

## Professional Accountability

### Introduction

This title considers the change from the professional ethos of autonomy and independent action to the contemporary emphasis on accountability as the dominant approach to professions' governance. It considers how professions and professionals are made accountable, to whom and for what. It concludes with an analysis of the significance of the change.

### Professional Autonomy to Professional Accountability

#### What is professional accountability?

Professional accountability is the activity of a professional person or organisation explaining their actions or decisions and taking responsibility for them in a transparent manner. Traditional accountability was to personal conscience and professional peers, centred in the individual and enforced by their association. This form of accountability was second to and served professional autonomy. Contemporary professional accountability, by contrast, is mandated by and salient for parties external to professional association and community.

#### What is professional autonomy?

Historically, professional accountability has been based on professional autonomy, a situation that continues in part. Autonomy, as shown in the Professions title and Regulatory Structures title, is inherent in self-regulation. Self-regulation occurs at the institutional level in which control over standards of entry and participation is primarily exercised by a professional association more directly than the state or the market. Self-regulation is also an *ethic*,<sup>1</sup> an integral part of professional identity. It involves regulation of the self to maintain utmost fiduciary commitments to the client or patient as well as the public interest in the professional institution above any selfish interest.

The rationale for the regulatory autonomy of the professional association is, arguably, that they are the most capable of determining standards, ensuring their distribution through codes of conduct and enforcement through disciplinary action. It is important that professional roles, expertise and related professional doctrines (for example, the Rule of Law) are not subject to the partisan interests of the state or overrun by the crude commercialism of the market. Associations are, it is held, better able than external bodies to communicate with practitioners.

The rationale for individual autonomy (or self-accountability) centres on the intense circumstances clients or patients are in when they typically seek professional expertise. These are situations of asymmetrical information and capacity between professional and client, and where the stakes are usually serious, even

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<sup>1</sup> Christine Parker, 'Regulation of Ethics of Australian Legal Practice: Autonomy and Responsiveness' (2002) 25 *University of New South Wales Law Journal* 676, 676.

life-threatening. As argued elsewhere,<sup>2</sup> not all clients are vulnerable to professional power, but individuals often are.<sup>3</sup> Professionals need to be free from outside forces, including accountability regimes, which could interfere with their immediate exercise of loyalty and contextual judgment, as well as their broader motivation and ability to contribute to the advancement of their profession.

### **Why the change from autonomy to accountability?**

As with any change, there is a cluster of reasons for the shift from professional self-regulation through autonomy, to the holding of professions and professionals to account through mechanisms external to them. Some of the political, commercial, and social reasons are presented here.

*(a) Political and Economic Forces:* The political and economic reasons for the move to professional (and professional associational) accountability are detailed in the Regulatory Trends title. This title outlines the advent of economic and fiscal rationalism in government policy and corporate governance since the early 1980s.<sup>4</sup> Government must meet greater demands for health, education and other services to which professions are crucial. It has had ideological and budgetary incentives to break-up what are professional monopolies and drive down the fiscal impost of professional services provision to the general population.

*(b) Market Forces:* The neoliberal program has complemented and boosted business trends that have led to greater emphases on profits, driving down costs including those for professional services and prioritising the shareholder interest. The professional or in-house workplace is now a primary site of accountability influenced by corporate practices largely alternate to those of the professional association,<sup>5</sup> at least in the traditional senses.

*(c) Social and Technological Forces:* Consumer organisations have lobbied successfully for greater professional accountability, primarily in the form of accessible services, with fewer restrictive practices that add to costs and restrict supply. They have also supported greater governmental regulation and supervision of professions. They have advocated for robust recourse options for both clients and third parties against poor professional services. (Third parties include, for example, beneficiaries of negligently drafted wills or those injured by unsafe structures). In many contexts, they have advocated for free and accessible non-court alternatives for dispute resolution.

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<sup>2</sup> Justine Rogers, Dimity Kingsford Smith and John Chellew, 'The Professional Service Firm: A New Force in the Regulative Bargain' (2017) 40 *University of New South Wales Law Journal* 218.

<sup>3</sup> Parker above n 1.

<sup>4</sup> Justine Rogers, Dimity Kingsford Smith and John Chellew, above n 2, 236-46 especially 236-40.

<sup>5</sup> Hugh Breakey and Sampford, Charles, 'Employed Professionals' Ethical Responsibilities in Public Service and Private Enterprise: Dilemma, Priority and Synthesis' (2017) 40 *University of New South Wales Law Journal* 262.

