REGULATING DISHONEST CONDUCT IN THE PROFESSIONS

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Introduction

This paper examines the question of how professionals who engage in dishonest conduct in connection with their professional practice should be dealt with. It will consider the various legal regulatory strategies which may be used to control such conduct with a view to matching appropriate strategies with the various forms of dishonest conduct which may take place. An effective matching is necessary in order to fulfil the various aims of the different regulatory systems which are available. It will not deal with the many non-legal risk minimisation strategies that can be employed to prevent fraud such as training in ethics and fraud awareness, auditing by colleagues, and consumer-oriented fraud prevention initiatives (see Smith 2000, Smith 2002).

At the outset, it is important to realise that there are now considerable numbers of professionals working in the community, and that new occupations are achieving professional standing regularly (see Carlton 2002 in relation to complementary medicine practitioners).

It is generally agreed that there are six main characteristics of a professional occupation—although there has been a protracted academic debate over this question for decades now (see Western, Makkai, McMillan, and Dwan 2002). The six characteristics mentioned by Johnson (1972, p. 23) are: the presence of skill based on theoretical knowledge; the provision of training and education; some means of testing the competence of members; organisation of the members; adherence to a code of conduct; and an element of altruistic service in which work is performed not solely for financial reward.

It is this last element that makes crimes of dishonesty committed by professionals so disturbing, as fraud strikes at the very foundation of what it is to be a professional—namely, one who is willing to provide services to the public even in the absence of payment.

In Australia in 1996, there were 2.17 million professionals according to the Australian Standard Classification of Occupations published by the Australian Bureau of Statistics (1997). Employed professionals made up 17.1 per cent of the total Australian labour force while associate professionals made up 11.3 per cent. Together they comprised 28.4 per cent of the 8.4 million Australians aged 15 years and over in the employed labour force in 1996. Of the total number of professionals and non-professionals, fifty-three per cent were male (Australian Bureau of Statistics 1996).

This paper will focus on dishonesty engaged in by those professionals that have the greatest opportunity to commit financial crimes, primarily because of the opportunities that arise out of the nature of their work. This includes lawyers, accountants, financial advisers and health care providers all of whom have ready access to funds provided by either their clients or government funding agencies. Others, such as teachers, academics and computing professionals arguably have more restricted opportunities to commit crimes of dishonesty, although of course there are some famous examples of instances in which they have.

A Continuum of Dishonest Conduct

The concept of dishonesty lies at the heart of most property offences and is a matter of fact for juries to determine in criminal cases. The Commonwealth Criminal Code Act 1995, for example, defines dishonest as:

(a) dishonest according to the standards of ordinary people; and

(b) known by the defendant to be dishonest according to the standards of ordinary people (s. 130.3).
The Code goes on in sections 131.2 and 134.1 to provide certain further qualifications of when conduct will be dishonest for the purposes of establishing offences of theft and obtaining property by deception. For example, section 131.2(3) provides that ‘a person’s appropriation of property belonging to another may be dishonest even if the person or another person is willing to pay for the property’.

With respect to professionals, standards of honesty for criminal prosecutions are determined in the same way as for other accused persons. In professional disciplinary proceedings, however, standards of dishonesty are determined by the professional regulatory body in question that will consider whether the conduct ‘would reasonably be regarded as disgraceful or dishonourable’ by professionals in the same profession ‘of good repute and competency’ (Allinson v General Council of Medical Education and Registration of the United Kingdom [1894] 1 QB 750, 760-1).

In order to understand the complexity of dishonest conduct in professional contexts, Figure 1 presents some recent examples of behaviour that lie on a continuum from least serious to most serious, both in terms of moral turpitude, the motivation of the offender and the importance of mitigating circumstances.

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Seriousness

Figure 1 Seriousness of Dishonesty Categories

Seriousness is important not only in terms of sentencing in criminal contexts, but also in determining which is the most appropriate regulatory strategy to use in order to achieve deterrence.

A substantial body of research exists in criminology which attempts to set out deviant and criminal conduct in a hierarchical arrangement from least serious to most serious (see, for example, Croall 1992). Surveying public attitudes as to the seriousness of offending is a favourite topic for social science researchers and the results are invariably used to justify the imposition of certain sanctions according to the perceived seriousness of the conduct in question. Such research has also been used to guide decision-makers in applying sanctions consistently and to describe how the seriousness of various offences has changed with time.

The following categories of dishonesty have been developed from an examination of reported prosecution cases in Australia in recent years. The categorisation is not based on an empirical analysis of cases or on surveys of public attitudes but, rather, is a subjective assessment of seriousness apparent from recent cases. It incorporates elements of moral turpitude and also takes...
into account mitigating factors that might be raised at the time of sentencing. The categories are not mutually exclusive and have been developed in light of previous attempts at describing and classifying instances of financial crime (Krambia-Kapardis 2001, Weisburd and Waring 2001, Williams 2002). The following list is arranged in order from least to most serious instances of professional dishonesty.

