

# UNQUALIFIED PERSONS AND THE PRACTICE OF LAW

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Legal practitioners are integrally involved in the administration of justice and have various duties to discharge in upholding the law and meeting their duties to the court and to their clients. The entitlement to practise as a lawyer, which is conferred exclusively by legislation, is jealously guarded. Only those people who have complied with the provisions of the particular regulatory statute in their State or Territory may be admitted to practise the profession of the law. Those same statutes prohibit unqualified persons from practising law. This prohibition is bolstered by the inherent jurisdiction of the Supreme Court to strike lawyers off the roll of legal practitioners for misfeasance. However, the lack of uniformity in the definition of 'practice of law' creates an interesting anomaly. This article considers the Queensland case of *Legal Services Commissioner v Walter*<sup>1</sup> and how its outcome might have differed if it had occurred in South Australia. The article examines the statutory provisions prohibiting non-qualified persons from practising as lawyers with a particular focus on the concept of 'fee or reward' as an integral part of legal practice in South Australia. It also questions the continued relevance of the rationale for the prohibition in view of the changing nature of the legal profession, the exponential rise in the costs of legal services and the ever-reducing access of the general public to legal aid.

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<sup>1</sup> [2011] QSC 132.

## I INTRODUCTION

Australian law reports contain a number of decisions about legal practitioners who, despite having been suspended from legal practice for a period by the relevant authority, have continued to practise law or who, without relevant practising certificates but employed as law clerks, have engaged in legal work in advising and acting for clients. These cases, which invariably involve applications to strike defendants from the roll of legal practitioners, concern people who have obtained a law degree and completed post-graduate professional training before being admitted to practice. Other decisions about legal practice arise in a different context: they are about people who are found to be criminally liable for proffering legal advice or assistance to a third party when they are not qualified to do so.<sup>2</sup> This article is concerned with the latter situation and how it is dealt with in South Australia in particular.

The South Australian *Legal Practitioners Act* 1981 (SA) is particularly noteworthy for being more complicated than its interstate counterparts because it explicitly links the earning of a fee or reward to the idea of legal practice. It thus provides the point of departure for our examination of the anomalies inherent in the various statutory regimes that control who can and who cannot engage in certain forms of legal work. The ramifications of the terms used in the South Australian statute become evident when considering different factual contexts where persons might be prosecuted for practising as lawyers when they are not entitled to do so.

This article was prompted when one of the authors was preparing a question for an examination for an undergraduate Professional Conduct unit. The draft question asked students to consider the likely outcome of the Queensland case of *Legal Services Commissioner v*

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<sup>2</sup> Their lack of qualification is because they have never undertaken or completed a law degree or because even if they have a law degree they have never completed further practical legal training and been admitted to the Roll of Legal Practitioners in an Australian State or Territory. See footnote 8.

*Walter*<sup>3</sup> if it had happened in South Australia. However, it became apparent that the answer is far from clear. The author decided instead to use this scenario as the basis for a classroom discussion. In preparing for this discussion, it became apparent that there are several anomalies regarding the limits of legal professionalism across Australia when it comes to determining what 'legal practice' is. The purpose of this article is to highlight the particular situation in South Australia regarding breaches of s 21 of the *Legal Practitioners Act 1981* (SA). The article probes the differences in the definitions of 'legal practice' in each of the States and Territories and highlights the South Australian 'fee or reward' requirement as peculiar and confusing. The article then considers the rationale behind the requirement to be appropriately qualified to engage in legal practice. Finally, the article suggests that the 'lawyers reserve' is restricting access to justice and should be re-considered. At the very least, the definition of 'practising law' should be uniform across Australia.

The legal profession in Australia is organised on a State and Territory basis rather than a national one.<sup>4</sup> Each jurisdiction has its own statute prescribing who may practise law and what conditions they must satisfy before being able to do so.<sup>5</sup> These regulatory statutes which, in all jurisdictions except South Australia, are based on the National Profession Model Laws Project,<sup>6</sup> prevent unqualified persons from practising law under the heading: *Prohibition on*

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<sup>3</sup> [2011] QSC 132, [23].

