents) and;

- the particular, primarily commercial goals and roles in a given industry that contribute to the generic goal.
8. Facilitate the development of Codes of Ethics and Codes of Conduct for these professionalising occupations.
 9. Design-in:
 - specific remedies for specific ethical problems; and
 - a tailor-made holistic integrity system for the particular occupation.
 10. Insist on strong disciplinary sanctions, e.g., additional teeth for complaints and discipline where required.
 11. Adopt models for both consumer and client protection. This should include increasing consumer choice, and strengthening professional accountability in the exercise of duty of care to clients.
 12. Rehabilitate the notion of professional autonomy as required, and simultaneously strengthen the accountability and general integrity roles of professional oversight bodies.
 13. Focus on evidence-based design-in ethics integrity mechanisms and monitoring of particular groups, that is – on the basis of aggregated complaints data, self-assessment exercises, ethical attitude surveys, etc – identify high-compliance firms or practitioners, the major ethical problems in an area, and the poor performers, etc.
 14. Broaden PSC’s membership to include representatives of consumer, client and public interest groups.
 15. Require all groups to adopt the Ethics of the NSW Competition Code to:
 - place the commitment to fair competition in the codes of ethics and professional development programs of occupations; and
 - require reporting (and enable monitoring) of the practical ways in which such commitments are (or are not) realised.
 16. Consider the general applicability of a self-assessment instrument for occupations.
 17. Consider the general applicability of an ethics audit for occupations and the selective use of reputational indexes.
 18. Develop an online forum for particular occupations, in collaboration with occupational and consumer groups.
 19. Generate more resources to fund the developed monitoring aimed at improving the integrity systems applying to participants in Cover of Excellence schemes. Here we suggest that the PSC require participating associations show commitment to these improvements by contributing resources to assist funding and functioning of these improvements.
 20. Use publicity and education campaigns to raise the profile of the PSC’s Cover of Excellence schemes.