**Professional Misunderstandings**

Arguably the least serious forms of dishonesty might be said to arise through poor communication between practitioners and their clients resulting in clients believing that they have been defrauded or deceived in some way when, in fact, a legitimate explanation exists.

Examples might include solicitors failing to be clear in describing the circumstances in which costs are incurred or in which monies are debited from client accounts for legitimate purposes. A number of complaints arise each year against solicitors for over-charging or misappropriation of funds that involve poor communication between practitioners and their clients (Neville 2000). In these cases, criminality is generally not involved, although the practitioner may well be guilty of failing to adhere to proper professional standards of conduct.

**Client-Centred Altruistic Dishonesty**

Circumstances can also arise in professional practice in which a practitioner is drawn into criminal activity which is being conducted by a dishonest client, or advises a client concerning a proposed course of conduct that might be illegal (Williams 2002). Sometimes such conduct may be hard to characterise as dishonest as it may involve the practitioner acting with undue zeal on behalf of a client and, in the process, breaking professional ethical principles or criminal laws. For example, advising clients as to the circumstances in which it is legal to do certain activities, such as minimising taxation or destroying documents that could be relevant to legal proceedings, could sometimes lead to the professional adviser aiding and abetting a criminal act, or otherwise acting contrary to professional ethical standards (e.g. *McCabe v British American Tobacco Australia Services Limited* [2002] VSC 73 (Supreme Court of Victoria, 22 March 2002, *per* Eames J., subject to appeal). See also Cox and Wallace 2002).

In other cases solicitors who have stolen trust account funds have argued that they were trying to assist a desperate client or were attempting to cover errors with other clients’ trust funds (Neville 2000). Invariably, the client is unable to repay the funds and the deficiency in the trust account becomes apparent.

**Dishonest Omissions**

Although the criminal law does not always distinguish between acts and omissions in terms of culpability, in some cases failure to act may be considered to be less serious than carrying out an overt act of dishonesty. Where, for example, an auditor discovers fraud within a client’s company but fails to take action by reporting the matter to the police, it is sometimes unclear that the auditor has acted improperly. Recently, the International Federation of Accountants has suggested amendments to International Standard of Auditing (ISA 240) which will place a greater onus on auditors to make sure that fraud control measures are in place and to report suspicious financial transactions (Gettler 2000). Similarly, in light of recent corporate collapses, greater scrutiny is being placed on professional advisers to disclose improper activities within corporations that could involve dishonesty.
Conflicting Interests

Dishonesty can also arise out of a conflict of interest between professional advisers and their clients. There have, for example, been cases in which doctors have prescribed drugs or medical appliances for improper motives, such as where they have a financial interest in the drug or appliance, or where the doctor has received an improper inducement to prescribe the drug from a company. One recent problem has arisen of doctors constructing their own Websites in order to advertise their professional activities or provide information to the public, but failing to do so ethically and in accordance with standards of acceptable practice. In one case, for example, a famous doctor in the United States maintained a Website which contained material advertising particular health products. It was alleged, however, that he had failed to disclose a commercial interest in the products being advertised and sold through the Website (see Noble 1999).

Professional Opportunism

Sometimes professional advisers will become privy to information that could be used for their personal advantage and then make use of that information dishonestly. This may infringe client confidentiality or involve a misuse of confidential information. An example of a case of ‘medical insider trading’ was the so-called ‘MRI scam’ which was uncovered in late 1999 in which up to 300 Australian radiologists were allegedly involved. A report by the Health Insurance Commission (HIC) alleged that radiologists had backdated orders for MRI machines, or used revokable contracts, in order to profit illegally from a 1998 budget decision to introduce Medicare rebates in respect of scans carried out on privately-owned machines. The rebates were only applicable for machines purchased or ordered prior to the date of the budget announcement. Some thirty-three machines were ordered six days before the announcement with twenty-seven orders allegedly made on the basis of inside knowledge of the terms of the proposal (Zinn 2000). The HIC sought the repayment of $164,000 from one doctor in respect of payments made for MRI scans which had been requested by a general practitioner rather than a specialist as required by the HIC (Gray 2000 and see Australian National Audit Office 2000).

Medical practitioners have also been involved in fraudulently accepting fees from drug companies to carry out controlled trials of new drugs where they have failed to conduct the trials and have simply fabricated results. In one case in 1991, a single-handed general practitioner in East London agreed to take part in a clinical trial of a new autoinhaler for asthma. The drug company provided the inhalers and evaluation forms to fill out and agreed to pay him £150.00 per patient. When the time came to return the completed forms, the practitioner had not had enough time to select patients and do the trials and so he fabricated the results, returned the forms, and received his payment. He was deregistered but on appeal given three years’ conditional registration which prohibited him from engaging in medical or clinical trials (Gonsai v General Medical Council (Unreported decision of the Judicial Committee of the Privy Council, 1 December 1992; see Brahams 1993).