<sup>4</sup> See National Legal Profession Reform Project, *Legal Profession National Law: Consultation Draft* (National Legal Profession Reform Project, 2010); National Legal Profession Reform Project, *Legal Profession National Law: Post COAG Draft* (National Legal Profession Reform Project, 31 May 2011). The draft Legal Profession National Law, 31 May 2011 is the latest attempt to regulate lawyers on an Australia-wide basis but only New South Wales and Victoria have agreed to be part of this national scheme. See also Legal Profession Uniform Law Application Bill 2014 (NSW); *Legal Profession Uniform Law Application Act 2014* (Vic).

<sup>5</sup> See *Legal Profession Act 2006* (ACT); *Legal Profession Act 2004* (NSW); *Legal Profession Act 2006* (NT); *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).

<sup>6</sup> *Ibid.* Developed by the Standing Committee of Attorneys-General in 2004 the Model Laws Project was the precursor to the Legal Profession National Law, 2011.

*engaging in legal practice if not entitled.* The South Australian statute's differently worded heading speaks of an 'Entitlement to Practise'. The nomenclature is significant as it highlights the fact that the practice of law is an entitlement bestowed by the legislature exclusively on a select group of people. Common to all jurisdictions is the central idea that a person must 'not practise law' unless he or she is an Australian legal practitioner.<sup>7</sup> The negative phrasing (a general prohibition on 'practising the profession of the law' unless certain criteria are met) reinforces the impression of the existence of a general presumed *lack* of entitlement. It is only when certain conditions as to qualifications are met that the entitlement to practise law comes into effect. These conditions, found in the various statutory definitions of 'Australian lawyer' and 'Australian legal practitioner'; 'local lawyer' and 'local legal practitioner'; and 'interstate lawyer' and 'interstate legal practitioner', require persons both to be admitted to the roll of practitioners in a State or Territory by the relevant Supreme Court as admitting authority and then, as admitted Australian lawyers, to hold a practising certificate which confers on them the status of Australian legal practitioner and allows them actually to practise law as either a barrister and/or a solicitor.<sup>8</sup>

Although the definition of legal practitioner/lawyer and general entitlement to practise is fairly standard across the various Australian State and Territory regulatory statutes, the concept of the 'practice of law' is less so. Bartlett and Burrell have noted that the proposed National Law is a 'missed opportunity to clarify what constitutes "engaging in legal practice"'.<sup>9</sup> Moreover this lack of definition is, as

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<sup>7</sup> See *Legal Profession Act 2006* (ACT) s 16; *Legal Profession Act 2004* (NSW) s 14; *Legal Profession Act 2006* (NT) s 18; *Legal Profession Act 2007* (Qld) s 24; *Legal Practitioners Act 1981* (SA) s 21; *Legal Profession Act 2007* (Tas) s 13; *Legal Profession Act 2004* (Vic) s 2.2.2; *Legal Profession Act 2008* (WA) s 12. Penalties for breaching these provisions include fines, imprisonment or both.

<sup>8</sup> *Legal Profession Act 2006* (ACT) ss 7, 8; *Legal Profession Act 2004* (NSW) ss 5, 6; *Legal Profession Act 2006* (NT) ss 5, 6; *Legal Profession Act 2007* (Qld) ss 5, 6; *Legal Practitioners Act 1981* (SA) s 5; *Legal Profession Act 2007* (Tas) ss 5, 6; *Legal Profession Act 2004* (Vic) ss 1.2.2-1.2.3; *Legal Profession Act 2008* (WA) ss 4, 5.

<sup>9</sup> Francesca Bartlett and Robert Burrell, 'Understanding the 'Safe Harbour': The Prohibition on Engaging in Legal Practice and Its Application to Patent and

they point out, problematic for professionals such as patent and trademarks attorneys whose work invariably results in them ‘trespassing on the legal practitioners’ reserve’.<sup>10</sup>

## II CASE STUDIES

Two case studies, one in which a fee was charged and the other where legal assistance was provided gratis, set the scene for our discussion.<sup>11</sup>

