

Professional Legal Ethic in Australia

Reid Mortensen

School of Law and Justice, University of Southern Queensland

Toowoomba Campus, Australia

Email: Reid.Mortensen@usq.edu.au

I. CONTEXT

This paper is a short account of the deep moral structures of Australian legal professions. In attempting to understand how the ethics of *any* legal profession compare with those of other countries' professions, the social, political and historical foundations of the profession help to explain the moral inclinations of individual lawyers and why they practise as they do. For that reason, I concentrate on the *political and philosophical liberalism* that explains so much of Australian legal professions' ethical structures. Specifically, I address two themes of a liberalism that informs the ethical dispositions of Australian lawyers –

- Qualified partisanship (Part II); and
- Moral neutrality (Part III).¹

I do not claim that these themes are unique to Australia. Indeed, one characteristic of Australian legal professions is their continuity with the legal professions of other common law countries. And I do not suggest that these ethics are even unique to the common law. The legal professions of the civil law world, in particular, also bear liberal influences, even if they are expressed differently. But before any consideration is given to the liberal themes of Australian legal professions, their institutional context must be explained.

1 Constitutional and legal framework

Australia is a federation of six States,² each of which was a self-governing colony in the British Empire before voting to establish, in 1901, a new nation as a self-governing dominion within the Empire. The Founding Fathers were also enamoured of the American federal structure, and therefore entrusted the central 'Commonwealth' Government with only the limited powers necessary for the government of the nation as a whole, and left the balance of constitutional power to the States. Australian legal professions are therefore State-based, and in the federal Territories they are also Territory-organised.³

Control of the local profession therefore ultimately rests with the Supreme Court of the relevant State or

Territory, although to practise in federal courts a lawyer must separately enrol as a practitioner of the High Court of Australia.⁴ Each State and Territory can therefore structure and regulate its legal profession differently – in New South Wales (NSW), Queensland and Victoria the professions are divided into barristers' and solicitors' branches; in the smaller jurisdictions they are unified, although some lawyers might actually practise exclusively as barristers (at an 'Independent Bar'). In most States and Territories, there is a degree of external regulation by agencies appointed by the executive government. In the Australian Capital Territory (ACT), South Australia and Tasmania, the professions are self-regulated by local Law Societies (lawyers' professional guilds), though subject to the traditional supervision of the Supreme Court.⁵

The position is complicated further by efforts since 2009 to create one national legal profession. There was already a generous scheme for lawyers to practise across State borders – a lawyer who is entitled to practise in any *one* State or Territory thereby gains a right of practice in *all* of the others.⁶ However, the large commercial firms lobbied to remove distinctive practice requirements for firms in each State and Territory, and pressed for one Australian legal profession to be regulated under one statute. The lobbying was resisted by most State Law Societies, and the proposal failed completely in 2011 when most States concluded that a national scheme would add to the regulatory burden on lawyers and the cost of regulation.⁷ Still, an achievement of this process were revised codes of conduct: the *Australian Barristers Conduct Rule*, which was adopted in NSW, Queensland and Victoria; and the *Australian Solicitors Conduct Rule* was also adopted in the ACT and South Australia. However, NSW and Victoria – where the large global and national law firms have more influence – tried to salvage the overarching regulatory legislation with their own two-State solution: the *Legal Profession Uniform Law* that was introduced in both States in 2015. Western Australia has recently shown an interest in joining the *Uniform Law*, but no other State or Territory seems attracted to it.

¹ Adapted from the two principles of 'lawyer's morality' in David Luban, *Lawyers and Justice: An Ethical Study* (Princeton NJ, 1988) 7. See also Murray Schwartz, 'The Professionalism and Accountability of Lawyers' (1978) 66 *California Law Review* 669, 673.

² New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia.

³ Ie, the two internal territories of the Australian Capital Territory (including the Jervis Bay Territory) and the Northern Territory. The only inhabited external territory, Norfolk Island, has its own small legal profession.

⁴ *Judiciary Act 1903* (Cth), ss 55A-55C.

⁵ *Legal Profession Act 2006* (ACT), ss 35-71; *Legal Practitioners Act 1981* (SA), esp ss 16-20AK; *Legal Profession Act 2007* (Tas); *Legal Profession Regulations 2008* (Tas), r 4.