Inadequate Standards

Dishonesty can also arise out of inadequate professional standards or poor levels of training. Sometimes a practitioner may make use of client funds in order to keep a failing or poorly managed practice alive. In one case, a Melbourne pharmacist defrauded the Health Insurance Commission of $1.1 million in pharmaceutical benefits over a two-and-a-half year period to help finance her struggling business. She was convicted and sentenced to 18 months’ imprisonment (R. v Thi Thuy Nguyen, County Court of Victoria, 13 June 2001, The Age, 14 June 2001).
Invariably in such cases, the financial difficulties are not solved and further funds are stolen which are never able to be repaid. Although clearly illegal and unethical, the reason behind the conduct is understandable as being due to ineptitude or incompetence rather than intentional dishonesty.

Other cases have involved inept investment of client funds or investment outside regulatory controls. In one Queensland case, a solicitor pleaded guilty to having misappropriated approximately $4 million from client trust account funds for investment in a Nigerian advance fee letter scam. He was sentenced on 5 May 2000 to 10 years’ imprisonment for one count of misappropriation and 5 years’ imprisonment concurrent for two counts of uttering false documents. It was ordered that he be eligible for release on parole after 3 years of that period (R. v Paul John Crowley, District Court of Queensland, 5 May 2000).

In the case of R. v Fulton (Supreme Court of Tasmania, 13 December 2001, Slicer J.) a solicitor had used client trust funds amounting to $98,000 for the payment of settlement monies due to other clients which the practitioner failed to secure due to incompetent handling of civil litigation on their behalf. He was convicted and sentenced to two years’ and six months imprisonment, suspended after he had served 14 months’.

Sometimes practitioners may simply want to make use of their clients’ funds for speculative investment purposes, such as the case of a doctor in New South Wales who misappropriated patients’ money intended for an investment scheme who was convicted and later deregistered (NSW Medical Board 1993, p. 34). On other occasions practitioners may be experiencing personal financial difficulties and misappropriate client funds to invest in order to maintain their income.

**Individual Psychopathology**

In some cases, an individual may commit dishonest conduct owing to the presence of some personal psychopathology, such as an addiction to gambling or drugs. In these cases the conduct will clearly be dishonest and culpable, but the addiction may be taken into account as a mitigating circumstance. Cases involving solicitors and accountants who misappropriate client funds in order to fund compulsive gambling activities or to purchase drugs of addiction occasionally come before the courts.

**Dishonesty Involving Undue Influence**

The other area in which dishonesty has arisen concerns practitioners who have exerted undue influence over their clients to leave them bequests in their wills or have sought to borrow money from clients which they are unable or refuse to repay.

Perhaps the most infamous allegations of this form of abuse were made against a medical practitioner in England in the 1950s, John Bodkin Adams, who was alleged to have killed a number of geriatric patients in the nursing home he ran after having arranged for them to leave their money and chattels to him in their wills. The allegations were not proved, although the practitioner was later de-registered for other offences including failure to disclose a pecuniary interest in a patient’s death (Devlin 1986).

More recently, a general practitioner, Dr Harold Shipman, was convicted on 31 January 2000 at Preston Crown Court in England, of murdering fifteen female elderly patients, and sentenced to life imprisonment in respect of each conviction. Dr Shipman was also convicted of forging the will of one eighty-one year-old victim by making himself the sole beneficiary of her estate, worth some £386,000 (Carter 2000). The inquiry conducted into Dr Shipman’s activities by Dame Janet Smith
found that although Shipman had forged the will of one patient, she found no evidence that he had killed her for monetary gain. She noted that in this case, she was not convinced that Shipman’s motivation was simply a wish to inherit her considerable estate. His selection of a victim whose daughter was a solicitor, his incompetent forgery of the will and the arrangements he made for its delivery to a solicitor made discovery inevitable. She concluded that it was hard to resist the inference that Shipman was driven by a need to draw attention to himself and his crimes (Smith 2002).

**Misuse of Professional Power**

Dishonesty can also arise in non-financial circumstances. For example, health care providers have sometimes misrepresented the nature of treatment provided for inappropriate personal reasons.