In *Legal Practice Board v Giraudo*,<sup>12</sup> Clinton Giraudo assisted Mr Domney in the resolution of two disputes that Domney had in relation to his car repair business (one with a firm of custom brokers and one with a customer who disputed his car repair bill). Both disputes ended up being litigated in the Local Court. Giraudo’s assistance to Domney took the form of writing letters to Domney to advise him of various options to resolve the disputes. Giraudo also prepared court documents and wrote letters to the plaintiffs’ solicitors on Domney’s behalf as well as attending pre-trial conferences with Domney. Giraudo was not and had never been a legal practitioner.<sup>13</sup> He claimed to have carried out these and other activities as a consultant to, or employee of, Domney’s company and as such that he was simply acting in ‘a clerical capacity’ as ‘secretary or scribe’. The Legal Practice Board commenced proceedings against him for contempt of court pursuant to the then current *Legal Practitioners Act 1893 (WA)*<sup>14</sup> (“the WA Act”) alleging that by his

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Trade Marks Attorneys in Australia’ (2013) 23(4) *Australian Intellectual Property Journal* 74, 76.

<sup>10</sup> Ibid 75-76.

<sup>11</sup> Ibid 78-82. See also Bartlett and Burrell, above n 9 for other case studies of instances of offending behavior.

<sup>12</sup> [2010] WASC 4.

<sup>13</sup> See Bartlett and Burrell, above n 9, 81. His occupation as a patent attorney was, as Bartlett and Burrell observe, immaterial given that there was no issue of intellectual property in the case.

<sup>14</sup> Since repealed and superseded by the *Legal Practice Act 2003 (WA)* which, in turn, has been replaced by the *Legal Profession Act 2008 (WA)*.

actions he had contravened ss 76 and 77 of the WA Act. These statutory provisions were to the effect that legal work: whether defending proceedings, acting as a solicitor, carrying out work in connection with the administration of law in acting on Domney's instructions, drawing or preparing documents relating to the personal estate of Domney or drawing or preparing documents relating to court proceedings could only be performed by a certificated legal practitioner.<sup>15</sup> Hall J scrutinised the nature of Giraudo's involvement in Domney's affairs and held that it was 'absurd for Mr Giraudo to assert that he was only acting as an amanuensis for Mr Domney'.<sup>16</sup> The documentary evidence comprising letters written by Giraudo and court documents prepared by him conclusively established that 'Giraudo was acting essentially as a solicitor who was the guiding intelligence behind the (legal) proceedings'.<sup>17</sup> Giraudo had, contrary to the WA Act, performed work that could lawfully only be done by a practising lawyer.<sup>18</sup> In addition, he had charged Domney approximately \$2,000 for the work he had performed.<sup>19</sup> His breach of ss 76 and 77 of the WA Act meant that he 'must be punished for contempt of the Supreme Court of Western Australia'.<sup>20</sup> Hall J determined that the appropriate penalty was a fine totalling \$4,000. In this regard Giraudo, whose 'defence of the proceedings against him was not an aggravating factor [but nevertheless entitled the judge] to take into account that he had not accepted that his conduct was in breach of the Act and has not therefore shown any appropriate insight into his own conduct',<sup>21</sup> was fortunate to avoid a term of imprisonment.<sup>22</sup>

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<sup>15</sup> *Legal Practice Board v Giraudo* [2010] WASC 4, [5]-[6].

<sup>16</sup> *Ibid* [27].

<sup>17</sup> *Ibid* [63].

<sup>18</sup> *Ibid* [16]-[46]. Such work included: writing letters to Domney advising him of various options to resolve the disputes; writing letters to the plaintiff custom brokers firm stating that he 'represented' (the defendant) and that (the defendant) 'had engaged me to help resolve this matter'; requiring the plaintiff solicitors 'to send all further correspondence in this matter to me'; preparing a chronology of relevant events in court documents he entitled 'Particulars of Defence and Chamber Summons respectively'.

<sup>19</sup> *Ibid* [45]-[46], [61].

<sup>20</sup> *Ibid* [66].

<sup>21</sup> *Ibid*.