⁶ James Jones, Anthony Davis, Simon Chester and Caroline Hart, 'Reforming Lawyer Mobility - Protecting Turf or Serving Clients?' (2017) 30 *Georgetown Journal of Legal Ethics* 125.

⁷ Linda Haller, 'When Shall the Twain Meet? *Correspondent's report from Australia*' (2011) 14(2) *Legal Ethics* 257; Reid Mortensen, 'The Twain (and Only the Twain) Meet – the Demise of the Legal Profession National Law', (2013) 16(1) *Legal Ethics* 219.

2 *The colonial inheritance*

A second aspect of the context for Australian legal professions' ethics is the extent to which the professions identify as progeny of the confident English legal professions and, even compared with most other parts of the Commonwealth, retain the structures of the English professions in a conservative form. This was not the British Government's intention for any of its Australian colonies,⁸ but in 1829 the NSW Supreme Court divided the local profession into barristers' and solicitors' branches.⁹ And reinforcing the Bar's understanding of itself as inheriting British traditions, only barristers or advocates admitted as such in the United Kingdom could practise at the NSW Bar until the colony provided for its own barristers in 1848.¹⁰ Divided professions were also inherited in Victoria and Queensland after they separated from NSW. Despite government efforts in all three States to unify the profession, amalgamation has been resisted strongly and the divided professions are entrenched. A divided profession, along with the preservation and development of the English moral traditions of both branches, does see different ethical dispositions arise between barristers and solicitors. Although they can be exaggerated, the distinctive 'raiding' and 'trading' ethics of barristers and solicitors not only reflect the different emphases of their work on, respectively, adversarial litigation and transactions, they also stem from the origins of each branch in lawyers who in medieval and early modern times often emerged from (for barristers) martial and gentrified classes and (for solicitors) a commercial class.¹¹

Even if the distinctive traditions of barristers and solicitors are left to one side, lawyers across the English-speaking world, including Australia, regularly appeal to the great moral claims of English lawyers of the eighteenth and nineteenth centuries, and which mark out legal professions that honed their ethics against the emerging liberalism of that period. I also use those claims as reference points for the deep moral structures of Australian lawyers' ethics.

3 *The adversary system*

An important colonial inheritance, and one shared with the whole common law world, is the adversary system of justice. Popularly, though falsely, claimed to have originated in trial by battle, the adversary system is more properly understood as a distinctive English expression of liberalism. In the eighteenth century, court procedure saw litigants themselves carrying greater responsibility for and control over litigation (with the responsibility for the claim and defence divided between the parties). Litigants themselves collected the evidence that was needed to establish, or repel, a claim. The judge and the jury developed a passive role in the process; being the decision-makers, but entirely dependent on evidence mustered by the

parties and any legal arguments put to the court. Party-control of the conduct of litigation and prosecutions resonated with the individual freedom and responsibility of the litigant. A passive judge exemplified the limited role that liberalism gave to government.

This remains the fundamental method of legal decision-making in the common law. In the common law world, inquisitorial processes have been widely adopted over the twentieth- and twenty-first centuries through the growth of investigative commissions and mixed judicial-administrative tribunals. Through the development of case management in the regular courts,¹² judges are more actively involved in the conduct of litigation. These developments, however, have not shifted the lawyer's principal responsibility in litigation and prosecutions for evidence-collection, strategy and case development; nor the ethics that respond to this role. Party-control of legal proceedings is assumed, as is the lawyer as the professional agent for that.

The way that the adversary system of justice mediates liberalism into lawyers' ethics has been subject to longstanding and influential scholarly criticism. David Luban, in particular, questions the moral foundation of the adversary system itself (though accepting Enlightenment liberalism) and, so, the moral ground of any scheme of lawyers' ethics that rests on it.¹³ In an earlier critique, Richard Wasserstrom was concerned what the adversary system did to the personal morals of lawyers themselves; making them 'competitive rather than cooperative, aggressive rather than accommodating, pragmatic rather than principled, and ruthless rather than compassionate'.¹⁴ This happens, although it is perhaps not an *inevitable* moral outcome for a liberal legal profession.