In a widely-publicised case, a medical practitioner diagnosed as HIV positive, engaged in unprotected sexual intercourse with his partner over extended period without disclosing his medical condition. He was charged and pleaded guilty to one count of recklessly engaging in conduct which placed a person in danger of serious injury, one count of obtaining financial advantage by deception and one count of attempting to obtain financial advantage by deception. He was sentenced to 4 years and 2 months’ imprisonment with a non-parole period of 3 years. On 25 August 1997, his name was removed from the Medical Register by order of the Medical Practitioners Board of Victoria. The Board’s Panel found him guilty of ‘abuse of trust by having unprotected sexual intercourse with two current patients, by flagrantly defrauding Medicare, by misusing the doctor/patient relationship to borrow large sums of money from existing patients, and by encouraging an untrained person known by him to be HIV positive to assist in minor surgical and office procedures’. It also found that he had compounded these grave abuses of trust by knowingly exposing one patient to the risk of transmission of HIV by engaging in unprotected anal sexual intercourse with the patient’ (R. v Dirckze County Court of Victoria, 13 August 1999, Anderson J.).

In another case, a radiographer had on eight separate occasions, placed a transducer probe of an ultrasound machine into the vaginas of his patients ostensibly for diagnostic purposes but actually for his own sexual gratification. According to the law at the time, he could not be convicted of rape because the patients had agreed for the act to take place, albeit due to a mistaken belief as to the necessity of the procedure (R. v Mobilio [1991] 1 VR 339, Victorian Court of Criminal Appeal). The law was subsequently amended to provide that consent is not valid where ‘the person mistakenly believes, because of a false representation, that the act is for medical or hygienic purposes’ (s. 36(g) Crimes Act 1958 (Vic.).

**Personal Cupidity**

Finally, there are financial cases in which dishonesty occurs simply through greed and a desire for personal advancement. Such cases often involve practitioners living beyond their means and trying to maintain an inappropriately extravagant lifestyle. Cases in this category often involve heath care providers who defraud the government or financial advisers who misappropriate client funds. Some of the largest and most complex instances of professional dishonesty in Australia’s history have involved financial planners and advisers, not all of whom have been qualified accountants. The largest investment fraud in Australia’s history was perpetrated by an accountant, David Gibson, who defrauded 600 clients out of $43 million in the 1980s, using managed investment funds and employing a Ponzi scheme in which early investors were paid dividends out of the investments of subsequent investors. Gibson was sentenced to 12 years’ imprisonment with a non-parole period of nine years (Brown 1998).
A more recent case prosecuted by the Health Insurance Commission, involved a psychiatrist who was alleged to have made claims amounting to more than $1 million in respect of false referrals received from more than 100 general practitioners over approximately a six year period. The phantom referrals were, in fact, never made by general practitioners but fabricated by the psychiatrist through forging signatures and creating false referrals and benefit assignment forms (see Cauchi 1999).

Dishonesty in connection with nursing homes is also an area of concern. Such cases usually involve medical entrepreneurs and business people rather than health care providers, such as doctors and nurses, although occasionally professionals may be involved. Arguably Australia’s largest nursing home fraud involved a Sydney nursing home operator and pharmacist who was convicted of defrauding the Commonwealth in January 1997. The defendant had operated five nursing homes and had stolen $1.7 million in Commonwealth government funding through lodging false claims for costs allegedly incurred in respect of the nursing and personal care of frail aged residents in the homes. Claims were made in respect of family members, non existent employees on the nursing payroll and other staff not involved in nursing or personal care of residents such as builders, bricklayers, and contractors (Comfraud Bulletin 1998, p. 3).

Often such so-called ‘lifestyle cases’ arise because of changes in individuals’ financial circumstances that are beyond their control. For example, solicitors have been subject to considerable pressures in recent years since the implementation of Competition Policy which has resulted in the collapse of the their monopoly over conveyancing. In 1995, the Industry Commission in Australia estimated that the introduction of competition reforms in the legal profession would result in a fifty per cent reduction in conveyancing costs due to the removal of the profession’s monopoly over conveyancing work, and a thirteen per cent reduction in barristers’ fees through the removal of advertising restrictions (Tonking 1995, p. 42). In fact, a comparison of conveyancing fees between 1994 and 1996 conducted by the Justice Research Centre found that the mean professional fees charged by small law firms decreased in real terms by approximately seventeen per cent because of increased competition (Baker 1996).

This has meant that some solicitors had to seek out new sources of income. Unfortunately, some succumbed to the temptation to act illegally and to defraud their clients in order to maintain their existing standard of living.

**Regulatory Mechanisms**

Having considered some of the types of professional dishonesty, it remains to examine the various ways in which they may be dealt with. The following discussion is restricted to legally regulated systems which enable people to take positive action. This obviously excludes the various non-legal ways of handling complaints such as adopting what is known as exit procedures or simply not going back to the professional person concerned and taking no further action.