<sup>22</sup> Unlike one of his offending predecessors: See *Legal Practice Board v Ridah* [2004] WASC 263, [17]. Ridah had leased offices in premises where there were

In *Legal Services Commissioner v Walter*<sup>23</sup> the applicant, rather than seeking to prosecute Walter, sought an injunction to prevent Walter from engaging in conduct that constituted an offence against a relevant law, namely s 24(1) of the *Legal Profession Act 2007* (Qld). This provision provides that ‘a person must not engage in legal practice in this jurisdiction unless the person is an Australian legal practitioner’. An Australian legal practitioner is an Australian lawyer who holds a practising certificate issued either in Queensland or interstate and an Australian lawyer is a person who is admitted to the legal profession under Queensland’s *Legal Profession Act 2007* (Qld) or under a corresponding law in another Australian jurisdiction.<sup>24</sup> Mr Walter had encouraged 10 plaintiffs to commence proceedings in the Supreme Court at Cairns against the ‘chief executives of a number of local government authorities, a State Government Minister and a number of other defendants’.<sup>25</sup> Daubney J described these proceedings as being framed in terms of ‘identical, peculiar notions of the law unsuccessfully espoused [by Walter himself] in previous litigation’.<sup>26</sup> Walter had provided the plaintiffs with ‘advice, drafted correspondence, pleadings and submissions in the proceedings, at times corresponded on their behalf with other parties to the litigation and purported to act as the agent of one of the plaintiffs, Mrs Burns’.<sup>27</sup> In short, he had engaged in activities that lay

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numerous other barristers and solicitors, had furnished his offices with the wigs, robes and other paraphernalia of a barrister and solicitor, displayed fraudulently produced law degrees and a practising certificate, and over a nine month period had acted for 86 clients in some 128 criminal, civil and family matters. McKechnie J’s sense of outrage and violation is palpable: ‘It is sometimes said that it is always possible to imagine a worse case. In this case my imagination is unequal to the task. This is as bad a case of an unqualified person engaging in legal practice as is possible to imagine. The Legal Practitioners Act 1893 leaves the Court at large to select the type and the length of punishment. I have come to the clear view that the only punishment sufficient to denunciate the conduct is a term of imprisonment’.

<sup>23</sup> [2011] QSC 132.

<sup>24</sup> *Legal Profession Act 2007* (Qld) ss 5(1), 6(1).

<sup>25</sup> *Legal Services Commissioner v Walter* [2011] QSC 132, [23].

<sup>26</sup> *Ibid* [25]. One instance of such litigation was *Lade and Company Pty Ltd v Finlay & Ors* [2010] QSC 382 where McMeekin J in giving the defendant summary judgment described Lade’s statement of claim as ‘unintelligible’ and the causes of action ‘devoid of merit’.

<sup>27</sup> *Legal Services Commissioner v Walter* [2011] QSC 132, [23].

‘near the very centre of the practice of litigation law’<sup>28</sup> and by so doing ‘engaged in legal practice in Queensland at a time when he was not an Australian legal practitioner’.<sup>29</sup> This was an offence against the *Legal Profession Act 2007* (Qld) that justified the grant of a permanent injunction against him preventing him from any further involvement in the matters in any forum at all.<sup>30</sup>

In both cases the defendants were found to have fallen foul of the relevant legislative provisions by ‘practising law’ despite not being qualified to do so. However, the ‘practice of law’ is treated differently in different jurisdictions. In particular, the definition in South Australia is quite different from that in the Queensland legislation. The question that the authors seek to answer is this: If Mr Walter assisted litigants in South Australia, and carried out the same activities as he did in Queensland, would he be found guilty of a breach of s 21 of the *Legal Practitioners Act 1981* (SA)?

### III DEFINING THE PRACTICE OF LAW

The starting point for an analysis of the question, and a determination of the answer, is to consider the meaning of ‘the practice of law’. Legal work is defined in succinct terms in the *Legal Profession Act 2008* (WA) to mean:

- (a) any work in connection with the administration of law; or
- (b) drawing or preparing any deed, instrument or writing relating to or in any manner dealing with or affecting –
  - (i) real or personal estate or any interest in real or personal estate;  
or
  - (ii) any proceedings at law, civil or criminal, or in equity.<sup>31</sup>

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<sup>28</sup> Ibid [28].

<sup>29</sup> Ibid [29].

<sup>30</sup> Ibid [33].

<sup>31</sup> *Legal Profession Act 2008* (WA) s 12(1). See also *Legal Profession Act 2006* (ACT) s 16(1). Both of these Acts provide specific examples of legal work.