II. QUALIFIED PARTISANSHIP

The lawyer's partisan representation of her client is the professional expression of liberalism's radical elevation of the individual citizen, and the citizen's right to explore all of the moral choices that are available to him within the bounds of the law. Lawyering is the agency of the autonomous citizen, so the lawyer's role is to push the client's interests to the fullest extent that is legally permissible.¹⁵

The *theme of partisanship* is powerfully expressed in a lawyer's legal obligations to act single-mindedly in the client's interests. In Anglo-Australian law, it is best represented by the lawyer's fiduciary obligations to the client.¹⁶ These obligations emerged from equitable ideas of conscience, and also demand that, when representing her client, a lawyer not be distracted by duties owed to other clients or her own

⁸ *Third Charter of Justice 1823* (UK), cl 10; *Australian Courts Act 1828* (UK) (9 Geo 4 c. 83), s 2.

⁹ *Division of the Legal Profession Case* [1829] NSWSC 34; *Division of the Legal Profession Case* [1831] NSWSC 5.

¹⁰ *Barristers Admission Act 1848* (NSW) (11 Vic No 57); *Ex parte Digby* (1877) 6 WN (NSW) 90; *R v Stephen* (1880) 1 NSW 244.

¹¹ Jane Jacobs, *Systems of Survival* (New York, 1992); Mary Ann Glendon, *A Nation Under Lawyers* (New York, 1994) 60-84.

¹² *Ashmore v Corporation of Lloyd's* [1992] 1 WLR 446.

¹³ Luban, above n 1, 50-103; David Luban, 'Twenty Theses on Adversarial Ethics' in Helen Stacy and Michael Lavarch (eds), *Beyond the Adversarial System* (Sydney, 1999) 134-54.

¹⁴ Richard Wasserstrom, 'Lawyers as Professionals: Some Moral Issues' (1975) 5 *Human Rights* 1.

¹⁵ Cf Schwartz, above n 1, 673.

¹⁶ Andy Boon and Jennifer Lavin, *The Ethics and Conduct of Lawyers in England and Wales* (2nd ed, Oxford, 2008) 197.

personal interests. A lawyer cannot act when there is a ‘conflict’ – whether of duties owed to different clients, or with the lawyer’s own personal interest.¹⁷ This may also be one area where, in recent years, solicitors’ ‘trading’ and commercial inclinations have created some ethical tension with this theme of single-minded partisanship. Through the 2010s, Australia’s largest commercial firms pushed strenuously for a change to these conflict rules to allow solicitors’ practices to act simultaneously for clients’ with conflicting interests – even when the clients were unaware of the conflict. This lobbying, mainly directed at the Law Council of Australia’s development of the *Australian Solicitors Conduct Rules*, was ultimately unsuccessful – probably because it challenged deep-seated professional understanding of the solicitor’s role. It may nevertheless represent a shift, at least by some lawyers in global or national commercial practices, from an understanding of legal practice as a fiduciary commitment to the interests of an individual client towards a more general marketplace business ethic.

How extreme the partisanship of the common lawyer must be, though, remains to be resolved. Throughout the common law world, Henry Brougham’s declaration in 1820 that an advocate ‘knows in the discharge of that office but one person in the world, that client and no other’¹⁸ is the principal reference for this debate.¹⁹ Brougham’s claim is taken to support *zealous* partisanship, because he continued that the advocate ‘must not regard the alarm, the suffering, the torment, the destruction which he will bring upon any other’.²⁰

Luban’s critique of the widespread support for zealous partisanship led him to develop a *modified partisanship*, by which this kind of zeal would be expected of lawyers in criminal defence but, in civil litigation and transactional work, a lawyer’s partisanship would not allow her to cause harm to innocent third parties, manipulate the letter of the law beyond its spirit, or cause a substantive injustice (whatever that may mean).²¹ Common examples of the difference are the treatment of witnesses and, in civil litigation, the pleading of a limitation period to defeat what are otherwise substantiated claims.²² Zealously partisan lawyers representing the Catholic Church in NSW were comprehensively criticised for opting to cross-examine a plaintiff-witness in an historic child sex abuse case; a cross-examination that took four days and gave rise to ‘extreme distress’ for an already vulnerable witness.²³

I prefer the term *qualified partisanship* as an account of this theme of Australian legal professions’

deep moral structures. As is the case with common lawyers across the world, all Australian lawyers are officers of the Supreme Court that admitted them.²⁴ Australian courts have repeatedly emphasised the constraints that this status places on the lawyer’s duty to the client, and therefore its qualification of their partisanship. Chief Justice Mason’s statement in *Giannarelli v Wraith* is now the standard expression of this qualification.