In order to illustrate the range of systems and sanctions (or mechanisms for redress), Figure 2 presents them around a pyramid based on frequency of use and severity of sanctions. This derives from the responsive regulatory model described by Braithwaite (2002). Although this gives an appearance of clarity and simplicity, there are many ways in which these systems and regulatory responses overlap.
Conciliation

In recent years many professionals have been made more accountable though the introduction of independent complaint-handling authorities. These bodies operate as a form of coerced self-regulation or what Johnson (1972) has called ‘mediated professionalism’. In Victoria, for example, the legal profession was subject to substantial reform with the introduction of the Legal Practice Act 1996 (Vic) which ended its monopoly over the regulation of the profession. Amongst other reforms, the legislation introduced a Legal Practice Board, Legal Ombudsman, and Legal Professional Tribunal to regulate the activities of legal practitioners. The legislation made the Law Institute of Victoria a Recognised Professional Association and also made membership voluntary. In New South Wales, the Office of the Legal Services Commissioner also made complaint-handling substantially more consumer-oriented (see Parker 1997, p. 16).

In relation to health care, all jurisdictions in Australia have Health Complaints Commissioners whose functions include the resolution of disputes between health providers and health users arising out of the provision of health services. Commissioners are required to investigate complaints and may resolve them by conciliation which simply means by encouraging a settlement of the complaint by holding informal discussions with the health provider and the health user. Conciliators often do not have training in the profession in question, although they may be professional and legally-qualified conciliators. Where necessary, they will seek expert assistance from relevant trained professionals. Complaints may be resolved by extracting an explanation and apology from the health provider or by the health provider’s defence organisation paying a sum of money to the complainant. If conciliation fails, the Commissioner may refer the complaint to a Registration Board for disciplinary action.

Civil Action

Consumers of professional services who have suffered loss as a result of unprofessional conduct may commence civil proceedings for damages in negligence, trespass or breach of contract, although the legal principles which apply in this area are by no means settled. Allen (1996) has recently argued that various doctrinal barriers to recovery remain in the way of responding adequately to the breach of trust inherent in professional exploitation. In certain circumstances, loss which has been caused by a professional person’s conduct and which is reasonably foreseeable may be recovered.
Civil action will provide a financial sum to successful claimants which aims to place them in the same position they would have been in had the wrongful act not taken place. Normally, an award of damages is aimed at compensation rather than punishment although in rare instances exemplary or punitive damages may be awarded which aim to make an example of the defendant with a view to deterring similar conduct in the future (Collis 1996). Damages are assessed by a jury which hears evidence presented by medical experts for both the plaintiff and the defendant in an adversarial setting.

**Disciplinary Action**

Each jurisdiction has a body which is responsible for the registration of various kinds of professionals. Although the members of the oldest professions are statutorily recognised and registered, some professionals including accountants are not covered by existing registration authorities and thus are not subject to internal professional disciplinary controls, other than the potential removal of membership of a professional association. Where misconduct occurs in such situations, the client will only have recourse to criminal and civil action or in some cases to conciliation offered by some consumer agencies.

Registration bodies such as professional boards are set up to protect members of the public by providing for the registration of practitioners (see, for example, Medical Practice Act 1994 (Vic.) s. 1(a)). Boards are under a legal duty to investigate complaints that are made and where allegations are proved, the registration of the practitioner may be restricted in some way or removed. Disciplinary action is not intended to be punitive in the retributive sense, but rather is designed to ensure that acceptable standards of practice are maintained in the profession (see Smith 1994). The one exception to this is Boards with jurisdiction to impose monetary penalties or fines which are exclusively intended to be punitive and to act as a deterrent (e.g. Medical Practice Act 1994 (Vic.) s. 50(2)(f)).

Some Boards may also require practitioners to undergo counselling or further education in order to remedy any deficiencies in their professional skills. The effect of disciplinary action may also be to declare standards of acceptable conduct for the rest of the profession although this is obviously dependent upon the extent to which the decisions in disciplinary cases are widely disseminated to all registered practitioners (Smith 1993).

Registration Boards are predominantly composed of senior, experienced members of the profession in question, although in recent years the proportion of non-medically qualified lay members is increasing substantially such that most Boards now have twenty-five per cent of their membership non-medically qualified (Smith 1994). Formal proceedings are now usually open to the public and they are conducted adversarially and with legal representation (Smith 1991).

Proportionally, there are few complaints made to disciplinary bodies each year. In Victoria, for example, approximately 2,300 complaints are made each year concerning the conduct of solicitors. These relate to problems of delay, poor attitude, over-charging, and misappropriation of funds. In 1999, twenty-one practitioners were referred to the profession’s tribunal for a disciplinary hearing. Of those cases, twelve had their practising certificates cancelled or reduced, and were fined; seven were fined without restrictions being placed on the practising certificate; and two cases were dismissed. On average, six practices a year are taken over by the Law Institute in Victoria because of trust account defalcations, which represents approximately two per cent of the 3,411 solicitors authorised to handle trust funds in that state. Most cases related to misuse of investment funds, although since controls have been placed on solicitors’ mortgage practices, these cases have reduced substantially (Neville 2000). In medicine, approximately 1,000 complaints are made to the New...
South Wales Medical Board each year which regulates the conduct of approximately 22,000 registered medical practitioners in that state (4.5%)(Dix 2002). In nursing, in 1995-96, approximately 600 nurses were reported to regulatory authorities throughout Australia, at a time when there were approximately 265,000 registered nurses, making a proportion of complaints to the total numbers of nurses 0.2 per cent (Fletcher 1998).

