4. Ensuring Professional Integrity: Ethical Obligations and Discovery

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Introduction

4.1 The Terms of Reference for this Inquiry direct the ALRC to inquire into and report on, among other things, 'the law, practice and management of discovery of documents in litigation before federal courts' and the questions of the overuse and expense of discovery.[1] The Terms of Reference also direct the ALRC to have regard to 'the sufficiency, clarity and enforceability of obligations on practitioners and parties to identify relevant material as part of the discovery process as early as possible'. The

1 See the Terms of Reference at the front of this Consultation Paper.

ethical and professional obligations of lawyers, and how these obligations are exercised in practice, directly concern the practice and management of discovery of documents in litigation before federal courts. Such obligations have a role to play in limiting the overuse, and reducing the cost, of discovery. Accordingly, this chapter considers the ethical and professional obligations of lawyers in the context of discovery.

4.2 The first part of this chapter outlines the key sources of legal ethical obligations in Australia and provides an illustrative overview of the nature and extent of several key forms of potential discovery abuse and misconduct, including identifying the key legal ethical obligations such conduct may contravene. It also outlines the current professional and court imposed disciplinary structures and mechanisms in place to enforce those obligations.

4.3 The second part discusses the overarching issues that arise with respect to legal ethical obligations and misconduct in the context of discovery, including: lack of awareness about, and the broad nature of, legal ethical obligations; the limited application of such obligations; and difficulties in enforcement. This part also includes a brief examination of the role and nature of legal obligations in a changing legal environment, in particular in the context of electronic discovery and the applicability of obligations outside traditional courtroom processes.

4.4 The final part of the chapter examines existing educational requirements in relation to the legal ethical obligations owed by lawyers and proposes a new approach to the education of lawyers in this area.

Legal ethical obligations

4.5 The preceding chapters discuss legal obligations imposed on parties to litigation by disclosure requirements or court orders for discovery, procedures prescribed to determine the extent of those discovery obligations, and the practices employed to discharge them.

4.6 At the same time, lawyers owe a series of concurrent legal ethical obligations to the administration of justice, including the court, their clients and other lawyers. This framework of legal ethical obligations may be characterised as a 'duty matrix',[2] and is the focus of this chapter.

4.7 The ethical and legal rules relating to discovery practice are not mutually exclusive, and the 'ethical' rules are no less important than the 'legal' rules. As Professor Gino Dal Pont has indicated:

> the phrase 'legal ethics'... is an oxymoron to the extent that 'legal' implies mandatory laws, whereas 'ethics' for many connotes discretionary rules. In this latter sense, some use the term 'ethics' to distinguish rules that are professionally binding on a lawyer (ethical rules) from rules that are legally binding (legal rules). But such a practice conveys the incorrect impression that the ethical and legal rules are mutually exclusive, and that legal rules are more important than ethical rules.[3]

2 A Lamb and J Littrich, *Lawyers in Australia* (2007), 185.
3 G Dal Pont, *Lawyers' Professional Responsibility* (4th ed, 2010), 4.

4.8 To reflect this, the ALRC refers to the duties discussed in this chapter as 'legal ethical obligations'. That said, the distinction can be useful, and so this chapter considers the more general professional and ethical duties placed on lawyers—duties or rules over and above those specifically developed to govern discovery practice. These ethical duties—and crucially, the enforcement mechanisms—are also more clearly directed to lawyers, as opposed to other parties, than the other legal rules discussed earlier.

4.9 The nature and practical effect of these obligations on the behaviour of legal practitioners has evolved over time, which in part reflects the increasingly diverse practice of law and the evolution of the Australian legal system. For example, the growth of in-house legal counsel; the public listing of law firms; the rise of multidisciplinary firms; and the increasing role played by litigation funders may be seen to have 'muddied' the legal ethical waters.

Sources of legal ethical obligations

4.10 In Australia, the key sources of lawyers' professional responsibilities are general law, statute and professional rules—sometimes collectively referred to as the 'law of lawyering'.[4]

4.11 As outlined above, the focus of this Inquiry is on discovery in the context of the federal civil justice system. However, to the extent that lawyers practising in the federal system are subject to regulation at a state and territory level, this chapter necessarily considers sources of obligations under state and territory legislation and professional rules.[5]

4.12 Of particular relevance in this context is that, in early 2009 the Council of Australian Governments (COAG) embarked on a project to nationalise regulation of the legal profession in Australia, referred to as the National Legal Profession Reform Project. At the request of COAG, the Australian Government Attorney-General established a taskforce (the Taskforce) to consider options for the establishment of a 'national legal profession and national regulatory framework, while retaining State and Territory involvement and engagement by professional associations'.[6] In April 2010 a consultation package was released, which included a draft *Legal Profession National Law* (Draft National Law) and accompanying draft *Legal Profession National Rules* (Draft National Rules).[7] At the time of writing a three-month public consultation period on the consultation package had closed and the Taskforce was considering submissions received.

4.13 While the obligations articulated and imposed by substantive legislation and rules provide an important framework on a professional level, the ethical practice of

4 See, eg, C Parker and A Evans, *Inside Lawyers' Ethics* (2007), 4.

5 A person who is entitled to practise as a barrister or solicitor in the Supreme Court of a state or territory is entitled to practise in any federal court, provided his or her name also appears in the Register of Practitioners kept by the Chief Executive and Principal Registrar of the High Court: *Judiciary Act 1903* (Cth) ss 55B, 55C.

6 National Legal Profession Reform Taskforce, *Regulatory Framework* (2009).

7 National Legal Profession Reform Project, *Legal Profession National Law: Consultation Draft* (2010); National Legal Profession Reform Project, *Legal Profession National Rules: Consultation Draft* (2010).

law also involves lawyers deciding 'on a personal level ... what the rules mean, how to obey them [and] what to do when there are gaps or conflicts in the rules'.[8] This issue is addressed further with respect to approaches to the education of lawyers about legal ethical obligations.

General law

4.14 General law—in particular the law of contract, torts and equity—governs 'most incidents of lawyers' relationships with their clients, the court and third parties'.[9] For example, a lawyer's duty to their client arises in the context of the lawyer–client relationship, which is essentially a contractual relationship. Also arising in the context of that relationship is the lawyer's duty of care arising in tort and of confidentiality arising in equity.[10]

4.15 Further, while statute and rules largely govern the discovery process, 'the substantive right to discovery still exists as a principle of equity ... and recourse is had to equity where the rules are silent'.[11]

4.16 However, to the extent that the key obligations relevant to the discovery context arise from statute and professional rules, the focus of this chapter is on those sources of legal ethical obligations, rather than general law duties.

Statute and delegated legislation

4.17 There are several statutory sources of legal ethical obligations in Australia, including: the legal profession and civil procedure legislation in each jurisdiction; model laws; and other specific pieces of legislation.

4.18 The legal profession legislation in each jurisdiction outlines general requirements for engaging in legal practice and obligations with respect to trust accounting and costs, as well as establishing regulatory bodies and processes for handling complaints against, and the discipline of, practitioners in the jurisdiction.[12]

4.19 The basis for legal profession legislation in all jurisdictions, except South Australia, is the *Legal Profession Model Laws Project Model Provisions* (Model Laws), developed by the Standing Committee of Attorneys-General (SCAG), with the Law Council of Australia (Law Council).[13] The Model Laws were initially released in 2004 and revised in July 2006.

4.20 In February 2006, SCAG also released the *Legal Profession Model Laws Project Model Regulations* (Model Regulations), a revised edition of which was released in June 2007.[14]

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8 C Parker and A Evans, *Inside Lawyers' Ethics* (2007), 4.
9 G Dal Pont, *Lawyers' Professional Responsibility* (4th ed, 2010), 15.
10 See discussion below in relation to civil liability laws which have consolidated tort law.
11 B Cairns, *Australian Civil Procedure* (8th ed, 2009), 336.
12 *Legal Profession Act 2004* (NSW); *Legal Profession Act 2007* (Qld); *Legal Practitioners Act 1981* (SA); *Legal Profession Act 2007* (Tas); *Legal Profession Act 2004* (Vic); *Legal Profession Act 2008* (WA); *Legal Profession Act 2006* (ACT); *Legal Profession Act 2006* (NT).
13 Standing Committee of Attorneys-General, *Legal Profession Model Laws* (2nd ed, 2006).
14 Standing Committee of Attorneys-General, *Legal Profession Model Regulations* (2nd ed, 2007).

4.21 The core provisions of the Model Laws and the Model Regulations that are of relevance to this Inquiry relate to standards for legal education, definitions of misconduct, costs disclosures and the regulation of legal practices.

4.22 In addition, as part of the National Legal Profession Reform Project, COAG, with the support of the Australian Government Attorney-General, released the Draft National Law and accompanying Draft National Rules. The Draft National Law encompasses those areas currently dealt with in legal profession legislation in each jurisdiction.[15]

4.23 There is also civil procedure legislation in some jurisdictions which regulates the conduct of participants in civil litigation and includes several provisions of relevance to the discovery process.[16] For example, the *Civil Procedure Act 2010* (Vic) implemented a series of recommendations from the Victorian Law Reform Commission's (VLRC) *Civil Justice Review* to improve the standard of conduct of participants in civil litigation and reduce costs and delay, including several measures applicable to discovery.[17] Of particular relevance to this Inquiry are the 'overarching obligations'—the content and effect of which are discussed later in this chapter—imposed by the *Civil Procedure Act* on all parties to litigation and their legal representatives.

4.24 The statutory sources of legal ethical obligations outlined above are augmented by obligations—both legal and ethical—imposed by other specific pieces of legislation. These are discussed in this chapter only to the extent that they impose legal ethical obligations, rather than practice-directed obligations. For example, these include:

- the obligation to act,[18] and assist their clients to act,[19] consistently with the overarching purpose of the *Federal Court of Australia Act 1976* (Cth).[20] There is a similar obligation under various other pieces of legislation;[21] and
- the obligation not to proceed unless there are reasonable prospects of success under legislation introduced to consolidate tort law and procedural changes in civil actions to encourage quicker and cheaper resolution of civil disputes.[22]

4.25 Finally, the *Legal Services Directions 2005* (Cth) are a set of binding rules issued under s 55ZF of the *Judiciary Act 1903* (Cth) by the Attorney-General about the

15 National Legal Profession Reform Project, *Legal Profession National Law: Consultation Draft* (2010); National Legal Profession Reform Project, *Legal Profession National Rules: Consultation Draft* (2010).

16 See, eg, *Civil Procedure Act 2005* (NSW); *Civil Procedure Act 2010* (Vic).

17 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008). The reforms will take effect on 1 January 2011.

18 *Federal Court of Australia Act 1976* (Cth) s 37N(1).

19 Ibid s 37N(2).

20 Ibid s 37M. The overarching purpose provisions took effect on 1 January 2010.

21 See, eg, *Family Law Rules 2004* (Cth) rr 1.04, 1.08(1); *Civil Procedure Act 2005* (NSW) s 56; *Uniform Civil Procedure Rules 1999* (Qld) r 5(1); *Civil Procedure Act 2005* (ACT) s 56(1). See: J Spigelman, 'Just, Quick and Cheap: A New Standard for Civil Procedure' (2000) Special Edition 6 *Bar Brief* Note also that the Civil Dispute Resolution Bill 2010 (Cth), which was being considered by the Senate Legal and Constitutional Affairs Legislation Committee due to report on 22 November 2010, includes a similar overarching purpose clause.

22 See, eg, *Civil Law (Wrongs) Act 2002* (ACT) ss 186–190.

performance of legal work for the Commonwealth. The *Legal Services Directions* were first issued in 1999 and were revised and reissued in 2005 as a statutory instrument. Appendix B of the *Legal Services Directions* outlines the obligation of the Commonwealth and its agencies—and by extension, lawyers working for the Australian Government—to behave as model litigants in the conduct of litigation.[23]

Professional rules

4.26 In Australia, the legal profession is essentially regulated on a state and territory basis. Traditionally, the legal profession was divided into solicitors and barristers. In many jurisdictions, the profession is now combined—either formally, or in practice. For most purposes, however, solicitors and barristers are regulated separately by professional bodies such as law societies and bar associations. Legal profession rules are binding on Australian legal practitioners and Australian-registered foreign lawyers to whom they apply.[24]

4.27 As is the case with legal profession legislation, while there are no national professional conduct rules in force, the professional conduct rules that apply to Australian legal practitioners are now largely uniform. Most jurisdictions have now adopted some form of the Law Council's *Model Rules of Professional Conduct and Practice* (Model Rules)[25] developed in 2002.[26]

4.28 In line with a recommendation made by the ALRC in *Managing Justice—A Review of the Federal Civil Justice System* (ALRC Report 89)[27] and as part of the COAG National Legal Profession Reform Project, the Law Council and the Australian Bar Association (ABA) respectively have developed the *Legal Profession National Rules: Solicitors' Rules 2010* (Draft National Solicitors' Rules) and *Legal Profession National Rules: Barristers' Rules 2010* (Draft National Barristers' Rules).[28] At the time of writing, public consultation on these rules had closed and the Law Council and ABA were considering submissions received.

Legal ethical obligations, misconduct and discovery

4.29 In ALRC Report 89, the ALRC commented that: 'in almost all studies of litigation, discovery is singled out as the procedure most open to abuse, the most costly

23 *Legal Services Directions 2005* (Cth). At the time of writing, these Directions were under review.

24 See, eg, *Legal Profession Act 2004* (NSW) s 711.

25 Law Council of Australia, *Model Rules of Professional Conduct and Practice* (2002).

26 The Model Rules form the basis for the following professional conduct rules: *Professional Conduct and Practice Rules 1995* (NSW); *Legal Profession (Solicitors) Rule 2007* (Qld); *Rules of Professional Conduct and Practice* (SA); *Professional Conduct and Practice Rules 2005* (Vic); *Legal Profession (Solicitors) Rules* (ACT); *Rules of Professional Conduct and Practice* (NT). The Western Australian and Tasmanian rules have yet to follow: *Legal Profession Rules 2009* (WA); *Rules of Practice 1994* (Tas), however the ALRC understands that Western Australia is currently in the process of revising its professional conduct rules and has previously indicated it will adopt the Model Rules following the current revision by the Law Council and Australian Bar Association: *Draft Professional Conduct Rules 2010* (WA).

27 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), Rec 13.