The duty to the court is paramount and must be performed, even if the client gives instructions to the contrary ... [A] barrister’s duty to the court epitomizes the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client’s success, but also to the speedy and efficient administration of justice.²⁵

The Chief Justice clearly contradicted Brougham’s claim that an advocate should disregard all but the client’s interests, and recognised an element of ethical constraint on the pursuit of client interests. Although the constraint is recognised in other common law countries,²⁶ American observers have noted Australian lawyers’ heightened awareness (relative to American lawyers’ awareness) of their status as officers of the court, and that it has some effect on how they conduct advocacy.²⁷ The latter point may be debatable, but it at least suggests a broad ethical awareness of the line between the duties to the court and the interests of the client that justifies the description of a qualified partisanship.

Just where the line between duties to the court and the client is drawn is not easily understood,²⁸ and again is conditioned by the needs of the adversarial system of justice. This is particularly marked with duties of confidentiality, where the law of client privilege links the close-to-absolute secrecy that a lawyer must maintain for client communications to the needs of adversarial litigation.²⁹ The need for the client to be confident that a lawyer will not disclose his secrets, no matter how appalling, is thought necessary for the client to be completely candid with the lawyer and the lawyer’s case preparation; and so for the administration of adversarial justice. It is tied, once again, to party-control of litigation. The general public may not understand why a lawyer who has received client’s confession of guilt is, without the client’s consent, *prohibited by law* from telling the court of that guilt³⁰ – or even from telling the authorities that an innocent person might be suffering punishment for the offence that the client committed.³¹

¹⁷ See also *Australian Barristers Conduct Rules*, rr 118-20; *Australian Solicitors Conduct Rules*, rr 10-12.

¹⁸ *The Queen’s Trial* (1820) 1 St Tr (NS) 1348.

¹⁹ For Australia, see Christine Parker and Adrian Evans, *Inside Lawyers’ Ethics* (3rd ed, Melbourne, 2018) 30.

²⁰ *The Queen’s Trial* (1820) 1 St Tr (NS) 1348.

²¹ Luban, above n 1, 157.

²² *Ibid.*, 9-10.

²³ Tony Foley, ‘Institutional Responses to Child Sex Abuse: How a Moral Conversation with its Layers Might Contribute to Cultural Change in a Faith-Based Institution’ (2015) 18(2) *Legal Ethics* 164.

²⁴ Eg, see *Legal Profession Uniform Law* (NSW & Vic), s 25.

²⁵ (1988) 165 CLR 543, 555-6.

²⁶ *Rondel v Worsley* [1969] 1 AC 191, 227.

²⁷ Abbe Smith, ‘Defending the Unpopular Down-Under’ (2006) 30(2) *Melbourne University Law Review* 495.

²⁸ Cf *Giannarelli v Wraith* (1988) 165 CLR 543, 555-6.

²⁹ *Baker v Campbell* (1983) 153 CLR 52, 74; *Attorney-General (NT) v Maurice* (1986) 161 CLR 475, 480.

³⁰ *Tuckiar v R* (1934) 52 CLR 335.

³¹ *Carter v Managing Partner, Northmore, Hale, Davy and Leake* (1995) 183 CLR 121.

Here, the rationale that seems to justify an individual injustice is the lawyer's duty to the system of justice – specifically an adversary system of justice at that.³²

It is unsurprising, given the difficulty of knowing where partisanship ends and the prior duty the court takes over, that the professional codes are preoccupied with the question. The *Australian Barristers Conduct Rules* and the *Australian Solicitors Conduct Rules* detail when confidences must be kept or may be disclosed;³³ when documents must be handed back to a client or competing lawyer for litigation or a prosecution;³⁴ that courts and other lawyers must not be misled and mistakes made in comments to a court or another lawyer must be corrected;³⁵ that precedents that are unhelpful to the client's case must nevertheless be brought to the court's attention;³⁶ that a lawyer must withdraw if she is aware of a client's perjury;³⁷ that a lawyer who is aware of a client's guilt cannot present an alibi or any defence inconsistent with the client's confession;³⁸ when a client's intention to disobey a court order must or must not be disclosed to the court;³⁹ that allegations made about another person are supported by evidence;⁴⁰ that witnesses are not to be suborned or coached;⁴¹ and that unfair advantage may not be taken of another lawyer's mistake (including where she has accidentally received an opponent's confidential material).⁴² The partisanship of lawyers who represent the Crown in criminal prosecutions is even more constrained, and prosecutors are required 'not to press ... for a conviction beyond a full and firm presentation of that case'.⁴³ The citizen therefore has a greater formal entitlement to a partisan lawyer than the government has.