Rather than defining legal work per se, the statutes in other jurisdictions provide diverse examples of legal work by exempting specified instances of legal practice (for example, legal practice engaged in by a complying community legal centre; conveyancing work carried out by a licensed conveyancer; or legal practice engaged in pursuant to employment in a council) from the general prohibition on practising law. In this regard the *Legal Practitioners Act 1981* (SA) provides the most convoluted definition of and exceptions to legal practice. It defines the phrases ‘practise the profession of law’, ‘legal practice’ and ‘practise’<sup>32</sup> by reference to s 21. Sub-section 21(2) states:

Without limiting the generality of subsection (1), but subject to subsections (3) and (3a), a person practises the profession of the law, if acting for fee or reward on behalf of some other person he or she –

- (a) prepares any will or testamentary instrument; or
- (b) prepares an instrument creating, transferring, assigning, modifying or extinguishing any estate or interest in real or personal property; or
- (c) prepares any instrument relating to the formation of a body corporate, any amendment to the memorandum or articles of association, rules or regulations of a body corporate, any prospectus or take-over scheme relating to a body corporate, or any instrument affecting the rights of shareholders or debenture holders in a body corporate or any scheme of arrangement in respect of a body corporate; or
- (d) prepares any other instrument creating, transferring, assigning, modifying or extinguishing any right, power or liability at law or in equity; or
- (e) represents any party to proceedings in a court or tribunal.

It is important to note that providing advice about the law or about legal procedure is not expressly included in this list. However, it is indirectly adverted to in s 21(3a) which provides that ‘a person will not be taken to be practising the profession of the law by reason only of the fact that the person provides legal advice or legal services

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<sup>32</sup> See *Legal Practitioners Act 1981* (SA) s 5.

relating to the law of a place outside Australia' – the implication being that a person will be practising the profession of the law if such person provides legal advice relating to the law of Australia. An express prohibition on the provision of legal advice is not specifically set out in any of the relevant statutes but arguably, as we shall see shortly, the provision of legal advice is very much part of the common law's understanding as to what is meant by practising the profession of law.

Section 21(3) then lists no fewer than 23 disparate activities that may be performed by certain persons who by doing so will not breach s 21. A couple of examples suffice to demonstrate how broad in scope and diverse in application these exemptions are. For example, the preparation by an 'unqualified person' of an instrument relating to the transfer of shares issued by a body corporate is not prevented,<sup>33</sup> nor is representing a party to proceedings if the person is authorised under any Act to do so.<sup>34</sup> So too, 'the preparation for fee or reward of an opinion on a question of law by a member of the faculty of law of a university' does not comprise legal practice provided that 'the opinion [prepared by the law faculty member] is prepared at the request of a legal practitioner, the Attorney-General of the State or of the Commonwealth, the Crown Solicitor or the Australian Government Solicitor or the Director of Public Prosecutions'.<sup>35</sup> On the other hand, only South Australia does not provide a broad exemption for anyone acting 'under the authority of a law of ... the Commonwealth' as is provided in all other State and Territory Legal Profession Acts.<sup>36</sup>

In the absence of a clear, unambiguous and uniform legislative definition of legal practice we can glean further assistance on its

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<sup>33</sup> *Ibid* s 21(3)(l).

<sup>34</sup> *Ibid* s 21(3)(g).

<sup>35</sup> *Ibid* s 21(3)(w).

<sup>36</sup> *Legal Profession Act 2006* (ACT) s 16(3)(a); *Legal Profession Act 2004* (NSW) s 14(2)(a); *Legal Profession Act 2006* (NT) s 18(2)(a); *Legal Profession Act 2007* (Qld) s 24(2)(a); *Legal Profession Act 2007* (Tas) s 13(2)(a); *Legal Profession Act 2004* (Vic) s 2.2.2(2)(a); *Legal Profession Act 2008* (WA) s 12(3)(a). See also Bartlett and Burrell, above n 9, 83.

meaning from judicial dicta. In *Giraud*, Hall J relying on Brinsden J in *Barristers' Board v Palm Management Pty Ltd*<sup>37</sup> held that engaging in work in relation to the 'administration of law' was synonymous with engaging in the 'practice of law'.<sup>38</sup> In turn, the practice of law concerned providing advice or performing services that 'affected important rights of a person under the law and required some skill and knowledge of the law greater than that possessed by the average citizen'.<sup>39</sup> The average citizen could act routinely and mechanically to fill out blanks in a printed form or draw 'instruments of a generally recognised type that (did) not involve the determination of the legal effects of special facts and conditions' but anything that went beyond that to a 'situation where an instrument is shaped from a mass of facts and conditions, the legal effect of which must be carefully determined by a mind trained in the existing laws in order to ensure a specific result and to guard against others' would be legal practice.<sup>40</sup>