28 Law Council of Australia, *Legal Profession National Rules: Solicitors' Rules* (2010); Australian Bar Association, *Legal Profession National Rules: Barristers' Rules* (2010).

and the most in need of court supervision and control'.[29] An overarching concern is that discovery may be used as a tactical tool to exhaust the resources of the other party or encourage settlement.

4.30 As indicated throughout this Consultation Paper, the primary concerns with regard to the discovery process in Australia centre on expense, scale and delay.

4.31 While the ALRC is not aware of any evidence of chronic abuse or misconduct arising in relation to discovery, allegations of misconduct and abuse in the context of discovery concern the following issues: charging unreasonable costs; making unnecessarily broad discovery requests or flooding the other party with voluminous irrelevant documents; withholding relevant documents; and delay.

4.32 These concerns are examined below against the backdrop of legal ethical obligations owed by lawyers to the administration of justice, including to the court, the client, other lawyers and third parties. Potentially, there is a range of other forms of discovery abuse that may occur, encompassing ethically objectionable practices ranging from discourtesy to harassment, however this discussion is illustrative and is not intended to provide an exhaustive overview of the ways in which discovery abuse may conflict with legal ethical obligations.

4.33 The ALRC notes that the challenge in this Inquiry is to disentangle issues arising from perceptions of abuse, from those of valid practice, to assess what should be appropriate responses to actual instances of misconduct.

'Trolley load litigation' and defensive legal practice

4.34 On admission to practice, lawyers become officers of the court. Accordingly, lawyers owe an overriding duty to the court which prevails over all other duties, including the duty to the client. The preamble to the Advocacy and Litigation Rules, contained within the Model Rules, relevantly states:

> Practitioners, in all their dealings with the courts, whether those dealings involve the obtaining and presentation of evidence [or] the preparation and filing of documents ... should act with competence, honesty and candour. Practitioners should be frank in their responses and disclosures to the court, and diligent in their observance of undertakings which they give to the court or their opponents.[30]

4.35 The Model Rules also incorporate an expression of the general standard of conduct expected of practitioners:

> A practitioner must not engage in conduct, whether in the course of practice or otherwise, which is:
>
> ... calculated, or likely to a material degree, to:
>
> (a) be prejudicial to the administration of justice;
>
> (b) diminish public confidence in the administration of justice...[31]

29 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000) [6.67].

30 Law Council of Australia, *Model Rules of Professional Conduct and Practice* (2002) r 12.

31 Ibid r 30.1.

4.36 Despite this duty to the administration of justice and, in particular, to the court, in initial consultations the ALRC heard concerns about what has been referred to as 'trolley load litigation', 'trial by avalanche', or 'defensive legal practice'.[32]

4.37 These practices essentially involve lawyers providing the opponent with vast numbers of documents.[33] Former Chief Justice Black of the Federal Court has observed the need to

> avoid having trolley loads of documents being wheeled into court when hardly any of them are likely to be referred to and when every page will add to the cost of the litigation.[34]

4.38 There are many reasons put forward to explain the phenomenon of trolley load litigation. First, it might be argued that the production of vast numbers of documents is simply a consequence of the exponential growth in documents in the wake of computer technology; secondly, the adversarial nature of the system and attempts by lawyers to do what is seen to be in the best interests of their client; thirdly, an attempt to 'wear down' the other party; and finally, where the scope of required discovery is unclear, in order to avoid disciplinary action for professional misconduct if documents are withheld.

Legal rules

4.39 Legislation and court rules increasingly contain an overarching purpose to facilitate the 'just resolution of disputes', 'according to law' 'as quickly, inexpensively and efficiently as possible'.[35] While not expressly stated, lawyers applying due diligence to reduce the volume of potentially discoverable documents to those directly relevant to the proceeding is clearly consistent with such purposes. Accordingly, practices such as trolley load litigation may constitute a breach of the duty to conduct proceedings in a way which is consistent with those overarching purposes.[36]

Legal ethical obligations

Duty to the administration of justice and the court

4.40 Practices such as trolley load litigation may be inconsistent with the legal ethical obligations owed by lawyers to the court and the administration of justice. More specifically they raise issues with respect to:

- the duty of fairness, in particular not to abuse court processes (discussed in more detail in relation to misconduct involving unreasonable expense and delay);

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32 The phrase 'trolley load litigation' was used by Einstein J of the New South Wales Supreme Court in *Michael Wilson and Partners Ltd v Nicholls* [2009] NSWSC 669. 'Defensive legal practice' was a term used by a stakeholder in consultations.

33 The focus of this Inquiry is on trolley load litigation that arises as a result of the discovery process, as opposed to arising from, eg, the filing of unnecessary material as exhibits to affidavits.

34 As cited in Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 434.

35 See, eg, *Federal Court of Australia Act 1976* (Cth) s 37M; *Family Law Rules 2004* (Cth) rr 1.04, 1.08(1); *Civil Procedure Act 2005* (NSW) s 56; *Uniform Civil Procedure Rules 1999* (Qld) r 5(1); *Civil Procedure Act 2005* (ACT) s 56(1).

36 See, eg, *Federal Court of Australia Act 1976* (Cth) s 37N; *Civil Procedure Act 2005* (NSW) s 56.

- the duty to narrow the issues in dispute and identify relevant material and thereby reduce the volume of potentially discoverable documents;[37] and
- the obligation of lawyers to appraise the case and exercise personal judgment about the existence and relevance of documents in the proceedings.[38]

Duty to the client

4.41 The lawyer's duty to the client forms another important aspect of the 'duty matrix' and arises in the context of the lawyer–client relationship, the basis of which is the 'retainer'. As a result, the duty to the client arises under general law (in particular contract, torts and equity) as well as relevant legislation and professional rules.

4.42 For example, while the retainer is contractual in nature, the relationship is also fiduciary and, accordingly, lawyers owe a duty of care to exercise reasonable competency and skill in the conduct of the client's matter.[39]

4.43 In a general sense, the Model Rules articulate a lawyer's duty to the client. The preamble to the 'Relations with Clients' section states:

> Practitioners should serve their clients competently and diligently. They should be acutely aware of the fiduciary nature of their relationship with their clients, and always deal with their clients fairly, free of the influence of any interest which may conflict with a client's best interests ... Practitioners should not, in the service of their clients, engage in, or assist, conduct that is calculated to defeat the ends of justice or is otherwise in breach of the law.[40]

4.44 More specifically, the Model Rules provide that a practitioner must

> seek to assist the client to understand the issues in the case and the client's possible rights and obligations, if the practitioner is instructed to give advice on any such matter, sufficiently to permit the client to give proper instructions.[41]

37 The obligation is owed under Law Council of Australia, *Model Rules of Professional Conduct and Practice* (2002) r 13.2.1, as well as by all parties under the *Civil Procedure Act 2010* (Vic) ss 23, 34(1). Conversely, only lawyers owe the obligation under: *Professional Conduct and Practice Rules 1995* (NSW) r 23-A.15A; *New South Wales Barristers' Rules* r 42; *Civil Procedure Act 2010* (Vic) ss 34(1), 34(2); *Civil Procedure Act 2010* (Vic) s 23.The obligation under the *Civil Procedure Act 2010* (Vic) to take 'reasonable steps' is discussed in Ch 5.

38 For an illustrative discussion of a disciplinary proceeding in which a lawyer was disciplined for inadequate discovery, see: M Costello, 'The Legal Practitioners Disciplinary Tribunal: A Solicitor's Duty Regarding Discovery' (1996) 23(10) *Brief* 26.

39 *Rogers v Whitaker* (1992) 175 CLR 479.

40 Law Council of Australia, *Model Rules of Professional Conduct and Practice* (2002), 5.

41 Ibid r 12.2.

4.45 Accordingly, a lawyer's duty to the client encompasses a duty to advise, that is subject to the overriding duty to the court. The duty requires that, for example, lawyers advise their clients about the purposes of discovery, their rights and obligations with respect to the discovery process, and which documents are relevant for the purposes of discovery.

4.46 Judicial discussion of the duty has emphasised the obligation to take positive steps to ensure that clients are aware of the duty of discovery[42] and to take responsibility for ensuring that clients comply with those duties. While not specifically articulated in the professional rules, other cases have also suggested that lawyers have an obligation to work with clients to understand and interrogate document management systems in order to satisfy discovery search obligations.[43]

4.47 In the preceding chapter, the ALRC proposed greater judicial control over the discovery process, including in relation to the scope of discoverable documents. Even where the scope of discovery is more strictly controlled, however, the role of lawyers and parties to litigation in making decisions about how much to disclose, and at what stage, remains of central importance in attempts to address the expense, scale and delay currently associated with discovery.

4.48 For example, lawyers and their clients still face decisions about which documents to discover where they are aware of documents that fall within the scope of a request or order but that are not substantially relevant to the issues in dispute and where disclosure will only burden their opponent with the task of vetting useless material.

Question 4–1 In practice, how do lawyers make decisions about whether to discover a document which falls within the scope of a discovery request or order, but that is not substantially relevant to the issues in dispute?

Withholding documents—misleading conduct

4.49 The duty to act with candour, including not to mislead the court, is articulated in legislation and professional rules, and reflects the position at common law. The duty—both proscriptive and prescriptive—is a central obligation owed by lawyers and necessarily has general application to the conduct of matters by lawyers.

4.50 However, in the context of discovery it also has application to the extent that in some instances, parties do not provide adequate discovery through failing to disclose the existence of relevant documents, or by destroying documents.

42 See, eg, *Rockwell Machine Tool Co Ltd v E P Barrus (Concessionaires) Ltd* [1968] All ER 98, 99. See also: M Costello, 'The Legal Practitioners Disciplinary Tribunal: A Solicitor's Duty Regarding Discovery' (1996) 23(10) *Brief* 26.

43 This obligation is discussed later in this chapter in relation to document destruction and the duty to preserve documents. See also the seminal case in the US: *Qualcomm v Broadcom* (Unreported, USDC Cal., 05cv1958, 3 August 2007).

4.51 Under professional rules, lawyers must not knowingly make—either in oral or written submissions—'a misleading statement to a court', 'a false statement to the opponent in relation to the case', or 'deceive or knowingly or recklessly mislead the court'; and they have an obligation to correct any misleading statements.[44]

4.52 This duty encompasses an obligation not to mislead the court with respect to the facts of the case or to misinterpret the law, to be aware of the applicable rules and procedure as well as to draw the court's attention to authorities which support or act against their client's case.[45]

4.53 The Model Rules incorporate an expression of the general standard of conduct expected of practitioners, providing that 'a practitioner must not engage in conduct, whether in the course of practice or otherwise, which is ... dishonest'.[46]

4.54 Specific legislative articulations of the duty of candour are broad, often included within the scope of overarching obligations. For example, the *Civil Procedure Act 2010* (Vic) contains overarching obligations including to act honestly.[47]

4.55 In the context of discovery, such an obligation is likely to arise most frequently where lawyers and their clients are making decisions about which documents falls within the terms of a discovery request or order, particularly where those decisions lead to a failure to discover relevant documents.

4.56 Such decisions raise a dilemma which lawyers often need to consider, that is where their obligation to their client and the duty to the court may come into conflict.

Question 4–2 In practice, how do lawyers make decisions about whether to discover relevant documents that may potentially fall outside the scope of a discovery request or order?

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44 See, eg, Law Council of Australia, *Model Rules of Professional Conduct and Practice* (2002) rr 14.1, 14.2. See also: Solicitors' rules—Law Council of Australia, *Model Rules of Professional Conduct and Practice* (2002) rr 14.1, 14.2; *Professional Conduct and Practice Rules 1995* (NSW) rr 23-A.21, 23-A.22; *Legal Profession (Solicitors) Rule 2007* (Qld) rr 14.1, 14.2; *Rules of Professional Conduct and Practice* (SA) rr 14.1, 14.2; *Professional Conduct and Practice Rules 2005* (Vic) rr 14.1, 14.2; *Rules of Professional Conduct and Practice* (NT) r 17.6, 17.7; *Legal Profession (Solicitors) Rules* (ACT) rr 18.1, 18.2. Barristers' rules—Australian Bar Association, *Legal Profession National Rules: Barristers' Rules* (2010) rr 26, 27; *New South Wales Barristers' Rules* rr 21, 22, 51, 52; *Barristers Rule 2007* (Qld) rr 23, 24; *Barristers' Conduct Rules 2010* (SA) rr 26, 27, 48, 49; *Victorian Bar Practice Rules* (Vic) rr 19, 20; *Conduct Rules* (WA) rr 20, 21; *Legal Profession (Barristers) Rules 2008* (ACT) rr 21, 22.

45 Law Council of Australia, *Model Rules of Professional Conduct and Practice* (2002), r 14.6. Solicitors' Rules—*Professional Conduct and Practice Rules 1995* (NSW) r 23-A.25; *Legal Profession (Solicitors) Rule 2007* (Qld) r 14.6; *Rules of Professional Conduct and Practice* (SA) r 14.6; *Professional Conduct and Practice Rules 2005* (Vic) r 14.5; *Legal Profession (Solicitors) Rules* (ACT) r 18.6; *Rules of Professional Conduct and Practice* (NT) r 17.11; Barristers' Rules—Australian Bar Association, *Legal Profession National Rules: Barristers' Rules* (2010) r 31; *New South Wales Barristers' Rules* r 25; *Barristers Rule 2007* (Qld) r 27; *Barristers' Conduct Rules 2010* (SA) r 31; *Victorian Bar Practice Rules* (Vic) r 24; *Conduct Rules* (WA) r 25; *Legal Profession (Barristers) Rules 2008* (ACT) r 25. See also *Rondel v Worsley* [1969] AC 191, 227–228.

46 Law Council of Australia, *Model Rules of Professional Conduct and Practice* (2002) r 30.1.

47 *Civil Procedure Act 2010* (Vic) s 17.