**Criminal Action**

The final way in which complaints of dishonesty may be dealt with is through the criminal courts. Criminal proceedings for theft or deception aim at punishing the offender in the retributive sense, denouncing the conduct in question, and preventing further offending by deterring the individual from engaging in similar conduct in the future while deterring others in the community from offending by making an example of the individual in question. Guilt is determined by a jury in serious cases and criminal compensation may be awarded in certain circumstances.

The penalties which are available to a judge in sentencing an offender include imprisonment, fines, community-based orders and various forms of conditional and supervised release. The extent to which such sanctions are appropriate and effective in deterring unprofessional conduct by so-called white collar offenders such as doctors is hotly debated (e.g. Tillman and Pontell 1992) and many have argued that more appropriate sanctions should be used such as adverse publicity, financial penalties, or further compulsory training in ethics and professional conduct. Weisburd and Waring (2001, p. 152), for example, argue that fines are a better sanction for white collar offenders as they permit reintegration to take place (see below).

**Problems with the Current Systems**

There are a number of problems that arise out of the current regulatory framework for dealing with dishonest professionals, and, indeed, professionals accused of crime or misconduct generally. First, there is a multiplicity of rules that govern professional practice that are to be found in civil and criminal laws, other regulatory statutes and codes of conduct which statutory professional bodies administer.

There is also a proliferation of ways in which professionals are regulated and a duplication of complaint-handling procedures. Professional behaviour may be investigated by the civil and criminal courts, registration authorities and a variety of consumer-oriented statutory bodies such as ASIC, the ACCC, Departments of Fair Trading, Ombudsmen and Complaints Commissioners within certain professions.

As such, professional conduct may be scrutinised from a plethora of perspectives which are both time consuming and expensive to administer. Each system also has conflicting aims and overlapping sanctions.

In summary, therefore, we have a range of different types of professional dishonesty which may be engaged in and a range of different ways in which allegations may be investigated and dealt with. The task which faces us is how best to match any unprofessional act with an appropriate and effective regulatory response so as to ensure that both consumers and providers of professional services are dealt with fairly and justly.
Responsive Regulation

At this point, it is appropriate to step back from the discussion and to refer briefly to a number of sociological approaches which have been devised to guide policy makers in effectively regulating the conduct of offenders, particularly professional people. John Braithwaite and his colleagues have been devising theories of business regulation for the last fifteen years or so (Grabosky and Braithwaite 1986, Braithwaite 1989, Ayres and Braithwaite 1992, Fisse and Braithwaite 1993, Grabosky and Braithwaite 1993, and Braithwaite 2002). Essentially, they divide regulatory responses into two categories.

Deterrence-Based Regulation

Deterrence-based regulatory strategies seek to rely upon the use of penal responses to regulatory violations.

Both disciplinary and criminal proceedings are principally deterrence-based in that draconian sanctions such as erasure of a practitioner’s name from a Register or imprisonment may be imposed on those who fail to demonstrate appropriate standards of professional conduct or who fail to comply with the provisions of the criminal law.

Compliance-Based Regulation

Compliance-based strategies, however, seek to achieve compliance with rules through negotiation rather than coercion. Thus, proper standards of professional conduct are adhered to through an acceptance of rules which are voluntarily complied with.

Professional Complaints Commissioners also employ a compliance-based approach although they have no ‘big sticks’ to wield if the practitioner fails to agree to conciliation or if a conciliated settlement is not complied with. Similarly, if a practitioner re-offends, conciliation will be the only way of dealing with the new complaint.

In recent times there has been a recognition that compliance-based strategies operate much more efficiently than deterrence-based ones but only where there is an ever-present possibility that coercive strategies can be used if voluntary compliance is not able to be achieved. As Ayres and Braithwaite (1992, p. 25) argue, ‘the trick of successful regulation is to establish a synergy between punishment and persuasion’. Persuasion, rather than punishment should be adopted as a strategy of first choice. If individuals exploit the privilege of persuasion, then regulators should use tough punishment (ibid.: 26).

Grabosky and Braithwaite (1986) have argued that regulators are best able to secure compliance when they are what may be described as ‘benign big guns’. These are agencies which ‘walk softly while carrying a very big stick’ (1986, p. 224). Regulators, they argue, are able to speak more softly when they carry big sticks but also where they possess a hierarchy of sanctions:

The more sanctions can be kept in the background, the more regulation can be transacted through moral suasion, the more effective regulation will be (Ayres and Braithwaite 1992, p. 19).