Daubney J expanded on the notion of legal practice in *Legal Services Commissioner v Walter*.<sup>41</sup> In his view 'the noun "practice" and the verb "practise" were "terms of art when used in the context of the professions"',<sup>42</sup> and he endorsed the 'broad approach' adopted by the Victorian Court of Appeal that to engage in legal practice was to carry on 'the profession of the law' or to engage 'in legal practice as a *legal practitioner*'.<sup>43</sup> People would commonly assume of a person purporting to be a legal practitioner that he or she was 'legally qualified' and was holding him or herself out to the general public 'as willing to act as a direct and responsible personal confidential legal adviser, and to do, and be directly responsible for, legal work generally...'.<sup>44</sup>

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<sup>37</sup> [1984] WAR 101.

<sup>38</sup> *Legal Practice Board v Giraud* [2010] WASC 4, [12].

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid* [13].

<sup>41</sup> [2011] QSC 132.

<sup>42</sup> *Ibid* [12].

<sup>43</sup> *Ibid* [13] citing *Felman v Law Institute of Victoria* [1998] 4 VR 324, 352 (Kenny JA).

<sup>44</sup> *Ibid* [14] citing *Downey v O'Connell* [1951] VLR 117, 122 (Gavan Duffy and O'Bryan JJ).

To paraphrase the observations of Phillips J in *Cornall v Nagle*<sup>45</sup> which were cited by Daubney J, if a person performs work which is usually (although not mandatorily) done by a solicitor, or does something that a statute or the rules of court require only a solicitor to do or does something which must be done only by those who have the necessary training or expertise in the law to do so as to protect the general public, then that person, who is not an admitted legal practitioner, will nevertheless be ‘regarded as acting or practising as a solicitor’.<sup>46</sup> Daubney J further held that to practise law was *not* equivalent to carrying on the business of being a lawyer in the sense of repeat business, regular payments for services rendered, soliciting business from the public, maintaining books and accounting records relating to a business and so forth.<sup>47</sup> In his view to practise law was to ‘invoke the notion of carrying on or exercising the profession of the law, not the “business” of the law’;<sup>48</sup> the central premise of a profession being, in addition to specialised learning, that it had ‘public service as its principal goal’.<sup>49</sup> It was accordingly fallacious to regard the indicia of carrying out a business as determinative of practising the profession of the law. Charging fees might be sufficient but was not necessary to determine whether a person had engaged in legal practice because one could practise law without any intention of charging for one’s services: ‘[A]n Australian legal practitioner who habitually acts pro bono for needy clients can hardly be said to be not engaged in legal practice because he or she provides professional legal services without reward from those clients’.<sup>50</sup>

The question of charging fees raises a key point in defining legal practice in South Australia. As previously mentioned, a difference between the two cases we have discussed is that in the first, Giraudo charged Domney for his services, whereas in the second there was no

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<sup>45</sup> [1995] 2 VR 188.

<sup>46</sup> *Legal Services Commissioner v Walter* [2011] QSC 132 [15] citing *Cornall v Nagle* [1995] 2 VR 188 (J D Phillips J).

<sup>47</sup> See *Legal Services Commissioner v Bradshaw* [2009] LPT 21, (Fryberg J).

<sup>48</sup> *Legal Services Commissioner v Walter* [2011] QSC 132, [18].

<sup>49</sup> *Ibid* [19]. Whether law is a profession or a business is an increasingly contested question. See also Paula Baron and Lillian Corbin, *Ethics and Legal Professionalism in Australia* (Oxford University Press, 2014) 10-22.

<sup>50</sup> *Legal Services Commissioner v Walter* [2011] QSC 132, [21].

evidence that Walter personally received remuneration (although there was evidence that he had solicited financial donations from members of the public to fund litigation of this nature).<sup>51</sup> The question of remuneration becomes pivotal in South Australia. Whether or not a person charges a fee appears to be the critical question in relation to whether he or she should be punished for practising law as a non-lawyer. Different jurisdictions tackle this question differently and it is to this we now turn.