Delay

4.57 As outlined above, there is increasing legislative articulation of the duty owed by lawyers to facilitate the just, quick, efficient and inexpensive resolution of proceedings.[48] In many respects, these legislative articulations reflect judicial criticism of practitioner conduct causing unreasonable expense or delay. For example, in *White Industries (Qld) Pty Ltd v Flower & Hart,* Goldberg J of the Federal Court made the following comments:

> The time has passed when obstructionist and delaying tactics on the part of parties to proceedings in the court can be countenanced by the court ... It is not proper ... to adopt a positive or assertive obstructionist or delaying strategy which is not in the interests of justice and inhibits the court from achieving an expeditious and timely resolution of a dispute. Court resources are finite and so are the resources of most litigants and the court should not countenance a deliberate strategy of obstruction and delay. If a party instructs its legal advisers to adopt such a strategy the legal adviser should inform the party that it is not proper to do so and if the party insists, then the legal adviser should withdraw from acting for that party.[49]

4.58 With respect to delay, the Model Rules provide that:

> A practitioner will not have breached the practitioner's duty to the client ... simply by choosing ... to exercise the forensic judgments called for during the case so as to ... present the client's case as quickly and simply as may be consistent with its robust advancement.[50]

4.59 The Draft National Laws impose an obligation on law practices to 'act reasonably to avoid unnecessary delay' where it results in increased legal costs.[51]

4.60 Under the National Barristers' Rules, barristers are required to complete work in sufficient time in order to comply with orders, directions, rules or practice notes of the court.[52]

4.61 In Victoria, Western Australia and Tasmania, the professional rules make specific reference to the duty of practitioners to use their best endeavours to 'complete legal work as soon as reasonably possible',[53] to 'avoid unnecessary expense and waste of the court's time'[54] and 'complete a client's business within a reasonable time'.[55]

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48 See, eg, *Federal Court of Australia Act 1976* (Cth) s 37N; *Civil Procedure Act 2005* (NSW) s 56. There is a specific obligation to minimise delay under the *Civil Procedure Act 2010* (Vic) s 25.

49 *White Industries (Qld) Pty Ltd v Flower & Hart* (1998) 156 ALR 169.

50 Law Council of Australia, *Model Rules of Professional Conduct and Practice* (2002) r 13.2.2. See also: Law Council of Australia, *Legal Profession National Rules: Solicitors' Rules* (2010) r 17.2.2; Australian Bar Association, *Legal Profession National Rules: Barristers' Rules* (2010) r 42(b); *Professional Conduct and Practice Rules 1995* (NSW) r 23-A.15A(e); *New South Wales Barristers' Rules* r 19(b); *Legal Profession (Solicitors) Rule 2007* (Qld) r 13.2.2; *Barristers Rule 2007* (Qld) r 21(b); *Rules of Professional Conduct and Practice* (SA) r 13.2.2; *Barristers' Conduct Rules 2010* (SA) r 42(b); *Professional Conduct and Practice Rules 2005* (Vic) r 13.2.2; *Victorian Bar Practice Rules* (Vic) r 17(b); *Conduct Rules* (WA) r 18(b); *Legal Profession (Solicitors) Rules* (ACT) r 17.2(b); *Legal Profession (Barristers) Rules 2008* (ACT) r 19(b); *Rules of Professional Conduct and Practice* (NT) r 17.4(b).

51 National Legal Profession Reform Project, *Legal Profession National Law: Consultation Draft* (2010) s 4.3.5.

52 Australian Bar Association, *Barristers' Conduct Rules* r 56(a).

53 *Professional Conduct and Practice Rules 2005* (Vic) r 1.2.

54 *Legal Profession Rules 2009* (WA) r 14.4.

4.62 In NSW, both the *Professional Conduct and Practice Rules* and the *Barristers' Rules* require lawyers to complete work in sufficient time in order to comply with court rules and orders.[56]

4.63 The *Civil Procedure Act 2010* (Vic) contains overarching obligations, including the specific obligation to 'disclose the existence of documents which the person reasonably considers are critical to the proceedings, at the earliest possible time after becoming aware of their existence'.[57]

4.64 Delay may arise in part as a result of other forms of alleged discovery abuse, for example, where trolley load litigation delays proceedings while parties examine large volumes of discovered documents. However, delay itself may also constitute a form of discovery abuse that contravenes lawyers' legal ethical obligations.

4.65 Commentators and stakeholders have indicated that the primary causes and means of delay in the context of discovery in Australia include:

- the failure to disclose the existence of documents at the earliest possible time;
- delay in responding to requests or orders for discovery;
- delay arising as a result of parties questioning the scope of discovery requests or orders; and
- other forms of satellite litigation about matters such as the assertion of legal professional privilege over documents.[58]

4.66 Delay is an area in which there is considerable overlap in regulation between legal and ethical rules. For example, under legal rules there is a duty to complete work in sufficient time to comply with court timetables and to act consistently with the overarching purpose of specific legislation. Accordingly, where the conduct of lawyers or other parties unduly delays the discovery process or the progress of litigation more broadly, such conduct is in breach of legal rules and lawyers may be subject to personal costs orders, an enforcement mechanism discussed later in this chapter.[59]

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55 *Rules of Practice 1994* (Tas) r 10.

56 Australian Bar Association, *Legal Profession National Rules: Barristers' Rules* (2010) r 56(a); *Professional Conduct and Practice Rules 1995* (NSW) r 23-A.15(a); *New South Wales Barristers' Rules* r 41. This is also a requirement under the *Barristers' Conduct Rules 2010* (SA) r 56.

57 *Civil Procedure Act 2010* (Vic) s 26.

58 See, eg, G Dal Pont, *Lawyers' Professional Responsibility* (4th ed, 2010); Y Ross, *Ethics in Law: Lawyers' Responsibility and Accountability in Australia* (5th ed, 2010); Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008); A Lamb and J Littrich, *Lawyers in Australia* (2007). While lawyers owe legal ethical obligations in relation to the responsible use of privilege this issue is not discussed in this chapter. For discussion of privilege in the specific context of federal investigations, see Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report 107 (2008).

59 See, eg, *White Industries (Qld) Pty Ltd v Flower & Hart* (1998) 156 ALR 169., 249 affirmed in *Flower & Hart (a firm) v White Industries (Qld) Pty Ltd* (1999) 87 FCR 134.; *Supreme Court Rules 1970* (NSW) pt 52, r 66; *Supreme Court Act 1970* (NSW) s 76C(1).

Question 4–3 Is discovery used as a delaying strategy in litigation before federal courts? If so, how and to what extent?

Costs

4.67 The Terms of Reference note the 'high and often disproportionate cost of discovery'. Complaints made to legal service bodies and disciplinary bodies commonly relate, at least in part, to legal costs.

4.68 In the context of discovery, the ALRC has heard that there are two primary forms of cost-related complaint that contribute to the concern that discovery may be used as a 'profit centre'. These are: using discovery as a tactical tool to increase legal costs and thus exhaust the resources of the other party; and charging excessive costs for work performed, including for work performed at a certain level.

4.69 Chief Justice Spigelman of the NSW Supreme Court has noted that the difficulty with legal costs is that a lawyer 'does not have a financial incentive' to complete the legal work as quickly as possible. However, he argues, 'the control is of course, the practitioner's sense of professional responsibility'.[60]

4.70 Under legal profession legislation in most jurisdictions, once retained in a matter, lawyers are under various obligations to provide to the client a written disclosure of costs, including an estimate which outlines the possible contingencies that may affect that estimate and which details the way in which costs are calculated.[61]

4.71 Existing legal professional legislation does not require that lawyers charge their clients reasonable fees. In many jurisdictions only where there is no costs agreement or applicable scale of costs are legal costs recoverable according to the 'fair and reasonable value of the legal services provided'.[62] However, mandatory criteria included for determining what is fair and reasonable only apply to costs assessors making a costs assessment.[63]

4.72 However, under the Draft National Laws, a law practice would be under an obligation not to charge more than fair and reasonable legal costs.[64] Legal costs would be considered fair and reasonable if they:

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60 J Spigelman, 'Opening of the Law Term' (2004) *(Speech to the Law Society of New South Wales Opening of the Law Term Dinner, Sydney, 2 February 2004)* .

61 See, eg, *Legal Profession Act 2004* (NSW) pt 3.2, s 309; *Legal Profession Act 2007* (Qld) pt 3.4, s 308; *Legal Profession Act 2004* (Vic) s 3.4.9; *Legal Profession Act 2008* (WA) s 260; *Legal Profession Act 2006* (ACT) s 269.

62 See, eg, *Legal Profession Act 2004* (NSW); *Legal Profession Act 2007* (Qld) s 319(1)(c); *Legal Profession Act 2007* (Tas) s 30; *Legal Profession Act 2004* (Vic) s 3.4.19; *Legal Profession Act 2008* (WA) s 271; *Legal Profession Act 2006* (ACT) s 279.

63 See, eg, *Legal Profession Act 2004* (NSW) s 363; *Legal Profession Act 2007* (Qld) s 341; *Legal Profession Act 2007* (Tas) s 327; *Legal Profession Act 2008* (WA) s 301; *Legal Profession Act 2006* (ACT) s 300. The inclusion of criteria is in line with a recommendation made in Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), Rec 27.

64 National Legal Profession Reform Project, *Legal Profession National Law: Consultation Draft* (2010), s 4.3.4.

> (a) are reasonably incurred and are reasonable in amount; and
>
> (b) are proportionate in amount to the importance and complexity of the issues involved in a matter, the amount or value involved in a matter, and whether the matter involved a matter of public interest; and
>
> (c) reasonably reflect the level of skill, experience, specialisation and seniority of the lawyers concerned; and
>
> (d) conform to any applicable requirements of this Part, the National Rules and fixed costs legislative provisions.[65]

4.73 The Draft National Laws also impose an obligation on law practices to avoid increased legal costs. Specifically, a 'law practice must not act in a way that unnecessarily results in increased legal costs payable by a client, and in particular must act reasonably to avoid unnecessary delay resulting in increased legal costs'.[66]

4.74 Generally professional rules do not explicitly require that lawyers charge their clients reasonable fees. However, jurisdictions vary in relation to the obligations owed by lawyers with respect to costs. For example, under the draft professional conduct rules in Western Australia

> a practitioner may only charge costs which are no more than is reasonable for the practitioner's services having regard to the complexity of the matter, the time and skill involved, any scale of costs that might be applicable and any agreement as to costs between the practitioner and the client.[67]

4.75 In Queensland, commentary included in the professional rules states that, in agreeing to act for a client, a lawyer 'should not take steps or perform work in such a manner as to unnecessarily increase costs to the client'.[68]

4.76 In South Australia, the professional rules provide that in relation to contingency fees:

> A practitioner or firm of practitioners shall not charge fees which are unfair or unreasonable or enter into a costs agreement the terms of which are unfair or unreasonable.[69]

4.77 In considering whether the fees or the terms of a cost agreement are unfair or unreasonable there is a range of factors to which regard is had. These include: the nature of the matter; the amount at stake; jurisdiction; the client; and the experience and reputation of the lawyer.[70]

4.78 The overarching obligations of the *Civil Procedure Act 2010* (Vic) also include the obligation to ensure that costs are reasonable and proportionate.[71]

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65 Ibid, s 4.3.4(2).
66 Ibid, s 4.3.5.
67 *Draft Professional Conduct Rules 2010* (WA) r 15.4. As noted earlier, Western Australia is revising its professional conduct rules, for the existing rule see: *Legal Profession Rules 2009* (WA) r 5.8.
68 *Legal Profession (Solicitors) Rule 2007* (Qld) guidelines to r 2.1.
69 *Rules of Professional Conduct and Practice* (SA) r 42.2.
70 Ibid.
71 *Civil Procedure Act 2010* (Vic) s 24.

4.79 As discussed in Chapter 3, the often high cost of discovery is sometimes attributed to the array of junior solicitors, law clerks and paralegals who may work through a request for discovery of documents. Abuse of discovery through the use of non-legally qualified 'paralegals to perform tasks which progress the matter which are billed as if they involve the exercise of legal skill' is alleged.[72]

4.80 Submissions to the VLRC *Civil Justice Review*, including submissions by the Victorian Bar, suggested that there is a culture in the Australian legal system of leaving no stone unturned, and continually searching for the 'smoking gun'.[73] However, where such approaches result in gross or excessive overcharging, such conduct may constitute professional misconduct under legal profession legislation. Legislation across jurisdictions provides that professional misconduct includes 'charging of excessive legal costs in connection with the practice of law'.[74]

4.81 Courts also have jurisdiction to supervise legal costs charged by lawyers to their clients, as well as to supervise the ethical conduct of lawyers in this respect.[75]

4.82 The vexed question is deciding what is undue or excessive with respect to costs. The focus of this Inquiry is on proposing steps which may assist in preventing such questions arising.

Question 4–4 Is discovery used to increase legal costs unnecessarily, either for the profit of law firms, to exhaust the resources of opposing parties, or for any other reason? If so, how, to what extent, and for what reasons?

Other issues

Delegation and outsourcing

4.83 In consultations, stakeholders expressed their concern about the practice of delegating responsibility for reviewing and categorising documents relevant to the discovery process to junior lawyers and paralegals and having more senior lawyers check only a small sample of documents and potentially not providing adequate supervision.

4.84 A similar concern was also raised with respect to the increasing practice of outsourcing this type of discovery work overseas, utilising lower labour costs as a means of reducing the costs of working through discovery requests and retrieving electronic data.

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72 B Bartley, 'Fair Trade? Why We Need to Rethink Time Billing' (2010) 30(8) *Proctor* 12. See also *Council of the Queensland Law Society v Roche* [2004] Qd R 574, in which disciplinary action arose as a result of a solicitor's gross overcharging, including most notably for 24 minutes spent, and $156 charged, for discussing and wrapping a box of chocolates for a reporting doctor's secretary, although the case did not arise in a discovery-specific context.

73 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 435.

74 See, eg, *Legal Profession Act 2004* (NSW) s 498; *Legal Profession Act 2007* (Qld) s 420; *Legal Profession Act 2007* (Tas) s 422.

75 See, eg, *Judiciary Act 1903* (Cth) s 26; *High Court Rules 2004* (Cth) O 71, r 1; *Federal Court of Australia Act 1976* (Cth) s 43.

4.85 In consultations, it was suggested that a further issue arising from delegation and outsourcing is the extent to which such practices lead to duplication. Specifically such duplication may arise where a senior lawyer re-does the work completed by a more junior lawyer or paralegal, in part in order to ensure they comply with their legal ethical and professional obligations.

4.86 The ALRC is interested in hearing from stakeholders about the potential impact such practices may have on ensuring that lawyers comply with their legal ethical and professional obligations.

Question 4–5 How does delegation of responsibility for reviewing and categorising documents relevant to the discovery process affect the practice of discovery in litigation before federal courts?

Question 4–6 How does outsourcing discovery overseas affect the practice, including the cost and efficiency, of discovery in litigation before federal courts?