Non-professionals, clients and patients, academics and social commentators are increasingly demanding more accountability from professionals. Lay people tend to be less trusting of professionals than they once were. A reduction of trust has accompanied a double uncovering of the professions. First, the discovery of the variability of professional competence and ethicality. Second and related, an apparent discovery that there is less distinction between the expertise and sagacity of the professional and that of the layperson. In addition, with increased access to higher education, the invention of the internet and related technologies the everyday availability of expert information to non-professionals has increased and provided ways of sharing both professional knowledge and concerns and criticisms about it. Indeed, it might be observed that the titles in this professional resource centre are an example of the way technical and professional information is made available more widely. However, generally, with other social trends that question authority and status, this has all led to greater examination of the expertise of professionals by several groups, including its flaws in competence and ethical lapses.<sup>6</sup>

*(d) Competition and Transparency.* Overall, there are two overarching rubrics of accountability: competition and transparency. The first, the competition prescript, opposes traditional ideas and practices of collegiality and market protection. The second, rooted in information disclosure, often to parties outside the professional relationship, is in stark contrast to traditional autonomy and fiduciary considerations. The latter privileged confidentiality of information and self-regulation. There are many ways in which professional accountability is made and next we outline the most commonly relied on. Most contemporary modes are driven by logics of competition and efficiency and depend on transparency or disclosure to be effective.

## **Modes of Professional Accountability**

### **Individual Professional Accountability**

*(a) Professional practice and conduct standards:* The intervention of external regulators who set standards (usually with sanctions for breach) is the most obvious example of accountability. As described in the Regulatory Structures title, standard-setting is usually a hybrid of parliamentary legislation, agency regulations or guidelines, and self-regulatory rules issued by the professional association. In medicine for example clinical practice guidelines have proliferated to 'encourage effective care and improve health outcomes'.<sup>7</sup>

*(b) Continuing professional education:* Standards may cover areas ranging from education for professional entry through to disciplinary regulations. As competency requirements have slowly eclipsed ethical standards to distinguish professions, meeting requirements for continuing professional education has become an indicator of individual professional fitness and mode of accountability. Research in this area suggests that some professions (often those less established) are more specific and directory about what

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<sup>6</sup> Magali Larson, *The Rise of Professionalism: Monopolies of Competence and Sheltered Markets* (Transaction Publishers, revised ed, 2013) throughout.

<sup>7</sup> Stefan Timmermans, 'From Autonomy to Accountability: The Role of Clinical Practice Guidelines in Professional Power' (2005) 48 *Perspectives in Biology and Medicine* 490, 491.

must be covered in continuing education. Others see more of an opportunity for general professional development, instead encouraging inclusion of good practice developments in programs.<sup>8</sup>

*(c) Individual accountability as a professional employee:* Large government, corporate and professional firm employers are another group of 'demanders'<sup>9</sup> of professional accountability. With the performance review as emblematic, all have accountability routines with policies and practices that may clash with professional duties to client and the professional. For instance, a health department doctor developing a medical practice guideline may believe it is being issued to pursue a cost cutting policy, not to improve patient health. A lawyer in a corporate complaints department who earns bonuses for finalising complaints without customer compensation must navigate an accountability routine that threatens their adherence to the administration of justice. The use of time-costing through recording 'billable hours' in large professional practices is a vivid example of accountability and efficiency challenging professional autonomy and independent judgment. Prevalent in law, time-costing is a routine for controlling the work of employees combining high targets and close supervision.

### **Client relations**

One of the many changes to the professional relationship influenced by outside accountability regimes is centred on disclosure and informed consent before professional services are performed or provided. The cost of the professional work will usually be disclosed as well as information about the nature of the services and the terms of provision. Information about complaints processes may also be included. It is not difficult to see how this accountability signals a more consultative approach to the professional relationship: 'Consumers want transparent decision-making processes and a partnership model in which responsibility is shared, not abrogated'.<sup>10</sup>

*(a) Complaints and discipline processes:* As the Corporate/Firm Internal Complaint Handling title and the External Complaint Handling and Discipline Systems title indicate, client complaints trigger major avenues of accountability. This is a leading area where government regulation has required internal complaints handling in practices and where public schemes external to the professions such as ombudsmen have been established. Likewise, professional discipline largely involves processes triggered by complaint to a regulator, rather than a professional association. Disclosure is compelled to ombudsmen and disciplinary panels external to the profession when complaints are made.

However, as with the creation of professional standards, it is also often the case that disciplinary processes remain a hybrid of agency authority and action and professional association action and/or peer involvement.

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<sup>8</sup> Thomas Hywel and Qiu Tian, 'Continuing Professional Development: Accountability, Autonomy, Efficiency and Equity in Five Professions' (2013) 61 *British Journal of Educational Studies* 161, 166-70.

<sup>9</sup> Hugh Breakey, 'Supply and Demand in the Development of Professional Ethics' in Marco Grix and Tim Dare (eds) *Contemporary Issues in Applied and Professional Ethics* (Emerald Group Publishing, 2016) 1.