III. MORAL NEUTRALITY

The second *theme of moral neutrality* is deeply embedded in the expectations of the common lawyers' role.⁴⁴ It seems paradoxical that moral neutrality would be considered part of the deep morality of the legal profession, but in this connection it represents the *thin* procedural morality⁴⁵ that recognises the citizen's rights to give effect to his own reasonable life plans. It is therefore only the law itself that places limits on the lawyer's societal obligation to accept instructions from a potential client. Nothing else (except maybe a fee) determines whether the lawyer should take and complete any work requested by the potential client. The corollary is that the lawyer carries no moral responsibility for the outcome of the lawyer's work. This theme of moral neutrality arises because any question of the substantive justice or moral worth of the legal work is regarded as irrelevant to the principal decision by which the lawyer accepts a client and his cause. This surrendering of the lawyer's moral judgment to the client's and the abdication of moral responsibility are certainly vexed, and they lie behind the criticism that a lawyer will do anything for fee. Even the liberal Thomas Macaulay questioned how 'it be right that a man should, with a wig on his head and a band round his neck, do for a guinea what, without these appendages, he would think it wicked and infamous to do for an empire'.⁴⁶ Anthony Trollope presented the ethic as identical with that of an assassin's: the client outlines what he wants done, and lawyer and assassin alike are the tools by which it is achieved.⁴⁷ These, of course, are hyperbole, but there is little doubt that lawyers will appeal to an ethic of moral neutrality to deflect criticism of the client they represent or the cause they pursue for him. As US Supreme Court Justice Fortas said:

Lawyers are agents, not principals; and they should neither criticize nor tolerate criticism based upon the character of the client whom they represent ...⁴⁸

This is a long distance from the common lawyer's medieval antecedents who, while usually expected to represent any comer, were taken to have committed 'a grave sin' if knowingly taking up an unjust cause.⁴⁹ The ethic of moral neutrality, though, as it has developed since the eighteenth century, is deeply ingrained in the modern

³² There are surprisingly few disciplinary where lawyers have broken confidentiality, but see *Legal Complaints Committee v Trowell* [2009] WASAT 42; *Legal Services Commissioner v Tampoe* [2009] QLPT 14.

³³ *Australian Barristers Conduct Rules*, rr 114-18; *Australian Solicitors Conduct Rules*, r 9.

³⁴ *Australian Solicitors Conduct Rules*, r 15.

³⁵ *Australian Barristers Conduct Rules*, rr 24-5, 49-50; *Australian Solicitors Conduct Rules*, rr 19.1-19.2, 22.1-22.2.

³⁶ *Australian Barristers Conduct Rules*, r 29; *Australian Solicitors Conduct Rules*, r 19.6.

³⁷ *Australian Barristers Conduct Rules*, r 79; *Australian Solicitors Conduct Rules*, r 20.1.

³⁸ *Australian Barristers Conduct Rules*, r 80; *Australian Solicitors Conduct Rules*, r 20.2.

³⁹ *Australian Barristers Conduct Rules*, r 81; *Australian Solicitors Conduct Rules*, r 20.3.

⁴⁰ *Australian Barristers Conduct Rules*, rr 64-8; *Australian Solicitors Conduct Rules*, r 21.

⁴¹ *Australian Barristers Conduct Rules*, r 69; *Australian Solicitors Conduct Rules*, r 24.

⁴² *Australian Solicitors Conduct Rules*, rr 30, 31; eg *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* [2013] HCA 46; Katie Murray, 'Acting on Opponents' Mistakes - *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* and the Inadvertent Disclosure of Privileged Material' (2014) 17(1) *Legal Ethics* 132

⁴³ *Australian Barristers Conduct Rules*, r 84; *Australian Solicitors Conduct Rules*, r 29.2.