Preservation or destruction of documents

4.87 The case of *McCabe v British American Tobacco Australia Services Ltd*,[76] which was overturned on appeal in *British American Tobacco Australia Services Ltd v Cowell*[77] illustrates the tension in practice between appropriate and legitimate destruction of documents in accordance with a document management system, and the deliberate destruction of documents aimed at removing 'documents from the jurisdiction of the court'.[78] As Professor Peta Spender has commented,

> although a good document management policy may involve the destruction of documents, at some point the routine destruction of corporate documents rises to the level of spoliation of evidence. The trick is to determine at what point this convergence takes place.[79]

76 *McCabe v British American Tobacco Australia Service Ltd* [2002] VSC 73.

77 *British American Tobacco Australia Services Ltd v Cowell* (2002) 7 VR 524. The Victorian Court of Appeal found that 'there was no evidence to justify the finding that, in giving advice as requested [the lawyers involved] "devised a strategy" by which the defendant might destroy damaging documents while pretending to innocent intention': *British American Tobacco Australia Services Ltd v Cowell* (2002) 7 VR 524, [98].

78 A Lamb and J Littrich, *Lawyers in Australia* (2007), 260.

79 P Spender, 'McCabe: Unresolved Questions about Truth and Justice' (2004) 12 *Torts Law Journal* 1, 10.

4.88 In light of the tensions revealed by such litigation, articulations of this duty were introduced in two jurisdictions. In NSW, the *Legal Profession Regulations* provide that lawyers must not advise clients to destroy, or be a party to the destruction of documents that are of relevance to current or anticipated litigation, contravention of which amounts to professional misconduct. The regulations state:

> **177 Advice on and handling of documents**
>
> (1) An Australian legal practitioner must not give advice to a client to the effect that a document should be destroyed, or should be moved from the place at which it is kept or from the person who has possession or control of it, if the practitioner is aware that:
>
> (a) it is likely that legal proceedings will be commenced in relation to which the document may be required, and
>
> (b) following the advice will result in the document being unavailable or unusable for the purposes of those proceedings.
>
> (2) An Australian legal practitioner must not destroy a document or move it from the place at which it is kept or from the person who has possession or control of it, or aid or abet a person in the destruction of a document or in moving it from the place at which it is kept or from the person who has possession or control of it, if legal practitioner is aware that:
>
> (a) it is likely that legal proceedings will be commenced in relation to which the document may be required, and
>
> (b) the destruction or moving of the document will result in the document being unavailable or unusable for the purposes of those proceedings.[80]

4.89 Following *McCabe,* the wrongful destruction of documents was inserted as an offence into the *Crimes Act 1958* (Vic).[81]

4.90 In the United States (US), the duty to preserve documents of potential relevance to anticipated litigation—particularly in the context of electronically stored information—has led to the development of what is referred to as a 'legal hold'. Legal holds are implemented by interrupting a company's ordinary document management system—which, for example, might delete emails after 30 days—to ensure relevant material is preserved.[82] The expectation of US courts is that lawyers should be actively involved in the implementation of a legal hold, including taking 'affirmative steps' to ensure the hold is being correctly implemented.[83]

80 *Legal Profession Regulations 2005* (NSW) reg 177(1), (2).
81 *Crimes Act 1958* (Vic) pt I, div 5.
82 Legal holds have developed through the common law. For a key articulation see: The Sedona Conference, 'Commentary on Legal Holds: The Trigger & The Process' (2010) (11) *Sedona Conference Journal* 265, 277, 282–283, 286.
83 *Zubulake v UBS Warburg* 229 FRD 422 (SDNY, 2004).

Question 4–7 Are relevant and discoverable documents wrongfully destroyed in anticipation, or in the course, of litigation before federal courts? If so, how, by whom, and to what extent? If this occurs, are the current provisions in New South Wales and Victoria effectively addressing this problem?

4.91 Overall, it is possible to discuss the nature of discovery abuse in a general sense, and to examine some select examples of such abuse. However, the actual nature and extent of discovery abuse in Australia remains unclear. In the course of this Inquiry stakeholders have expressed differing views as to the extent of alleged abuse by lawyers in the context of discovery. In light of this, the ALRC welcomes further submissions on this issue—and particularly about the tension between legitimate document management and inappropriate destruction.

Question 4–8 Is the discovery process deliberately abused by lawyers working in litigation before federal courts? If so, how and to what extent?

Disciplinary structures and court imposed sanctions

4.92 Practitioner obligations arise largely from jurisdiction-specific legislation or professional rules. Consequently, misconduct and breaches of legal ethical obligations by lawyers are largely dealt with by law societies or committees and bodies such as the legal services commissions or boards and the ombudsman in each jurisdiction.

4.93 Significant reform, including to disciplinary structures, the ability of consumers of legal services to be involved in the complaints process, and the range of sanctions available, has occurred across jurisdictions in recent years.[84]

4.94 Following the implementation of the Model Laws, misconduct is primarily characterised as 'professional misconduct' or 'unsatisfactory professional conduct', other than in South Australia where the distinction is made between 'unsatisfactory conduct' and 'unprofessional conduct'.[85]

4.95 Professional misconduct at common law is conduct by a lawyer in their 'professional capacity which would be reasonably regarded as disgraceful or dishonourable by [the lawyer's] professional brethren of good repute and competency'.[86]

4.96 While professional misconduct is also defined under legal profession legislation, the statutory concepts are 'neither exhaustive nor intended to restrict the meaning and application of misconduct at common law'.[87] Under the legal profession legislation, professional misconduct includes:

84 Y Ross, *Ethics in Law: Lawyers' Responsibility and Accountability in Australia* (5th ed, 2010), 217.
85 *Legal Practitioners Act 1981* (SA) s 5(1).
86 *Allinson v General Council of Medical Education and Registration* [1984] 1 QB 750, 763.
87 G Dal Pont, *Lawyers' Professional Responsibility* (4th ed, 2010), 523.

> (a) unsatisfactory professional conduct of an Australian legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and
>
> (b) conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.[88]

4.97 Unsatisfactory professional conduct includes:

> Conduct of an Australian legal practitioner occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonable competent Australian legal practitioner.[89]

4.98 Traditionally, other forms of constraining the conduct of lawyers, for example liability under general law to clients for breach of the duty of competence, care and skill, have complemented, and in some instances acted as an alternative, to the regulatory framework provided by the courts and professional bodies.[90] However, consideration of those more general mechanisms for enforcing a lawyer's duty to the client are a matter for individual clients and the ALRC's focus in this part of the chapter is in on systemic mechanisms for responding to alleged breaches of legal ethical obligations.

The National Legal Services Board and National Legal Ombudsman

4.99 As part of the National Legal Profession Reform Project, the Australian Government has proposed a new national framework to regulate the profession.

4.100 The proposed regulatory framework consists of a National Legal Services Board (the Board) and a National Legal Ombudsman (the Ombudsman). These bodies would 'operate within a delegated model, with many of the functions of the national bodies to be performed in practice by local representatives'.[91] While many of the functions of Board and Ombudsman would be delegable, the bodies would be responsible for monitoring of the functions and where necessary could assume control over special functions.[92]

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88 Standing Committee of Attorneys-General, *Legal Profession Model Laws* (2nd ed, 2006) s 4.2.2.

89 Ibid, s 4.2.1.

90 See, C Parker, 'Regulation of the Ethics of Australian Legal Practice: Autonomy and Responsiveness' (2002) 25 *University of New South Wales Law Journal* 676.

91 National Legal Profession Reform Taskforce, *Consultation Report* (2010), Executive Summary, 2.

92 National Legal Profession Reform Project, *Legal Profession National Law: Consultation Draft* (2010) ss 1.3.6(1), 1.3.7. See also National Legal Profession Reform Taskforce, *Consultation Report* (2010), 8 for a discussion of circumstances in which the Ombudsman would take over special functions—for example, where the relevant case may set a precedent.

4.101 The Board would be responsible for making National Rules to give effect to the National Law, except with respect to rules governing legal practice, conduct and continuing professional development.[93] These rules would be developed by the Law Council and ABA, subject to approval by the Board.[94]

4.102 The Ombudsman would be established as an independent body responsible for determining complaints about practitioners, ensuring compliance with the National Law and National Rules and serving an educative function.[95]

4.103 The Ombudsman's compliance role would encompass prosecution of practitioner misconduct[96] and powers to undertake complaint, audit and compliance investigations[97] and a role in administering the penalties regime envisaged under the National Law. Failure to comply with the National Law or National Rules would be capable of constituting unprofessional conduct or professional misconduct.[98]

4.104 In cases of unprofessional conduct or professional misconduct the Ombudsman may impose the following possible sanctions:

- caution or reprimand a practitioner;
- require an apology from the practitioner;
- order the practitioner to attend training;
- impose conditions on a practising certificate;
- order the work to be redone; or
- fine the practitioner (up to $25,000).[99]

4.105 The Ombudsman may also initiate proceedings in the designated disciplinary tribunal of the relevant jurisdiction. The designated tribunal's powers include: the power to make orders requiring the practitioner to do or refrain from doing something in connection with the practice of law; the ability to recommend that the practitioner be removed from the roll; and the power to have the practitioner's practising certificate cancelled.[100]

State and territory disciplinary structures

4.106 Legal professional disciplinary structures and processes vary across jurisdictions and the ALRC welcomes moves towards harmonisation as part of the National Legal Profession Reform Project.

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93 National Legal Profession Reform Project, *Legal Profession National Law: Consultation Draft* (2010) s 9.1.1.
94 Ibid, s 9.1.3.
95 Ibid, ss 8.3.5, 8.3.3.
96 National Legal Profession Reform Taskforce, *Consultation Report* (2010), 7.
97 National Legal Profession Reform Project, *Legal Profession National Law: Consultation Draft* (2010), ch 7.
98 Ibid, s 5.4.4.
99 Ibid, s 5.4.5.
100 Ibid, s 5.4.9.

4.107 Currently, complaints about the conduct of practitioners can be made by a number of parties and are lodged with a central legal services commission, a practitioner's complaints committee or conduct board, or the relevant law society.[101]

4.108 Generally, it is then open to the relevant body to dismiss, investigate or initiate disciplinary proceedings in relation to the complaint.[102] Complaints in some jurisdictions may be referred to mediation. In some instances the complaint is referred directly to the relevant disciplinary tribunal in that jurisdiction.

4.109 Following a finding that a practitioner's conduct constitutes unsatisfactory professional conduct or professional misconduct, a range of sanctions may be imposed, which range in severity from a caution to being struck off the roll of practitioners. Available sanctions include:

- removing the practitioner's name from the local or interstate roll;[103]
- suspending, cancelling, or imposing conditions upon the practitioner's practising certificate;[104]
- cautioning or reprimanding the practitioner;[105]
- fining the practitioner, with the maximum allowable fine ranging from $10,000–$100,000;[106]

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101 *Legal Profession Act 2004* (NSW) ss 505; *Legal Profession Act 2007* (Qld) s 429; *Legal Practitioners Act 1981* (SA) s 76; *Legal Profession Act 2007* (Tas) ss 57, 58; *Legal Profession Act 2004* (Vic) s 4.4.8; *Legal Profession Act 2008* (WA) ss 410(2), 555; *Legal Profession Act 2006* (ACT) s 394(2); *Legal Profession Act 2006* (NT) s 472(1).

102 *Legal Profession Act 2004* (NSW) ss 513, 525, 526; *Legal Profession Act 2007* (Qld) s 429; *Legal Practitioners Act 1981* (SA) ss 77, 82; *Legal Profession Act 2007* (Tas) ss 58, 60, 65A, 65B, 65C; *Legal Profession Act 2004* (Vic) s 4.4.13; *Legal Profession Act 2008* (WA) ss 421(3)(a), 415(1)(a)–(c); s 415(2)(b). See also: *Legal Profession Act 2008* (WA) ss 415(1)(d), 415(2)(a), 415(2)(c), 416(7), 417(1), 418; *Legal Profession Act 2006* (ACT) ss 399(1)(a)–(g), 399(2), 401, 402, 406(1), 410(1)(a); 412; *Legal Profession Act 2006* (NT) ss 477, 478(1)(a)–(h), 496(1)(a).

103 *Legal Profession Act 2004* (NSW) ss 565(3), 588(2); *Legal Profession Act 2007* (Qld) ss 461(3), 484(2); *Legal Practitioners Act 1981* (SA) ss 89(2)(d), 90AF(6); *Legal Profession Act 2007* (Tas) ss 480(3), 508(2); *Legal Profession Act 2004* (Vic) s 4.4.37(2); *Legal Profession Act 2008* (WA) ss 444(2)(b), 463(2); *Legal Profession Act 2006* (ACT) ss 431(3)(b), 460(2); *Legal Profession Act 2006* (NT) ss 528(3), 552(2).

104 *Legal Profession Act 2004* (NSW) ss 540(2)(d), 562(2)(b)–(d), 562(3)(b)–(d), 562(4)(j); *Legal Profession Act 2007* (Qld) ss 456(2)(b)–(d), 456(3)(b)–(d), 456(4)(j); *Legal Practitioners Act 1981* (SA) ss 77AB(1)(d), 82(6)(a)(iii)–(iv), 89(2)(b)–(c), 89A(c)–(d); *Legal Profession Act 2007* (Tas) ss 471(b)–(d), 472(b)–(d), 473(n); *Legal Profession Act 2004* (Vic) ss 4.4.17(b)–(d), 4.4.18(b)–(d), 4.4.19(j); *Legal Profession Act 2008* (WA) ss 439(a)–(c), 440(b)–(d), 441(m); *Legal Profession Act 2006* (ACT) ss 425(3)(b)–(d), 425(4)(b)–(d), 425(5)(i); *Legal Profession Act 2006* (NT) ss 525(3)(b)–(d), 525(4)(b)–(d), 525(5)(i).

105 *Legal Profession Act 2004* (NSW) ss 540(2)(a)–(b), 545(1)(f), 562(2)(e); *Legal Profession Act 2007* (Qld) ss 456(2)(e), 458(2)(a); *Legal Practitioners Act 1981* (SA) ss 77AB(1)(c), 82(6)(a)(i), 89(2)(a); *Legal Profession Act 2007* (Tas) ss 454(2)(a), 456(7)(a), 471(e), 476; *Legal Profession Act 2004* (Vic) s 4.4.19(k); *Legal Profession Act 2008* (WA) ss 426(2)(a), 439(d); *Legal Profession Act 2006* (ACT) ss 413(2)(a)–(b), 425(3)(e), 429(c); *Legal Profession Act 2006* (NT) ss 499(2)(a), 525(3)(e).