<sup>10</sup> Gail Whiteford, 'Autonomy, Accountability and Professional Practice: Contemporary Issues and Challenges' (2013) 54 *New Zealand Journal of Occupational Therapy* 11, 12.

Parker argues that the failure to remove professional associations from complaints and discipline is both a failure of accountability and insufficiently protects consumer needs.<sup>11</sup> Others argue that the discretionary quality of professional advising and ethicality demands continuation of an element of peer review. Whatever the mix, accountability to the client, to peers and to society through regulator involvement in complaints and discipline processes, provides direct and vivid information about how professionals and professions can improve.

The professional associations' co-regulatory roles and support for all these strands of accountability are, in turn, themselves forms of associational accountability. The associations' activities here and other initiatives, for instance diversity and wellbeing are, in part, responses to some of these external pressures.

### **Accountability of professional firms or organisations**

As another example of how competition represents a challenge to professional ethicality, corporate clients, particularly those of large professional firms 'shop around' for advice and services. They place pressure on professional firms or their employees to give them advice and services they want at the right price. Here accountability is potentially a downward spiral in ethicality because clients can compare the market.

Meanwhile, professional firms may be large public companies, some stock exchange listed. At this level competition is financial accountability indistinguishable from that made by industrial or financial corporations also listed. Here competition is not in the provision of competent or ethical professional services, but one in raising capital from and return on capital to, shareholders. Also, a form of disclosure quite alien to professional firms is the issue of a financial prospectus and annual financial statements. A professional listed company will also have to make continuing disclosure to the market of information material to its share price. For smaller firms, disclosure is also required if a professional firm wants the advantages of limiting its liability through membership of a Professional Standards Scheme (usually co-extensive with a professional association).<sup>12</sup>

### **Analysis of Professional Accountability**

#### **Changes in to whom accountability is given**

Professional autonomy focused on professionals being answerable to the client and the wider professional community. In practice answering to the client was limited because of the practical difficulties most clients had in knowing what they could claim and in enforcement. Accountability is now made to a variety of agencies especially responding to client complaints, where disclosure has made knowing what to claim easier. Accountability is made to employers as much as to the professional association and in a variety of circumstances, to the market.

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<sup>11</sup> Parker, above n 1, 683-5.

<sup>12</sup> Accountability through disclosure is in relation to complaints, professional indemnity insurance and risk management arrangements the firm has in place. These are important conditions of accessing and maintaining membership of a scheme which allows liability of the firm to be limited.

### **Changes in what professionals are accountable for**

The fiduciary obligation made not taking advantage of the client the central concern of the professional association and peers under the autonomy ethos. Competence and client service were not as important as loyalty to the client and honest and fair dealings with professional peers. Now employed professionals work within routines through which they account for meeting service levels including technical quality, timeliness, working within quoted costs and amity of client relations. Maintaining continuing professional development signals competence and fitness for practice. Likewise, complaints processes provide information on service quality and written practice standards make complaints easier for both clients and third parties. Accountability for financials and practice management (for example, risk management and IT disaster recovery) matters is given by incorporated firms: to the stock exchange where a professional firm is listed and to non-practicing capital investors and (depending on size) regulators where it is not.

### **Significance of the shift from autonomy to accountability**

Of most significance is the extension of areas and variety of recipients to which accountability must now be given. Areas not primarily intended to serve accountability are now serving dual purposes as indicators of fitness for practice and individual and firm performance. Not all accountability is equal. Improvements in client complaint handling are good for clients and an important means by which accountability can maintain and improve social trust in professions. Accountability for financial and other improvements in practice management likewise. The ethic of autonomy alone struggled to deliver these benefits.

However, a 'bully client'<sup>13</sup> opinion shopping for the 'right' result is potentially provoking a down-ward spiral in ethicality because large clients can compare the market. Further, the blunt instruments of monitoring, measuring and counting outcomes and outputs which passes for much accountability, may miss the point of accountability altogether. Time-costing limits the discretion of professionals to, say, spend more time with the client in fiduciary wise-counselling, than in drafting a document with a recognised cost code. The ultimate point of being accountable is to improve responsiveness to the ideals of being a professional: acting in the public interest, in the client's interest and in the interest of the profession. The salutary gap in this extension of accountability is for ethical professional conduct and the good it can do.

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<sup>13</sup> Gino Dal Pont, 'My Client the Bully' (2009) 83 (1/2) *Law Institute Journal* 1.

## Summary

This overview covers the contemporary emphasis on professional accountability. It has analysed the significance of changes introducing greater reliance on standard setting and on competence as opposed to ethicality. While covering several modes of accountability, the title concludes that not all accountability is beneficial, and more work is needed for ethical accountability.

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