⁴⁴ Aspects of Part III reprise ideas in Reid Mortensen, 'Agency, Autonomy and a Theology of Legal Practice (2002) 14 *Bond Law Review* 391.

⁴⁵ John Rawls, *A Theory of Justice* (Oxford, 1972) 395-9.

⁴⁶ Thomas Babington Macaulay (Lord Macaulay), 'Lord Bacon' in Thomas Babington Macaulay (Lord Macaulay), *Critical and Historical Essays Contributed to the Edinburgh Review* (5th ed, London, 1848) II, 318.

⁴⁷ Anthony Trollope, *Orley Farm* (Oxford, 1985) 359.

⁴⁸ Cited in Thomas Shaffer, *On Being a Christian and a Lawyer* (Provo, Utah, 1981) 7.

⁴⁹ Thomas Aquinas, *Summa Theologiae* (London, 1975) XXXVIII, 151; M Harding, 'True Justice in Courts of Law' in Thomas Aquinas, *Summa Theologica* (New York, 1948) III, 3345, 3355-6. See also Brennan J's references in *Gianarelli v Wraith* (1988) 165 CLR 543, 580.

lawyer's role – although it is generally not reflected in written obligations in any professional code.

The one exception to that is the 'cab rank rule' that applies to barristers in the English tradition and that, as a result, is a prominent professional rule in the Australian States that maintain divided professions and Independent Bars. The rule *requires* a barrister to accept any brief offered by a solicitor as long as it is within the barrister's skill and expertise and (again) a reasonable fee is offered.⁵⁰ The barrister is just 'a cab-for-hire'. Lord Hobhouse believed that this rule was 'a fundamental and essential part of a liberal legal system'.⁵¹ The thinking behind that can be traced to the eighteenth century, when it was recognised that a lawyer who tried to screen a client or cause on the ground of its justice or morality was assuming the role of a judge.⁵² The best-known instance where an Australian lawyer, *qua* lawyer, gave expression to the ethic of moral neutrality despite his personal and political commitments was HV Evatt's representation of the Waterside Workers' Federation in the 1951 constitutional challenge to the Federal Parliament's attempt to ban the Communist Party of Australia and dissolve communist trade unions (including the Waterside Workers). Dr Evatt had been a Justice of the High Court of Australia, but retired from the Court in 1940 to enter federal politics. By 1950, he was Deputy Leader of the Australian Labor Party Opposition, and was struggling with communist infiltration of the ALP and public perception that it was sympathetic to communism. Evatt himself had been urging that the ALP distance itself from communists. He nevertheless accepted the brief to appear for the Waterside Workers. The rest of the ALP leadership was horrified: 'What you are proposing is ethically correct, professionally sound, and politically very, very foolish'.⁵³ Evatt nevertheless appeared before the High Court for the union, and successfully argued that the *Communist Party Dissolution Act* was invalid.⁵⁴

There is no doubt that the cab-rank rule is easily escaped – a brief can be refused because of 'personal engagements'.⁵⁵ It does not apply to solicitors, yet it only applies to barristers when they are briefed by solicitors.⁵⁶ The rule does not formally guarantee anyone access to the best advocate.⁵⁷ Its real significance is probably symbolic,

as it is consistently presented as a central institution of common law justice.⁵⁸ There is little doubt that its greatest importance lies in criminal defence, where public understanding of the defendant's rights to due process of law may be weak, and defence lawyers are often subject to moral opprobrium for representing the 'obviously guilty'. In defence, the cab-rank lawyer can plead that she has no choice. And, here, the cab-rank rule's use as a reference point for the theme of moral neutrality in the legal profession's ethics may well see it have even a broader effect than a code applicable only to barristers would have. In an empirical study of Victorian lawyers, Abbe Smith noted the role that the cab-rank rule had in obligating lawyers to take on unpopular clients – and found that even solicitors (to whom the rule does not apply) were often morally motivated by cab-rank principles. She also found that, while there were naturally exceptions, the Victorian lawyers were generally prepared to take unpopular clients and represent them – even as zealous partisans. It was not that there were political or ideological reasons for accepting the client. Smith concluded that the lawyers were motivated 'more by a sense of professional duty than by a desire to help clients'.⁵⁹

IV. CONCLUSION

Australian lawyers easily wear the description, coined by Alasdair MacIntyre, that western lawyers are 'the clergy of liberalism'.⁶⁰ The deep moral structures of legal professions have emerged over the last two or three centuries in response to the profound social and economic changes of the modern era. However, as MacIntyre's description suggests, the practising legal profession has itself also been a critical means by which the legal system has given effect to the Enlightenment's elevation of the individual.