106 *Legal Profession Act 2004* (NSW) ss 562(4)(a), 562(7); *Legal Profession Act 2007* (Qld) ss 456(4)(a), 458(2)(b); *Legal Practitioners Act 1981* (SA) ss 82(6)(a)(ii), 82(6)(b)–(c); *Legal Profession Act 2007* (Tas) ss 454(2)(b), 473(a); *Legal Profession Act 2004* (Vic) s 4.4.19(b); *Legal Profession Act 2008* (WA) ss 426(2)(b), 441(a); *Legal Profession Act 2006* (ACT) ss 413(2)(e), 413(3), 425(5)(a), 427; *Legal Profession Act 2006* (NT) ss 499(2)(b), 499(3), 525(5)(a).

- requiring the practitioner to comply with a compensation, costs, or other payment order;[107]
- requiring the practitioner to apologise;[108]
- requiring the practitioner to seek advice or complete a course in legal education;[109]
- requiring the practitioner to seek counselling or medical treatment;[110] and
- imposing conditions or limitations on the practitioner or the practitioner's legal practice, such as periodic inspections or working under supervision.[111]

4.110 In addition to these listed sanctions, there is also a certain degree of flexibility—in most jurisdictions at least one disciplinary body can impose any order that it considers appropriate.[112]

4.111 The Supreme Court in each jurisdiction has inherent jurisdiction over all practising lawyers and hears appeals from the relevant disciplinary tribunals.

Court-imposed sanctions

4.112 A lawyer's primary duty to the court is supervised and enforced by the court, which 'retains an inherent supervisory jurisdiction over its officers, directed at preserving the proper administration of justice'.[113] In addition to this inherent jurisdiction of the court, jurisdiction is also conferred under statute by way of judicial appeal from disciplinary tribunals.

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107 *Legal Profession Act 2004* (NSW) ss 540(2)(c), 545(1)(g), 562(5), 566(1), 573(1)–(3); *Legal Profession Act 2007* (Qld) ss 456(4)(b), 456(6), 458(2)(c), 458(3), 462(1); *Legal Practitioners Act 1981* (SA) ss 77AB(1)(e), 85(1); *Legal Profession Act 2007* (Tas) ss 454(2)(d)–(e), 454(2)(g), 454(2)(m), 456(7)(d), 473(b), 473(d)–(e), 474, 481(1), 493(1); *Legal Profession Act 2004* (Vic) ss 4.3.17(1)(a)–(e); *Legal Profession Act 2008* (WA) ss 426(2)(c), 429(1), 441(c)–(e), 444(3); *Legal Profession Act 2006* (ACT) ss 413(2)(c), 429(b), 433(1), 444(1); *Legal Profession Act 2006* (NT) ss 525(6), 529(1), 536(1)–(2).

108 *Legal Profession Act 2007* (Qld) s 456(7)(b).

109 *Legal Profession Act 2004* (NSW) s 562(4)(b); *Legal Profession Act 2007* (Qld) ss 456(4)(c), 456(4)(i), 458(2)(g); *Legal Practitioners Act 1981* (SA) ss 79AB(1)(d)(ii), (6)(a)(iii)(B), 89(2)(b)(ii); *Legal Profession Act 2007* (Tas) ss 454(2)(h), 454(2)(j), 456(7)(e), 473(f), 473(l); *Legal Profession Act 2004* (Vic) s 4.4.19(c), 4.4.19(i); *Legal Profession Act 2008* (WA) ss 426(2)(d), 441(b), 441(l); *Legal Profession Act 2006* (ACT) ss 413(2)(d)(iii)–(iv), 425(5)(b), 425(5)(h); *Legal Profession Act 2006* (NT) ss 525(5)(b), 525(5)(h).

110 *Legal Profession Act 2004* (NSW) s 562(4)(h); *Legal Practitioners Act 1981* (SA) ss 77AB(1)(d)(ii), 82(6)(a)(iii)(B), 89(2)(b)(ii); *Legal Profession Act 2007* (Tas) ss 454(2)(h), 455(7)(e), 473(k); *Legal Profession Act 2008* (WA) s 441(j).

111 *Legal Profession Act 2004* (NSW) ss 562(4)(c)–(g), 562(4)(i); *Legal Profession Act 2007* (Qld) ss 456(2)(f), 456(4)(d)–(h), 458(2)(d)–(f); *Legal Practitioners Act 1981* (SA) ss 77AB(d)(i), 77AB(e), 82(6)(a)(ib), 82(6)(a)(iii)(A), 89(2)(b)(i); *Legal Profession Act 2007* (Tas) ss 454(2)(f), 454(2)(i), 454(2)(k)–(l), 456(7)(c),473(c), 473(g)–(j), 473(m), 473(o)–(r); *Legal Profession Act 2004* (Vic) ss 4.4.17(d)–(h), 4.4.19(l)–(m); *Legal Profession Act 2008* (WA) ss 441(f)–(i), 441(k); *Legal Profession Act 2006* (ACT) ss 413(2)(d)(i)–(ii), 425(5)(c)–(g), 429(a); *Legal Profession Act 2006* (NT) ss 525(5)(c)–(g), 525(7).

112 *Legal Practitioners Act 1981* (SA) s 89(e); *Legal Profession Act 2007* (Tas) ss 470(1), 485(2)(f), 487; *Legal Profession Act 2004* (Vic) ss 4.3.17(f), 4.4.19(n); *Legal Profession Act 2006* (ACT) s 425(1)(b); *Legal Profession Act 2006* (NT) ss 514, 525(2).

113 G Dal Pont, *Lawyers' Professional Responsibility* (4th ed, 2010), 370.

4.113 Courts possess a range of discretionary powers to discipline parties and lawyers for breach of both procedural rules and legal ethical obligations. This includes costs orders, which can be made personally against a lawyer under a range of legislation including the legal profession and civil procedure acts and various court rules.[114] Relevantly, such power may be exercised where lawyers act in a manner contrary to their legal ethical obligations, for example, by unduly delaying litigation or failing to obey court directions or orders.[115]

4.114 By way of example, under the *Civil Procedure Act 2010* (Vic), a broad range of sanctions are available to enforce the overarching obligations.[116] Contraventions can be taken into account in a court exercising any of its powers, including its discretion as to costs.[117] The court can also make compensatory orders[118] and any order it considers to be in the interests of a person prejudicially affected by the contravention.[119] Sanctions can be imposed on the court's own motion or on application by a person with sufficient interest in the proceedings.[120]

Legal ethical obligations, misconduct and discovery: issues arising

4.115 A range of factors, illustrated by the key forms of discovery abuse and misconduct outlined above, currently have an impact upon the occurrence and prevalence of such abuse and enforcement of relevant legal ethical obligations. As discussed below, these include the adversarial nature of the civil justice system, and more specifically:

- lack of knowledge about, and the broad nature and articulation of, legal ethical obligations;
- narrow application of legal ethical obligations; and
- limited enforcement of such obligations.

4.116 In many respects, the ALRC's proposals in other chapters of this Consultation Paper, encouraging a more active case management approach to discovery, will assist in countering potential discovery abuse generally.[121]

4.117 In addition, however, the ALRC considers that the proposals made below concerning: the need for greater awareness of legal ethical obligations; clearer articulation and explanation of obligations with respect to discovery; and wider

114 See, eg, *Federal Court Rules* (Cth) O 62, r 36(1); *Federal Magistrates Court Rules 2001* (Cth) r 21.07(1); *Civil Procedure Act 2005* (NSW) s 99.
115 Chapter 3 considered the use of costs powers to maintain proportionality in a discovery process, including the power to order payment of discovery costs in advance and the power to limit legal fees for discovery as well as the courts power to make costs orders.
116 *Civil Procedure Act 2010* (Vic) pt 2.4.
117 Ibid s 28.
118 Ibid s 29(1)(c).
119 Ibid s 29(1)(f).
120 Ibid s 29(2).
121 See, eg, Proposals 3–1, 3–2, 3–3.

application of the obligations and greater enforcement, will address the key legal ethical concerns expressed in relation to the discovery process.

Lack of awareness and the broad nature of legal ethical obligations

4.118 Lawyers operate within a duty matrix. However, the ALRC has heard that in some cases lawyers are not aware of their legal ethical obligations, other than in a general sense; or, more specifically, that lawyers may face difficulties in applying broad legal ethical obligations and concepts to specific circumstances arising in practice.

4.119 This difficulty appears to arise in part as a result of limited legal education about the practical application of ethics to practices such as discovery; the overly broad nature of the obligations; and lack of uniformity in the obligations across jurisdictions.

4.120 The impact of this lack of awareness is illustrated through the examples of alleged discovery abuse and misconduct outlined earlier in the chapter which demonstrate the difficulties which may arise in applying broad legal ethical in the context of discovery practice.

4.121 Professional conduct rules, as the primary site of articulated legal ethical obligations, fulfil a number of important roles within the Australian civil justice system. In particular they provide

> a base for education, practical guidance to practitioners, and an agreed standard of behaviour to which disciplinary bodies can refer. For professional practice rules to be useful, the rules should represent attainable aims and be useful in dealing with the continuing ethical dilemmas of professional life, command respect and be enforceable.[122]

4.122 However, legal ethical obligations contained in professional rules in Australia, which are likely to arise in the context of discovery, may be overly broad and lack clarity. In particular, there are no obligations of specific application to the discovery process, but rather they have general application to the full range of activities undertaken by lawyers in their professional capacity.

4.123 The general obligations include: facilitating the administration of justice; not abusing court processes; narrowing the issues in dispute; properly advising clients; completing work as soon as possible; not misleading the court; and not destroying documents.

4.124 However, in many instances the rules do not contain a positive or specific duty, and lawyers are required to apply broad concepts to specific scenarios which arise in everyday practice. This may contribute to lawyers' uncertainty about their obligations because, aside from those cases involving blatant professional misconduct, it is often difficult to establish where lawyers' behaviour amounts to discovery abuse in a broad sense or, more specifically, where misconduct is sufficient to attract sanctions or disciplinary action.

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122 Australian Law Reform Commission, *Review of the Federal Civil Justice System*, Discussion Paper 62 (1999), [5.2].

4.125 For example, to the extent that the Model Rules provide that by choosing to confine a matter to the issues in dispute a lawyer will not have breached their duty to the client, the Rules have been criticised for not imposing a positive duty. This may be particularly relevant to the practice of trolley load litigation.[123]

4.126 Similarly, with respect to delay, the Model Rules provide that a lawyer will not have breached their obligation to the client where they exercise forensic judgment so as to present the client's case as quickly and simply as is consistent with its robust advancement.[124] However, this rule has been criticised on the basis that it does not impose a positive obligation on a lawyer to conduct a matter quickly and simply but merely *allows* a lawyer to do so, operating in a 'passive, defensive role (primarily for the benefit of the advocate) rather than in active support of the court's function'.[125]

Options for reform

4.127 There has been much debate surrounding the form that professional conduct rules should take and whether such rules should be positive or aspirational and the appropriate level of detail.

4.128 In this instance there appear to be two possible approaches to ensuring that legal ethical obligations articulated in professional rules are sufficiently specific and clear so that lawyers are aware of their obligations concerning discovery.

4.129 The first approach is to articulate specific legal ethical obligations that apply in the context of the discovery. Such an approach would draw together existing broad legal ethical obligations and make them more relevant to the discovery process, and impose new obligations such as disclosure of the existence of all documents considered relevant to the proceedings at the earliest practicable time.[126]

4.130 The other approach is through the adoption of a principle–rule–commentary approach to professional conduct rules.[127] In ALRC Report 89 the ALRC recommended that the Law Council convene a working group to coordinate the drafting of commentary to legal practice standards, to be issued as part of, or as a supplement to, national model professional conduct rules.[128] As the ALRC has noted, such an approach to professional rules

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123 See, eg, C Parker and A Evans, *Inside Lawyers' Ethics* (2007), 89.

124 Law Council of Australia, *Model Rules of Professional Conduct and Practice* (2002) r 13.2.2. See also: Law Council of Australia, *Legal Profession National Rules: Solicitors' Rules* (2010) r 17.2.2; Australian Bar Association, *Legal Profession National Rules: Barristers' Rules* (2010) r 42(b); *Professional Conduct and Practice Rules 1995* (NSW) r 23-A.15A(e); *New South Wales Barristers' Rules* r 19(b); *Legal Profession (Solicitors) Rule 2007* (Qld) r 13.2.2; *Barristers Rule 2007* (Qld) r 21(b); *Rules of Professional Conduct and Practice* (SA) r 13.2.2; *Barristers' Conduct Rules 2010* (SA) r 42(b); *Professional Conduct and Practice Rules 2005* (Vic) r 13.2.2; *Victorian Bar Practice Rules* (Vic) r 17(b); *Conduct Rules* (WA) r 18(b); *Legal Profession (Solicitors) Rules* (ACT) r 17.2(b); *Legal Profession (Barristers) Rules 2008* (ACT) r 19(b); *Rules of Professional Conduct and Practice* (NT) r 17.4(b).

125 C Parker and A Evans, *Inside Lawyers' Ethics* (2007), 89.

126 This was one of the overarching obligations recommended by the VLRC and enacted in the *Civil Procedure Act 2010* (Vic).

127 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), Rec 14.

128 Ibid, Rec 14. To date, only the *Legal Profession (Solicitors) Rule 2007* (Qld) features commentary.

> combines appropriate features of these varied publications in one document, provides a more accessible and authoritative guide to professional conduct and improves the relevance of professional practice rules to the daily work of practitioners.[129]

4.131 The inclusion of commentary as part of, or as a supplement to, professional rules would provide guidance for the practical interpretation of the obligations in the context of discovery.

ALRC's views

4.132 The ALRC has heard that in some cases lawyers are not aware of their legal ethical obligations other than in a general sense, or that they face difficulties in applying broad legal ethical obligations to specific circumstances arising in practice. The ALRC is interested in stakeholder views on this matter.

4.133 If lawyers are not fully aware of their legal ethical obligations—either generally or as they apply in the context of discovery—then the ALRC welcomes stakeholder feedback on the best way of ensuring that lawyers and litigants are properly informed about their professional and legal responsibilities in relation to the discovery of documents.