In recent years, Registration Boards have disposed of complaints much more frequently through the use of its compliance-based sanctions rather than the sanctions which restrict registration (see Smith 1994). This may be seen as being insufficiently severe, but in terms of preventing recidivism and in regulating responsively, it may be more effective.
Achieving Compliance

In order for a compliance-based system to be effective, the various motivations of the actors need to be considered.

The motivations for professionals to comply with a registration authority’s regulatory strategies may be various. First, they may seek to comply with what may be described as deontologically-based motivations, namely, those ancient ethical precepts of professions such as those espoused in the writings of Hippocrates. Secondly, professionals may be motivated through a sense of social responsibility in that they seek to avoid harm being inflicted through unprofessional or incompetent conduct. Thirdly, utilitarian motivations based on financial and lifestyle considerations may guide a professional person’s actions such that compliance is achieved through a self-interested fear of losing income and position. Finally, professionals may seek to avoid the stigma of appearing before their colleagues in a disciplinary hearing and the attendant publicity which that attracts.

Re-Integrative Shaming

This last motivation raises Braithwaite’s idea of social control through the use of shaming. Braithwaite, in his book *Crime Shame and Reintegration* (1989), argued that shaming may be used to make offenders comply with rules. He distinguished, however, two forms of shaming: re-integrative shaming, and dis-integrative shaming.

In dis-integrative shaming, no effort is made to reconcile the offender with the community which has imposed the sanction. This separates the offender from the community and may force the offender into a deviant subculture (Braithwaite 1989, p. 55).

This is essentially what happens in a criminal trial when a term of imprisonment is imposed and also when a Registration Board erases the name of a practitioner from the Register. In both cases no attempt is made to reclaim the individual back into the fold of the professional community other than through the procedure of an application which may be made by the doctor for restoration of his or her name to the Register. This, however, is left solely up to the individual to instigate. Often, the shame associated with disciplinary erasure is such that the offender is never able to bring himself or herself to seek registration again, thus wasting the considerable community resources involved in academic and professional training over many years.

Re-integrative shaming, however, operates by the expression of disapproval of deviant conduct either in the form of mild rebukes or degradation ceremonies, but followed by gestures of re-acceptance into the community of law-abiding citizens.

Re-integrative shaming is disapproval extended while a relationship of respect is sustained with the offender. Stigmatisation is disrespectful humiliating shaming where degradation ceremonies are never terminated by gestures of re-acceptance of the offender. The offender is branded an evil person and cast out in a permanent, open-ended way. Re-integrative shaming in contrast might shame an evil deed, but the offender is cast as a respected person rather than an evil one. Even the shaming of the deed is finite in duration, terminated by ceremonies of forgiveness-apology-repentance (Braithwaite 1992, p. 3).
Achieving Re-Integrative Shaming

Disciplinary systems could be improved in a number of ways in order to accommodate the ideas of re-integrative shaming.

First, re-integrative shaming requires that the identification of deviance be done publicly and in the presence both of the person who was treated unprofessionally and representatives of the community in question. Systems which are conducted in private, such as that conducted by Complaints Commissions, and Boards whose proceedings are closed to the public, go against this principle. Conciliatory systems do, however, enable the consumer’s views to be expressed, although the community has no involvement at all.

Braithwaite has proposed, for example, that those responsible for harm committed in the business world should be forced to meet their victims in a face-to-face encounter and to acknowledge and learn from their wrongdoings. An example of how this can work concerned the behaviour of Colonial Mutual Life Insurance agents who had fraudulently sold insurance policies to impoverished Aboriginal people in remote communities. During the settlement process, senior executives were forced to meet the victims of the scam and to live with them for a period in the third-world conditions in which they lived. (Fisse and Braithwaite 1993, p. 236).

The other significant omission, is that once a deterrence-based sanction has been imposed, no further interest is shown in the practitioner. Once registration is withdrawn, for example, it is up to the individual in question to apply for re-registration.

It would, arguably, be preferable for Registration Boards to monitor the activities of erased and suspended practitioners closely and to invite them back to discuss their futures at appropriate intervals. This operates at present where a practitioner's registration is suspended for a period with a further requirement that the inquiry will resume at the conclusion of a stated period of time (see, for example, the General Medical Council’s use of this approach in Britain - Smith 1994, pp. 175-8).

It would also be preferable and in accordance with the idea of re-integrative shaming, for Registration Boards to guide professionals back into practice in a formal way and also for complainants to be present to offer suggestions as to how the offender should re-establish his or her position in the profession in such a way that instances of unprofessional conduct will not occur again in the future.

Regular performance review may be necessary but this should be suggested by the Registration Board and done in a conciliatory manner.