In many respects, the theme of moral neutrality is the most striking expression of the thin, rights-based morality that coordinates liberal societies. It is not without its philosophical difficulties⁶¹ – especially in its refusal to take any moral responsibility for the outcomes of a lawyer's work.⁶² The increasing specialisation of law firms and, since the 1970s, the rise of cause lawyering have seen large sectors of Australian legal professions screen the representation of clients by criteria other than their legal entitlements. They often share their clients' values or political commitments and, contrary to moral neutrality, take moral credit for achieving (what they consider are) substantively just outcomes. Global and national commercial firms, and specialist personal injuries, family law, conveyancing, intellectual property and criminal defence practices, inevitably develop a clientele of a distinct social profile. Trade unions instruct a small group

⁵⁰ See *Legal Profession Uniform Conduct (Barristers) Rules 2015*, r 17: A barrister must accept a brief from a solicitor to appear before a court in a field in which the barrister practises or professes to practise if:
(a) the brief is within the barrister's capacity, skill and experience;
(b) the barrister would be available to work as a barrister when the brief would require the barrister to appear or to prepare ...;
(c) the fee offered on the brief is acceptable to the barrister; and
(d) the barrister is not obliged or permitted to refuse the brief under rules 101, 103, 104 or 105.

⁵¹ *Arthur JS Hall & Co (a firm) v Simons* [2000] 3 WLR 543, 610.

⁵² See the comments of Samuel Johnson in 1773: James Boswell, *The Journal of the Tour to the Hebrides* (London, 1985) 168-9; and Thomas Erskine in *R v Thomas Paine* (1792) 22 St Tr 357, 412.

⁵³ Kylie Tennant, *Evatt: Politics and Justice* (Sydney, 1970) 262.

⁵⁴ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1. The political damage to the ALP was severe.

⁵⁵ *Legal Profession Uniform Conduct (Barristers) Rules 2015*, r 105(b).

⁵⁶ Barristers may accept a brief directly from a client, although it is uncommon: *Legal Profession Uniform Conduct (Barristers) Rules 2015*, rr 21-1.

⁵⁷ For a sceptical account of the rule, see HHA Cooper, 'Representation of the Unpopular' (1974) 22 *Chitty's Law Journal* 333.

⁵⁸ Eg, see *Rondel v Worsley* [1969] 1 AC 191, 227; *Giannarelli v Wraith* (1988) 165 CLR 543, 580; *Arthur JS Hall & Co (a firm) v Simons* [2000] 3 WLR 543, 550, 558, 585, 610.

⁵⁹ Smith, above n 27.

⁶⁰ Alasdair MacIntyre, *Whose Justice, Which Rationality?* (South Bend, Ind, 1988) 344.

⁶¹ Mortensen, above n 44, 394-403.

⁶² See above nn 44-49, and accompanying text.

of firms that specialise in industrial claims, personal injuries litigation and class actions. There is a burgeoning publicly- or community-funded sector of legal services committed exclusively to representing Aboriginal and Torres Strait Islander Australians, women, migrant groups, refugees, environmental groups or, above all, the impecunious. Although the Independent Bar and (especially in regional Australia) general legal practices still tend toward an ethic of taking all comers, it must be questioned whether, in the specialist and cause-oriented profession, individual lawyers are committed to an ethic of moral neutrality. It may not matter, as long as moral neutrality holds in the important and ethically distinctive area of criminal defence, where it is tied closely to the defendant's rights of due process. In civil legal practice, the extensive and highly pluralised market for legal services inevitably means there is still a lawyer who will help the citizen achieve his life plans. The *individual lawyer* may now often put her own moral cast on the legal work she takes, but Australian *legal professions* show all signs of deepening their place as a 'clergy of liberalism'.