4.134 The ALRC currently considers that the best way to raise awareness of the existence and practical application of legal ethical obligations is through legal education at a university level, and on a continuing basis. The ALRC has made a number of proposals with respect to this in the final part of this chapter.[130]

4.135 In addition, the ALRC considers that the current regulation of the legal profession on a state and territory basis is likely to contribute to any uncertainty about legal ethical obligations with respect to discovery. In light of the National Legal Profession Reform Project, consideration should be given to ensuring that lawyers and litigants are properly informed about their legal ethical obligations under any new uniform regulatory regime.

4.136 Legislation and professional rules in some instances contain overly broad or unclear statements of legal ethical obligations. In order to address discovery abuse there is a need for more clearly articulated obligations. In particular, standards of conduct expected in the context of the discovery process should be outlined more explicitly. The ALRC is interested in hearing more from stakeholders about whether existing general legal ethical obligations in professional rules are sufficiently specific and clear so that lawyers are aware of their obligations concerning discovery, and if they are not, about the best way to reform this.

General options for reform

4.137 The ALRC has considered two possible approaches to ensuring that legal ethical obligations in professional rules are sufficiently specific and clear so that lawyers are aware of their obligations concerning discovery.

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129 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), [3.78].

130 See, eg, Proposal 4–4, 4–5.

4.138 The principle–rule–commentary approach appears preferable. The inclusion of commentary as part of, or as a supplement to, professional rules would provide guidance for the practical interpretation of the obligations in the context of discovery, as is the case under the *Legal Profession (Solicitors) Rule 2007* (Qld).

4.139 While acknowledging the merits of articulating specific obligations concerning discovery, the ALRC considers that almost all general legal ethical obligations have relevance to the discovery process and that a clear explanation of their application to discovery would be sufficient to ensure lawyers are aware of their obligations.

4.140 In addition, the ALRC considers that the creation of obligations which only apply in the context of discovery may detract from the force of general legal ethical obligations on lawyers' conduct outside this process. The links between such commentary and the role and form of legal education are discussed in the final part of this chapter.

Question 4–9 Are lawyers and litigants properly informed about their professional and legal responsibilities in relation to discovery? If not, what are the best ways of ensuring that lawyers and litigants are properly informed about their professional and legal responsibilities in relation to discovery?

Question 4–10 Are existing general legal ethical obligations in professional rules sufficiently specific and clear so that lawyers are aware of their obligations concerning discovery?

Question 4–11 Should professional conduct rules be amended to include specific legal ethical obligations concerning discovery?

Proposal 4–1 The Law Council of Australia, the Australian Bar Association and legal professional bodies in each state and territory should develop commentary as part of, or as a supplement to, the professional conduct rules with a particular focus on a lawyer's legal ethical obligations with respect to the discovery of documents.

Costs specific reforms

4.141 One area in which lack of awareness, clarity and specificity of legal ethical obligations is particularly evident is with respect to costs. While the ALRC is not aware of any widespread overcharging for discovery costs, discovery has the potential to serve as a 'profit centre' for law firms.

4.142 The preceding chapters have considered ways in which to limit the use and scope of discovery, and thereby the associated costs. Similarly, the means by which the ALRC proposes to address abuse of discovery procedures, including trolley load litigation and delay, both of which increase the costs of discovery, will also address costs concerns.

4.143 In attempting to reduce the costs of discovery, the VLRC in its *Civil Justice Review*, recommended that courts be given the power to limit the costs incurred in connection with discovery to those which represent the actual cost of carrying out necessary work.[131] However, as discussed in Chapter 3, in the ALRC's preliminary view, the amount charged to clients for discovery should generally a matter for cost assessment or review under existing legal profession legislation.

4.144 While arguably it is implicit in the context of the legal profession rules with respect to costs that lawyers should do so,[132] the ALRC has formed the preliminary view that all legal profession legislation or professional rules should include an obligation to charge no more than fair and reasonable legal costs.

4.145 The Draft National Law provides an instructive model and would require that a law practice only charge costs which are reasonable having regard to a number of factors. In particular, under the Draft National Law costs are fair and reasonable if they:

- are reasonably incurred and are reasonable in amount; and
- are proportionate in amount to the importance and complexity of the issues involved in a matter, the amount or value involved in a matter, and whether the matter involved a matter of public interest; and
- reasonably reflect the level of skill, experience, specialisation and seniority of the lawyers concerned; and
- conform to any applicable requirements of legal profession legislation, professional conduct rules and fixed costs legislative provisions.[133]

4.146 The ALRC also considers it important that overcharging is capable of constituting unsatisfactory professional conduct or professional misconduct—in line with recommendations made in ALRC Report 89 and subsequently incorporated into professional rules.[134]

Proposal 4–2 The Australian Government, state and territory governments, the Law Council of Australia, the Australian Bar Association and legal professional bodies in each state and territory should ensure legal profession legislation and/or professional conduct rules provide that a law practice can only charge costs for discovery which are fair and reasonable.

Question 4–12 How should lawyers determine what are fair and reasonable costs in the context of discovery?

131 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), Rec 90.

132 For example, this was the Law Council's argument in its submission to Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000).

133 National Legal Profession Reform Project, *Legal Profession National Law: Consultation Draft* (2010) s 4.3.4(2).

134 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), Rec 27.

Narrow application of legal ethical obligations

4.147 A central issue that affects the operation of the discovery process and the abuse of the process, highlighted by the VLRC in the *Civil Justice Review*, is the limited application of legal ethical obligations on participants in the civil justice system other than lawyers.[135]

4.148 This issue arises in the context of legal ethical obligations and discovery given the control exerted by participants other than lawyers on the discovery process, and the role played by legal culture in shaping the behaviour of individual lawyers.

Expansion of legal ethical obligations

4.149 Throughout the discovery process, control is exercised by a range of participants other than lawyers—by clients, but also by insurers, litigation funders and other third parties, for example electronic discovery service providers—over decisions affecting the discovery process itself, and influencing the operation of the civil justice system more broadly.

4.150 In a submission to the VLRC's *Civil Justice Review*, IMF Australia, a litigation funder, acknowledged that such parties 'have a greater capacity than most to systemically assist or retard' court processes.[136]

4.151 However, current legislation and professional rules impose obligations on the conduct of lawyers, or in the case of recently introduced overarching purpose clauses in some legislation, on the courts, rather than other parties.

4.152 For example, the *Federal Court of Australia Act* imposes an obligation on litigants to act consistently with the overarching purpose of civil practice and procedure. However, this is only a secondary responsibility, in the sense that the court has primary responsibility and the parties are only under an obligation to assist the court. It does not impose any obligation directly on a party to take proactive steps.

Options for reform

4.153 There are two models of relevance in discussing the potential expansion of legal ethical obligations beyond lawyers.

4.154 The first is the model recommended by the VLRC in its *Civil Justice Review* and subsequently enacted in the *Civil Procedure Act 2010* (Vic), which contains provisions directly defining overriding obligations and duties imposed on all key participants in civil proceedings before Victorian courts. The overarching obligations apply to parties, lawyers, law practices, and 'any person who provides financial assistance or other assistance' to a party where that person exercises either direct or indirect control over the conduct of the civil proceeding or of a party, including but not limited to insurers

135 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 149, 153–155.

136 IMF Australia, *Submission by IMF to Victorian Law Reform Commission Civil Justice Review* (2007) <www.imf.com.au/> at 24 October 2010.

and litigation funders.[137] The court can make a range of orders where a participant contravenes the overriding obligations.[138]

4.155 The second model is that imposed by the model litigant obligations, which are contained in the *Legal Services Directions*. Under the *Legal Services Directions*, the Commonwealth and its agencies—and by extension, lawyers working for the Australian Government—are required to behave as model litigants in the conduct of litigation. Relevantly the obligation includes, for example, endeavouring to avoid, prevent and limit the scope of legal proceedings and keeping costs to a minimum.[139]

> In essence, being a model litigant requires that the Commonwealth and its agencies, as parties to litigation, act with complete propriety, fairly and in accordance with the highest professional standards.[140]

4.156 Indeed, the obligations contained in the *Legal Services Directions* go 'beyond the requirement for lawyers to act in accordance with their ethical obligations' under the legal profession acts and professional rules.[141]

ALRC's views

4.157 The control that all participants in civil litigation exercise together over the conduct of proceedings is significant. As a result, in order to avoid discovery abuse there is a need to impose legal ethical obligations on all key participants in civil proceedings.

4.158 To the extent that the *Civil Procedure Act 2010* (Vic) imposes obligations on all key participants in civil proceedings, the ALRC favours that approach. At a federal level, in order to impose obligations on parties other than lawyers it would be necessary to amend a range of federal legislation concerning civil procedure and the courts. While proposing such a review is beyond the scope of this Inquiry,[142] the ALRC suggests that any such review by the Government should consider the extension of legal ethical obligations beyond lawyers to other legal players, such as clients, insurers, litigation funders and electronic discovery (e-discovery) service providers.

Cultural change

4.159 Like many professionals, lawyers are influenced by the culture in which they work—by how their colleagues make decisions and what they believe their supervisors and clients expect of them. The Queensland Legal Services Commissioner, John Britton, has commented on the role of law firm culture and the 'reality that individual

137 *Civil Procedure Act 2010* (Vic) s 10(1).
138 Ibid ss 28, 29.
139 *Legal Services Directions 2005* (Cth) Appendix B, ss 2(d), 2(e).
140 Ibid, Appendix B, Note 2.
141 Ibid, Appendix B, Note 3.
142 Note the ALRC undertook a review of the civil justice system in 2000: Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000).

lawyers conduct themselves in ways that are a function in part at least of the workplace cultures of the law firms within which they work'.[143]

4.160 Similarly, in addressing the weaknesses of the current regulatory regime, Associate Professor Christine Parker and others have been vocal in recognising the difficulties associated with identifying individuals within firm structures who are responsible for misconduct, particularly where behaviour that runs contrary to legal ethical obligations may be an entrenched part of workplace culture.[144]

4.161 Further, as outlined above with respect to issues arising from delegation, the ALRC has heard some concerns arising from instances in which paralegals and junior lawyers exercise judgment with respect to discovery under minimal supervision by senior lawyers where they may not have sufficient experience to balance competing issues and interests.

4.162 The growth of commercial alliances between firms and corporations and the public listing of law firms has also increased the importance of ensuring that regulatory structures are responsive to the role played by firms and third parties in shaping the behaviour of individual lawyers, particularly where such structures may create tension between lawyers' legal ethical obligations and those owed, for example, to a company's shareholders.

4.163 Parker and her colleagues have argued that, although the values of individual lawyers influence their behaviour, 'law firms and work teams structure and frame individual lawyer's ethical decisions and behaviours' and they do this in three main ways:

(a) limiting individual lawyers' capacity to 'see' ethical issues;

(b) constraining or creating options and opportunities for individual lawyers to make ethical judgments and act on them; and

(c) creating internal incentives, or magnifying external ones, that pressure individual lawyers to choose certain ethical behaviours.[145]

4.164 Parker and her colleagues argue for 'organisational level bulwarks to counteract organisational level pressures for unethical conduct'. This is broadly described as an 'ethical infrastructure':

> A law firm ethical infrastructure means formal and informal management policies, procedures and controls, work team cultures, and habits of interaction and practice

143 J Britton, 'Rethinking the Regulation of Lawyer Conduct: The Centrality of Law Firm Management and Ethical Infrastructures' (Paper presented at Australian Legal Practice Management Association National Conference, Gold Coast, 15 August 2009), 7. See also: C Parker and others, 'The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour' (2008) 31(1) *University of New South Wales Law Journal* 158; C Parker and L Aitken, 'The Queensland Workplace Culture Check: Learning from Reflection on Ethics Inside Law Firms' (2010) *forthcoming in Georgetown Journal of Legal Ethics, 2011* .

144 See, eg, S Le Mire and C Parker, 'Keeping it In-house: Ethics in the Relationship between Large Law Firm Lawyers and their Corporate Clients through the Eyes of In-house Counsel' (2008) 11 *Legal Ethics* 201.

145 C Parker and others, 'The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour' (2008) 31(1) *University of New South Wales Law Journal* 158, 163.

> that support and encourage ethical behaviour. It might include the appointment of an ethics partner and/or ethics committee; written policies on ethical conduct in general, and in specific areas such as conflicts of interest, billing, trust accounting, opinion letters, litigation tactics and so on; specified procedures for ensuring ethical policies are not breached and to encourage the raising of ethical problems with colleagues and management; the monitoring of lawyer compliance with policies and procedures; and, ethics education, training and discussion within the firm.[146]

4.165 Others have proposed that firms could engage in various forms of 'ethical auditing':

> Departments and work-groups could be asked to formulate plans that would articulate standards or practice and propose mechanisms for ensuring compliance. On a rotating basis, departments, workgroups, and individual lawyers could be evaluated in terms of their performance with respect to these standards ...
>
> It is time to begin to charge lawyers with responsibility for designing systems that regularly and actively analyse professional judgments.[147]

4.166 Legal Services Commissions in both NSW and Queensland have developed voluntary questionnaires to encourage consideration of ethical issues by lawyers and law firms.[148] It has been suggested, in consultations, that the development of a questionnaire around legal ethical obligations arising in the context of discovery may be useful in promoting discussion and agreement about ethical discovery practice within law firms.

ALRC's views

4.167 The ALRC considers that law firms could assist in improving discovery process and minimising discovery abuse by training their own lawyers, setting strict ethical and practice standards, closely monitoring compliance with those standards, and insisting that discovery is pursued honestly, ethically, and in accordance with the letter and spirit of the rules. Law firms might, in this way, foster a culture of responsible litigation and ethical discovery practice. Such a culture should affect how litigation is conducted and focus on real decisions rather than mere 'symbolic or formalistic ethics management initiatives that do not make any difference to everyday actions and behaviours'.[149]

4.168 Further, to significantly improve the efficiency and ethical practice of discovery, a shift in culture in the wider legal community is necessary. While such a culture shift might be fostered by stricter discovery laws and a more rigorous enforcement of those laws, the ALRC welcomes stakeholder comment on the best ways to ensure legal ethical obligations are observed by both individual lawyers and by other legal participants such as large firms.

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146 Ibid, 172 (citations omitted).

147 R Nelson, 'The Discovery Process as a Circle of Blame: Institutional, Professional, and Socio-economic Factors that Contribute to Unreasonable, Inefficient, and Amoral Behavior in Corporate Litigation' (1999) 67 *Fordham Law Review* 773, 806–7.

148 See, eg, C Parker and L Aitken, 'The Queensland Workplace Culture Check: Learning from Reflection on Ethics Inside Law Firms' (2010) *forthcoming in Georgetown Journal of Legal Ethics, 2011* .