At present, once the big gun of erasure has been fired, professionals are dis-integratively shamed. They are thus stigmatised and are unlikely to re-enter practice. In research on the history of the General Medical Council in Britain, it was found that between 1858 and 31 December 1990, less than one half of the number of doctors whose names had been erased from the Register had them restored (49%). Of those whose names were not restored, 81 per cent made no application for restoration (Smith 1994, p. 206).

Compliance, Braithwaite and his colleagues argue, is meant to be achieved through an internal process by which individuals instil in themselves a sense of responsibility (Fisse 1993, p. 262). This will not occur unless there is consensus as to the undesirability and deviant nature of the conduct in question. As Brent Fisse observes:

> Effective regulation is about finesse in manipulating the salience of sanctions and the attribution of responsibility so that regulatory goals are maximally internalised, and so that deterrence and incapacitation works when internalisation fails (Fisse 1993, p. 262).
Matching Dishonest Conduct with Appropriately Responsive Sanctions

How, then, should regulators deal with the various types of professional dishonesty? Arguably, the many different systems which exist should be used appropriately having regard to their aims and to their ability to alter the behaviour of offenders and others in the professional community. To impose condict punishment such as imprisonment may be satisfying in the retributive sense for the complainant, but it may do nothing to ensure that misconduct is not repeated and that others refrain from engaging in similar forms of deviance in the future.

Accordingly, it is suggested that the various regulatory systems be used in the following ways.

Conciliation should be used where explanations can be used to settle disputes such as misunderstandings between practitioners and their clients. It should not be used where the persuasive effects of imposing a deterrence-based sanction are needed. Conciliation should be conducted openly and with representatives of the practitioner’s professional colleagues being present.

Civil action should be used where the consumer has suffered some pecuniary loss which may be quantified in monetary terms. Awards of exemplary damages should not be imposed where other regulatory approaches are being used in respect of the same offence. Where awards of damages are paid by a practitioner’s mutual fund, such as a defence society, the practitioner should bear part of the financial burden such as by way of a no-claim bonus being reduced.

Disciplinary proceedings should be used where standards of professional conduct have been breached and where restrictions need to be imposed on the individual’s registration. The most severe sanctions of erasure and suspension should be restricted to instances of repeated offending or failure to comply with previous directions. Following disciplinary suspension or erasure of registration, the practitioner’s conduct should be monitored by the registration authority and procedures undertaken so as to enable registration to be renewed.

Criminal action should be restricted to cases in which the criminal law has been breached and where the most severe deterrence-based sanctions are required and where other regulatory responses are inadequate to deal with conduct of this level of seriousness.

In addition, thought needs to be given to expanding the range of available responses. Sanctions such as adverse publicity, other financial penalties, or further compulsory training in ethics and professional conduct could be considered. Adverse publicity is a powerful sanction when directed against professionals, although care must be taken that this is not used in an oppressive or unfair way, or in such a way as to permit ‘grandstanding’ of criminal conduct.

Conclusion

In recent years there have been many changes that have taken place in the professions and these have created new opportunities for fraudulent and dishonest conduct to occur. In addition, the proportion of professionals in the labour force has increased greatly leading to an increase in the number of crimes of dishonesty that are being committed.

We have also witnessed various changes in the way in which criminal and unprofessional conduct is dealt with. Criticism of professional monopolies and self-regulatory practices have led to the establishment of new controls which have removed some of the power of the traditional professions such as the law and medicine. The creation of external forms of control which arose out of the consumer protection movement, has been the most dramatic change in this regard and is likely to continue to be of importance in the years to come.
Arguably these developments have taken place in a relatively uncoordinated way with the boundaries between the various regulatory systems sometimes being blurred and the situations in which they should be used not clearly understood. The proliferation of regulatory controls has also been wasteful in terms of resources and is sometimes oppressive for individuals who find themselves subjected to multiple investigations into the same course of conduct.

Having simple and appropriate systems in place is, arguably, the best way in which to identify and to control all forms of professional deviance, from the least to the most serious forms of illegality. The professions have a developed set of ethical principles which enable practitioners to determine what is and what is not acceptable conduct in the opinion of their peers, although the guidance given to practitioners regarding some types of dishonest conduct could be clearer and more specific in setting out what is and what is not permissible. Registration Boards possess the big sticks of suspension and erasure, and these are used relatively rarely in dealing with the very small number of practitioners who fail to comply with the ethical rules.

In cases where deterrence-based sanctions are used, registration authorities should take on board the notion of re-integrative shaming in order to ensure that practitioners are not isolated and scapegoated by the experience. This would help to ensure that those individuals who have breached the profession’s ethical rules will not do so again when they resume practice, as many of them do.

The time has come to review the range of responses that can be used to regulate the conduct of professionals and to make sure that the procedures which are used are matched closely to the nature and seriousness of the conduct in question. This might help to maximise the effectiveness of the various systems that we have available both in terms of achieving deterrence as well as ensuring that individuals are dealt with fairly.
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