149 C Parker and others, 'The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour' (2008) 31(1) *University of New South Wales Law Journal* 158, 182.

Question 4–13 How might law firms foster a culture of reasonable and ethical discovery practice?

Difficulties in enforcement and responding to misconduct

4.169 Despite reforms to the disciplinary and court-based structures for enforcement of legal ethical obligations, 'there are still few cases of disciplinary action being taken against lawyers for breach of their duty to the court or the law'.[150] Parker and Associate Professor Adrian Evans have commented that 'it is hard to believe that there really are so few cases in each of these categories where disciplinary action might be warranted'.[151]

4.170 It appears that this is due to a number of factors related to identification and reporting of misconduct and the general nature of the disciplinary model, rather than specific legal professional disciplinary structures.

4.171 In particular, the weaknesses of enforcement appear to arise from: lack of awareness about what conduct constitutes misconduct (dealt with earlier in the chapter); failure to report misconduct; and a disciplinary model which is reactive rather than proactive and focuses on individual behaviour rather than on more systemic causes of misconduct. Each of these are considered in turn below.

Failure to report misconduct

4.172 A large proportion of disciplinary matters brought to the attention of the relevant disciplinary body arise as a result of client complaints.[152] However, courts, costs assessors and other lawyers also have a role to play in reporting alleged misconduct.

4.173 There is limited recognition of the obligation owed by lawyers to report the misconduct of other lawyers under the legal profession legislation and professional rules in Australia. Indeed, there is no obligation under legal profession legislation for lawyers to report misconduct that may arise in the context of discovery.

4.174 Under professional rules in Victoria and South Australia, lawyers have an obligation to disclose conduct which is contrary to the general standards of conduct expected of lawyers—not to engage in conduct that is dishonest; or calculated or likely to a material degree to be prejudicial to the administration of justice or diminish public confidence in the administration of justice—and any conduct or event which may adversely impact on a lawyer's ability to practise according to the professional rules.[153] Whether such an obligation applies to lawyers reporting the conduct of other lawyers is unclear. It is arguable, however, that the obligation is restricted to self-reporting.

4.175 In addition, courts both as guardians of the administration of justice and in upholding their obligations under various pieces of legislation—the purposes of which

150 C Parker and A Evans, *Inside Lawyers' Ethics* (2007), 47.
151 Ibid, 47.
152 G Dal Pont, *Lawyers' Professional Responsibility* (4th ed, 2010), 535.
153 See, eg, Law Council of Australia, *Model Rules of Professional Conduct and Practice* (2002) r 31.

are to facilitate the just, quick and inexpensive resolution of disputes—are charged with responsibility for responding to alleged lawyer misconduct. However, the ALRC understands that court-initiated enforcement action, other than through the imposition of costs orders, is rarely taken in response to alleged legal ethical misconduct.

4.176 Finally, under the Draft National Law and in some jurisdictions, where a matter is subject to a costs assessment or review and the costs assessor considers that the legal costs charged are grossly excessive, they are under an obligation to refer the matter to the Legal Service Commission, or an equivalent body, to consider whether disciplinary action should be taken against the lawyer.[154] Similarly, however, the ALRC understands that this occurs rarely.

Options for reform

4.177 The approach taken in New Zealand (NZ), the United Kingdom (UK) and the US to ensuring lawyers report the misconduct of other lawyers provides for what has been referred to as 'lawyer whistleblowing'.[155]

4.178 In these jurisdictions, rules require lawyers to report where they consider another lawyer's conduct raises a 'substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects',[156] constitutes 'serious misconduct',[157] or where there are reasonable grounds to suspect the other lawyer is guilty of misconduct.[158]

4.179 There are difficulties associated with imposing such an obligation on lawyers, in particular with respect to the need to support and, in some cases, protect lawyers who make such reports[159] and mechanisms for safeguarding against vexatious reports. In addition, in consultations, stakeholders expressed concerns about the impact such a requirement would have on the costs of discovery.

4.180 The ALRC is not aware of any suitable models, aside from judicial education, for addressing court-initiated enforcement action.[160]

ALRC's views

4.181 Consumers of legal services as well as the courts, costs assessors and other lawyers play an important role in reporting misconduct, and as a result, in the effectiveness of means by which misconduct is brought to the attention of the relevant bodies.

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154 See, eg, National Legal Profession Reform Project, *Legal Profession National Law: Consultation Draft* (2010) s 4.3.30; *Legal Profession Act 2004* (NSW) s 393; *Legal Profession Act 2007* (Qld) s 343; *Legal Profession Act 2004* (Vic) s 3.4.46; *Legal Profession Act 2008* (WA) s 307; *Legal Profession Act 2006* (ACT) s 303.

155 G Dal Pont, *Lawyers' Professional Responsibility* (4th ed, 2010), 536.

156 American Bar Association, *Model Rules of Professional Conduct* (2010) r 8.3(a).

157 Any conduct involving dishonesty or deception or a serious criminal offence: Solicitors Regulation Authority (UK), *The Guide to the Professional Conduct of Solicitors*, cl 20.06.

158 *Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008* (NZ) rr 2.8, 2.9.

159 See G Dal Pont, *Lawyers' Professional Responsibility* (4th ed, 2010), 537.

160 Judicial education is discussed in Ch 3.

4.182 In a self-regulated profession, another way of ensuring that misconduct is reported to relevant disciplinary bodies is imposing mandatory reporting obligations on lawyers. In the ALRC's preliminary view, imposing mandatory obligations on lawyers to report the misconduct of other lawyers would assist in the better enforcement of legal ethical obligations.

4.183 The ALRC considers the formulation currently included in the *Professional Conduct and Practice Rules 2005* (Vic) if expanded, and the approaches in NZ, UK and US, to be useful models.

4.184 Consequently, the ALRC is interested in stakeholder feedback on whether professional rules should provide that a practitioner must promptly disclose the occurrence of possible misconduct by either themselves or another lawyer in the course of discovery and, if so, what conduct. For example, misconduct may constitute conduct that a practitioner considers to be: dishonest; or calculated (or likely to a material degree) to be prejudicial to, or diminish public confidence in, the administration of justice; or prejudice a practitioner's ability to practise.

4.185 As proposed with respect to the specificity and clarity of legal ethical obligations if such a reporting obligation were introduced, the development of commentary to accompany any such reporting obligation would be desirable.

4.186 However, given the difficulties associated with any such obligation, the ALRC is interested in stakeholder feedback on other ways to ensure alleged misconduct is reported to relevant disciplinary bodies, and whether imposition of a mandatory reporting obligation on lawyers would be an effective mechanism through which to achieve this.

4.187 With respect to the role of costs assessors in reporting misconduct, the ALRC is interested in hearing how often, in practice, costs assessors comply with requirements to refer matters to the legal disciplinary bodies where they consider that the legal costs charged are grossly excessive.

4.188 The ALRC is interested in stakeholder views on the best way to address the apparent infrequency with which judges report possible misconduct with respect to discovery in matters before them to legal professional bodies.

Question 4–14 What is the best way to ensure clients, lawyers and courts report allegations of lawyer misconduct to relevant disciplinary bodies?

Question 4–15 Should professional conduct rules provide that a practitioner must promptly disclose to the relevant legal professional body the occurrence of any misconduct arising in the context of discovery?

Question 4–16 If practitioners should be required to disclose misconduct in accordance with Question 4–15, what conduct should they be required to disclose?

Question 4–17 In practice, how often do costs assessors refer lawyers to disciplinary bodies for investigation of suspected gross overcharging?

Reactive regulatory system

4.189 As John Britton, the Queensland Legal Services Commissioner has commented, current regulatory systems and sanctions are

> almost entirely reactive rather than proactive and preventative in character. They address past and not future behaviour, and they are all stick and no carrot. They do no more to encourage high standards of conduct than threaten disciplinary consequences for conduct that falls short of the mark.[161]

4.190 However, in some jurisdictions the Offices of Legal Services Commissioners (OLSC) have attempted to play a more proactive and educative role in the enforcement of legal ethical obligations. For example, in NSW, the OLSC's approach is 'regulating for professionalism' within the framework of 'education towards compliance'.[162] The strategy involves working with lawyers to engender the development of an ethical legal culture, including requiring firms to 'self-assess and report on their implementation of appropriate management systems' as well as addressing individual misconduct and complaints.[163]

ALRC's views

4.191 In addressing the reactive nature of regulatory structures, the ALRC commends the 'education towards compliance' concept and considers that bodies such as the OLSC in each jurisdiction have a vital role to play in ensuring legal ethical obligations are observed and enforced.

4.192 The ALRC considers this issue and makes several proposals related to the role of education in the final part of this chapter.

Focus on individual misconduct

4.193 The primary focus of the current disciplinary framework in Australia is on protection rather than punishment, and on the behaviour of individual lawyers rather than the systemic causes of misconduct.

4.194 Commentators such as Parker have criticised this individual focus, arguing that the current disciplinary approach

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161 J Britton, 'The Business of Ethics' (Paper presented at University of Queensland Alumni Lunchtime Lecture, Brisbane, 12 May 2010).

162 S Mark, 'Regulating for Professionalism: The New South Wales Approach' (Paper presented at American Bar Association Annual Meeting, San Francisco, 5 August 2010).

163 C Parker, T Gordon and S Mark, 'Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales' (2010) 37 *Journal of Law and Society* 466, 468.

> is one that can easily lead to making a scapegoat of an individual practitioner for character failure rather than systemic change to address public concerns about consumer service quality and the administration of justice.[164]

4.195 Britton has suggested that the system 'puts the spotlight on individual lawyers' and 'lets law firms almost entirely off the hook'.[165] This issue is considered earlier in this chapter in discussing the need for cultural change.

ALRC's views

4.196 The ALRC considers moves towards extending obligations to all parties in the civil justice system, for example as envisaged under the *Civil Procedure Act 2010* (Vic), would assist in addressing the individual focus of currently regulatory structures and in holding law firms responsible where workplace culture, management and firm structures had a role in the alleged misconduct of individual lawyers.

4.197 The other key reforms which are likely to refocus current regulatory structures and thereby enhance the effectiveness of enforcement of legal ethical obligations are discussed above in the context of the need for change to the legal culture in Australia.

4.198 Overall, it appears that weaknesses in enforcement of legal ethical obligations arise as a result of factors such as failure to identify and report misconduct, and the general nature of the disciplinary model rather than specific legal professional disciplinary structures. However, the ALRC is interested in hearing from stakeholders about whether existing legal professional disciplinary structures are sufficient to deal with discovery abuse, and if not, how they might be reformed.

Question 4–18 Are existing legal professional disciplinary structures sufficient to deal with allegations of discovery abuse?

Question 4–19 If existing legal professional disciplinary structures are not sufficient to deal with allegations of discovery abuse, how should lawyers be disciplined for:

(a) a failure to comply with discovery obligations; or

(b) conduct intended to delay, frustrate or avoid discovery of documents?

The changing legal context and future challenges

4.199 The changing nature of the Australian legal system and the changing context within which existing professional obligations arise increasingly impacts on discovery.

4.200 A number of emerging issues are of particular relevance, including the rise of e-discovery and the applicability of practitioner obligations outside traditional courtroom processes.

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164 C Parker, 'Regulation of the Ethics of Australian Legal Practice: Autonomy and Responsiveness' (2002) 25 *University of New South Wales Law Journal* 676, 682.

165 J Britton, 'The Business of Ethics' (Paper presented at University of Queensland Alumni Lunchtime Lecture, Brisbane, 12 May 2010).

Electronic discovery

4.201 The increasing frequency with which documents are stored electronically adds a new dimension to lawyers' legal ethical obligations with respect to discovery.

4.202 For example, e-discovery brings into focus the obligations owed by lawyers to the client and the court, which in part involve a duty to advise clients about their discovery obligations and exercise personal judgment about the existence and relevance of documents in the proceedings.

4.203 To some extent the ALRC's proposal with respect to discovery plans, which would specify the scope of discovery, including the parameters of electronic searches, provides an articulation of lawyer's obligations.[166]

4.204 However, the extent of a lawyer's obligation to ensure that a client preserves documents and is aware of a client's document retention policy and electronic document management systems is largely unclear.

4.205 As discussed earlier in the chapter, the ALRC considers there are two possible ways to ensure professional rules are sufficiently clear so that lawyers are aware of their obligations—in this instance—concerning e-discovery. These are either through the articulation of specific legal ethical obligations which apply in the context of e-discovery; or through the adoption of a principle–rule–commentary approach to professional rules, which would provide guidance about the application of general legal ethical obligations in the specific context of e-discovery.

4.206 In the context of e-discovery, lawyers could also be held responsible for implementing a legal hold when litigation is anticipated, as occurs in the US.[167]

ALRC's views

4.207 The ALRC is interested in feedback from stakeholders on the impact of e-discovery on the legal ethical obligations of lawyers.

4.208 As outlined above, in the ALRC's view, a principle–rule–commentary approach is the best approach to providing guidance for lawyers to assist them in the practical interpretation of their obligations in the context of discovery. The ALRC considers that such clarification would also be useful in the context of e-discovery. However, the ALRC welcomes submissions on this point and with respect to the potential application of obligations similar to those arising from a legal hold in an Australian context.

Question 4–20 What impact, if any, has electronic discovery had on the legal ethical obligations owed by lawyers?

Question 4–21 Are existing general legal ethical obligations in professional rules sufficiently specific and clear so that lawyers are aware of their obligations in the context of electronic discovery?

166 See discussion in Ch 3 and in particular Proposal 3–2.
167 The use of legal holds is discussed earlier in this chapter.

Question 4–22 Should professional conduct rules be amended to include specific legal ethical obligations concerning electronic discovery?

Proposal 4–3 The Law Council of Australia, the Australian Bar Association and the legal professional bodies in each state and territory should develop commentary as part of, or a supplement to, the professional conduct rules with a particular focus on a lawyer's legal ethical obligations with respect to the electronic discovery of documents.

Legal ethical obligations and alternative processes

4.209 Another emerging issue is the applicability of traditional legal ethical obligations outside courtroom processes, for example during pre-action protocols, pre-trial management and alternative dispute resolution processes.

4.210 Currently, professional rules define 'court' broadly to encompass: courts and tribunals; investigations or inquiries established or conducted under statute or by a Parliament; Royal Commissions; and arbitrations, mediations or any other form of dispute resolution.[168]

4.211 However, significant debate exists with respect to the imposing of legal ethical and conduct obligations on such processes, an issue recently considered by the National Alternative Dispute Resolution Advisory Council (NADRAC).[169]

4.212 NADRAC has suggested that examination of the issue involves consideration of: which participants should be subject to the obligations; the ambit and framing of obligations; when the obligations would apply; and enforcement.[170]

ALRC's views

4.213 The ALRC considers that COAG, the Law Council and legal professional bodies in each state and territory should consider the application of legal ethical obligations outside traditional courtroom processes in formulating or revising professional rules. These bodies should also consider issuing clarification about the legal ethical obligations of lawyers in these new forums.

Legal education

4.214 Education is vital to ensuring lawyers are aware of their legal ethical obligations and are able to consider and apply their obligations in practice. It also plays a key role in shaping legal culture.

4.215 Clearly then it is important that good discovery practice—grounded in consideration of legal ethical obligations—is incorporated into legal education at a university level, through the practical legal training that Australian lawyers must

168 See, eg, Law Council of Australia, *Model Rules of Professional Conduct and Practice* (2002), 3.
169 National Alternative Dispute Resolution Advisory Council (NADRAC), *The Resolve to Resolve: Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* (2009), sch 2.
170 Ibid, sch 2.

undertake before they may be admitted to practice, and in continuing legal education.[171]

Academic qualifications

4.216 In all Australian jurisdictions, admission to practise as a lawyer requires the study of 11 areas of knowledge (known as the 'Priestley Eleven').[172] These are the core subjects studied by law students in Australia.

4.217 Discovery is usually taught in universities as part of civil procedure, one of these core subjects. Civil procedure in NSW, for example, includes the study of 'obtaining evidence—discovery of documents, interrogatories, subpoena and other devices'.[173]

4.218 Legal ethics is also taught at universities. For example, in NSW, law students must study:

> Professional and personal conduct in respect of practitioner's duty:
>
> (a) to the law;
>
> (b) to the Courts;
>
> (c) to clients, including basic knowledge of the principles of trust accounting; and
>
> (d) to fellow practitioners.[174]

4.219 To the ALRC's knowledge, ethics classes in Australian law schools do not routinely consider ethical discovery practice. Exceptions to this appear to be the content of a course called 'Dispute Resolution and Ethics' offered at the University of Adelaide, and parts of civil procedure and litigation subjects at the Australian National University and the University of Sydney which appear to include teaching focused on practical examples. The ALRC welcomes submissions that identify other courses or subjects that consider legal ethical obligations in the context of discovery.

Practical legal training

4.220 Civil procedure and ethics are studied again, with a different focus, as part of the practical legal training that must be completed before a person may be admitted to practice as a solicitor.

4.221 To be admitted in NSW, for example, applicants must be competent in a set of skills, practice areas and values prescribed in the *Legal Profession Admission Rules*

171 Judicial education in discovery is discussed in ch 3.

172 In NSW for example, these subject are set out in the *Legal Profession Admission Rules 2005* (NSW) r 95(1)(b), sch 5. The Draft National Rules propose that approved areas of academic knowledge continue to reflect the Law Admissions Consultative Committee's prescribed areas of knowledge, and that the list of recognised tertiary academic courses continue to reflect existing recognised academic courses: National Legal Profession Reform Project, *Legal Profession National Rules: Consultation Draft* (2010), ch 3, schs 1, 2.

173 *Legal Profession Admission Rules 2005* (NSW), sch 5.

174 Ibid, sch 5.

2005 (NSW). Applicants must have achieved competence in, among other things, 'civil litigation practice' and 'ethics and professional responsibility'.[175]

4.222 Civil litigation practice refers to the ability of an entry-level lawyer to 'conduct civil litigation in first instance matters in courts of general jurisdiction, in a timely and cost-effective manner'.[176] This involves the ability to identify the issues likely to arise in a hearing and gather the necessary evidence. One of the listed means of gathering evidence is discovery.[177]

4.223 Ethics and professional responsibility, the Rules state, includes:

- acting ethically;
- discharging the legal duties and obligations of legal practitioners;
- complying with professional conduct rules;
- complying with fiduciary duties;
- complying with rules relating to the charging of fees; and
- reflecting on wider issues.[178]

Continuing legal education

4.224 Following admission to practice, in order to retain a practising certificate legal practitioners are required to complete a course of continuing legal education (CLE) or continuing professional development (CPD) each year.

4.225 In October 2007, the National Continuing Professional Development Taskforce issued a set of national CLE Guidelines,[179] which arose in part 'from a concern that legal practitioners were not receiving sufficient ongoing education in legal and practical ethics and professionalism'.[180]

4.226 The Guidelines recommend that practitioners be required to complete ten units[181] of CPD activity each year, including at least one unit in each of the following 'core areas':

- practical legal ethics;

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175 Ibid, sch 6. The Draft National Rules propose that the competency standards for entry level lawyers reflect the Law Admissions Consultative Committee's existing competency standards and that the list of recognised courses of study also reflect the existing recognised practical legal training courses: National Legal Profession Reform Project, *Legal Profession National Rules: Consultation Draft* (2010), ch 3, schs 3, 4.

176 *Legal Profession Admission Rules 2005* (NSW), sch 6.

177 Ibid, sch 6, Civil Practice, Explanatory Note.

178 Ibid, sch 6, Ethics and Professional Responsibility.

179 National Continuing Professional Development Taskforce, *A Model Continuing Professional Development Scheme for Australian Lawyers* (2007), [3.5].

180 S Mark, *Competing Duties: Ethical Dilemmas in Practice* (presentation to Newcastle Law Society, 19 October 2009).

181 In some jurisdictions the current requirement is completion of seven units, which will increase to ten units for practising certificates commencing on or after 1 July 2011: ACT Law Society, *A Continuing Professional Development Scheme for Canberra's Solicitors (MCPD Guidelines)*.

- practice management and business skills;
- professional skills;[182] and
- substantive law (in some jurisdictions).[183]

4.227 The Guidelines include a non-exhaustive, illustrative list of topics, arranged by these core areas. Topics listed under the practical legal ethics core area include 'lawyer's duties to the court' and 'ethics within a technical legal context'.[184]

4.228 While discovery is not specifically referred to in the list of examples of activities, in the ALRC's view, a suitable study activity related to discovery could count towards a unit in the practical legal ethics core area, the professional skills core area or be studied as substantive law.[185]

4.229 New South Wales, Queensland, Victoria and the ACT have either adopted the guidelines, or substantially based their scheme on the guidelines.[186] Western Australia also requires practitioners to complete courses on ethics and professional responsibility, and legal skills and practice.[187]

4.230 Barristers in the ACT must also complete activities in 'ethics and regulation of the profession'; and in substantive law and professional skills.[188]

4.231 In the Northern Territory, practitioners are required to complete a certain number of activities related to developing substantive law and legal practice competencies, but does not require particular courses in ethics.[189]

4.232 General legal ethics courses are common.[190] However, few CPD or CLE courses specifically cover ethical obligations in the context of discovery.[191]

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182 National Continuing Professional Development Taskforce, *A Model Continuing Professional Development Scheme for Australian Lawyers* (2007), [3.5].

183 See, eg, Law Institute of Victoria, *Continuing Professional Development Rules* (2008) r 5.2; *Legal Profession Rules 2009* (WA) pt 2, div 2, r 10(2)–(4). Note, the Draft National Rules also propose that Australian legal practitioners must complete 10 CPD units of CPD activity each year including one unit relating to each of these first three core areas: practical legal ethics, practice management and business skills, and professional skills: National Legal Profession Reform Project, *Legal Profession National Rules: Consultation Draft* (2010), ch 11.

184 National Continuing Professional Development Taskforce, *A Model Continuing Professional Development Scheme for Australian Lawyers* (2007), 7.

185 See, eg, Law Institute of Victoria, *Continuing Professional Development Rules* (2008) r 5.2.

186 *Professional Conduct and Practice Rules 1995* (NSW) r 42.1.6; Law Institute of Victoria, *Continuing Professional Development Rules* (2008) r 5.2; *Queensland Law Society Administration Rule 1995* (Qld) r 47(4); ACT Law Society, *A Continuing Professional Development Scheme for Canberra's Solicitors (MCPD Guidelines)*.

187 *Legal Profession Rules 2009* (WA) r 10. The Northern Territory has mandatory CPD requirements, but does not mandate the study of ethics: *Legal Profession Regulations 2007* (NT) sch 2, reg 5.

188 *Legal Profession (Barristers) Rules 2008* (ACT) r 113; Australian Capital Territory Bar Association, *Continuing Professional Development* <www.actbar.com.au/> at 28 October 2010.

189 *Legal Profession Regulations 2007* (NT) sch 2, pt 2, div 1, r 2(2).

190 See, eg, College of Law (NSW), *Rule 42: Ethics & Professional Responsibility; Practice Management & Business Skills; and Professional Skills [Face to Face Seminar]* (2010) <www.collaw.edu.au/> at 1 November 2010.

191 See, eg, Legalwise Seminars, *Legal Skills and Legal Ethics for All Lawyers [seminar]* (2010) <www.legalwiseseminars.com.au/> at 30 September 2010.

Guidance from legal professional associations

4.233 Guidance from legal professional associations—in particular, state and territory bar associations and law societies—also plays a role in legal education. Where such guidance exists, it may be given in the form of individualised responses to inquiries,[192] published ethics committee rulings,[193] or online collections of articles and advice on certain topics.[194]

4.234 Earlier in the chapter, the ALRC proposed that the Law Council and law societies and bar associations in each state and territory develop commentary as part of, or as a supplement to, the professional conduct rules with a particular focus on the legal ethical obligations of lawyers in relation to discovery.[195] Such commentary would also play an important role in educating lawyers about their legal ethical obligations.

4.235 Finally, legal professional associations also maintain a register of disciplinary actions open for public inspection, the availability and content of which serves an important educative function.[196]

Legal education: issues arising

4.236 There are concerns that current legal education with respect to legal ethical obligations often 'does not equip ... lawyers to know how to put ethics into action in real-life ... contexts, or even to recognise ethical issues when they arise'.[197] Such commentary highlights that it is important for legal ethical obligations to be taught using a range of teaching methods that encompass their practical application, including through case studies and skills courses.

4.237 Significant decisions about discovery in civil litigation before federal courts are likely to be made by experienced lawyers. If education is to play a significant role in improving discovery practice, particularly in the short to medium term, it is likely to be through CLE undertaken by practising lawyers who work in litigation and understand the real conflicts and difficulties that parties face in obtaining and disclosing relevant documentary evidence.

4.238 This may require that providers of CLE pay particular attention to the ethical discovery practices in relevant programs, such as those concerning civil litigation,

192 See, eg, New South Wales Bar Association, *Urgent Ethical Guidance for Members* <www.nswbar.asn.au/> at 25 October 2010; Queensland Law Society, *Queensland Law Society Ethics Centre* <www.qls.com.au/> at 1 November 2010; Bar Association of Queensland, *From the President: Ethical Enquiries—Ethical Counsellors* <www.qldbar.asn.au/> at 25 October 2010.

193 See, eg, Law Institute of Victoria Ethics Committee, *Ethics Committee Rulings* <www.liv.asn.au/> at 1 November 2010.

194 See, eg, Queensland Law Society, *Ethics FAQs* <http://ethics.qls.com.au/faq> at 1 November 2010; Law Society of South Australia, *Professional Standards: Ethics and Professional Responsibility* <www.lawsocietysa.asn.au/> at 1 November 2010; Law Institute of Victoria Ethics Committee, *Ethics Resources* <www.liv.asn.au/> at 1 November 2010.

195 Proposal 4–1.

196 *Legal Profession Act 2004* (NSW) s 577; *Legal Profession Act 2007* (Qld) s 472; *Legal Profession Act 2007* (Tas) s 497; *Legal Profession Act 2004* (Vic) ss 4.4.26, 4.4.27; *Legal Profession Act 2008* (WA) s 452; *Legal Profession Act 2006* (ACT) s 448; *Legal Profession Act 2006* (NT) s 541.

197 C Parker and A Evans, *Inside Lawyers' Ethics* (2007), 217.

ethics and management and consider the development of subjects specifically addressing ethical discovery practices.

4.239 Another way to educate practising lawyers in ethical discovery practices may be for all legal professional associations to issue 'best practice' notes about the legal and ethical responsibilities of lawyers with respect to discovery. These practice notes would ideally be updated regularly to respond to practitioners' questions or evolving technological developments.

4.240 Ongoing legal professional education about legal ethical obligations generally, as well as those concerning discovery, may be essential to fostering professional integrity, as in order to act consistently with such obligations lawyers must have 'current knowledge and awareness of the ethical framework within which they practice'.[198]

ALRC's views

4.241 In the ALRC's preliminary view, the study of a lawyer's legal and ethical duties in relation to discovery should be incorporated, or expanded upon, in existing university curricula, through practical legal training, and in programs that form part of a lawyer's continuing legal education.

4.242 Admission rules across jurisdictions appear suitably broad and therefore should not need to be changed in order for universities and other providers of legal education to pay closer attention to ethical discovery practice.

4.243 In the ALRC's view, though the topic might usefully be considered in subjects or programs dedicated to legal ethics, the ethics of good discovery practice should also be taught in core civil litigation subjects. Students and lawyers should understand that ethical discovery is intrinsic to good legal practice.

Question 4–23 Are law students and lawyers studying the legal and ethical responsibilities of lawyers with respect to discovery? If so, is existing training and education sufficient?

Question 4–24 How should law students and lawyers be trained in the legal and ethical responsibilities of lawyers with respect to discovery?

Question 4–25 Is discovery abuse and misconduct likely to be reduced in practice if law students and lawyers are provided with more education about the legal and ethical responsibilities of lawyers with respect to discovery?

Proposal 4–4 Providers of legal education should give appropriate attention to the legal and ethical responsibilities of lawyers in relation to the discovery of documents in existing and proposed civil litigation, case management and ethics subjects that form part of:

198 S Mark, *Competing Duties: Ethical Dilemmas in Practice* (presentation to Newcastle Law Society, 19 October 2009).

(a) law degrees, particularly those required for admission to practice as a solicitor or barrister;

(b) practical legal training required for admission to practice as a solicitor or barrister; and

(c) continuing legal education programs, including those required for obtaining and maintaining a practising certificate.

Proposal 4–5 Legal professional bodies should issue to their members 'best practice' notes about the legal ethical obligations of lawyers with respect to discovery.