In Queensland and Victoria (and in most instances of legal practice in New South Wales and Tasmania) the prohibition on unqualified practice is strict and there is no defence. However, Mr Walter's fate might have been different if instead of an injunction being sought against him, he had been prosecuted for the course of action he pursued in the Australian Capital Territory, the Northern Territory or in Western Australia. This is because each of these jurisdictions expressly provides that it is a defence to a prosecution for an offence against the relevant section if the person charged with undertaking legal work despite being unqualified proves that he or she did not engage in the legal practice for 'fee, gain or reward',<sup>52</sup> or 'has not directly or indirectly been paid or remunerated or promised or expected pay or remuneration for the work so done'.<sup>53</sup> The implication of this is that unqualified people in those jurisdictions can practise law pro bono with impunity (although arguably repeat offenders would find themselves the subject of injunction proceedings as was the case with Mr Walter).

The position in South Australia is more complicated, tying as it does in s 21(2) the idea of practising law with the idea of 'acting for fee or reward'. This means that the question of remuneration becomes one of central importance, not as a defence but as constituting an integral part of the practice of law. As we have seen, the Supreme Court of Queensland considered the question of

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<sup>51</sup> Ibid [26].

<sup>52</sup> See *Legal Profession Act 2006* (ACT) s 16(2); *Legal Profession Act 2006* (NT) s 18(3).

<sup>53</sup> *Legal Profession Act 2008* (WA) s 12(4).

remuneration in the context of the definition of ‘engage in legal practice’ and fairly rapidly considered that payment was not a necessary ingredient. Daubney J<sup>54</sup> adopted Street CJ’s statement in *Re Foster*:

A trade or business is an occupation or calling in which the primary object is the pursuit of pecuniary gain ... But in a profession pecuniary success is not the only goal. Service is the ideal, and the earning of remuneration must always be subservient to this main purpose.<sup>55</sup>

This is a compelling argument. And it highlights the incongruent position adopted by the South Australian statute. The South Australian Act specifically provides that a person practises the profession of the law, if acting for fee or reward on behalf of some other person, he or she performs certain activities. If, as Daubney J suggests, the earning of remuneration or the obtaining of some reward is subservient or subsidiary to the main purpose of legal practice, it is curious that the South Australian legislation make specific reference to it, and indeed, the legislation suggests that a person who performs the listed activities for no fee or no reward might not be in breach of the Act. In the absence of any judicial interpretation of s 21, it is strongly arguable that if Mr Walter had provided his services to litigants in South Australia he would not have been in breach of s 21 of the *Legal Practitioners Act 1981* (SA) because he was not acting for any fee or reward.

The extent to which the State would tolerate an unqualified person performing the listed activities, even without payment, remains untested. Assume that a law school Legal Advice Clinic was set up purely by law students to provide advice and draft documents for members of the public without any supervision by an admitted practitioner.<sup>56</sup> Section 21(2) of the *Legal Practitioners Act 1981* (SA)

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<sup>54</sup> *Legal Services Commissioner v Walter* [2011] QSC 132, [19].

<sup>55</sup> *Re Foster* (1950) 50 SR (NSW) 149, 151.

<sup>56</sup> Clinical legal education is an important aspect of most modern law schools, including that of the writers. However, all legal clinics in Australia that are attached to law schools operate under the strict and close supervision of fully qualified practising lawyers with practising certificates.

seems to suggest that there is no impediment to a law student gratuitously preparing legal instruments such as a will or a Memorandum of Transfer or providing advice about the law and drafting pleadings for a person who asks for help. If a law student pretended to be a lawyer and misled clients into believing that the student was in fact a qualified legal practitioner, that would be a different situation. But there is a plausible argument that pursuant to the current wording of the statute, a hypothetical unsupervised law school Legal Advice Clinic in South Australia would not be unlawful. However, we speculate that should that scenario occur, the legal profession would attempt to have it stopped without further ado.

There are no reported South Australian cases interpreting the term ‘reward’ in the *Legal Practitioners Act 1981* (SA). In the absence of any such judicial clarification, we argue that had Mr Walter’s case occurred in South Australia, he would not have been in breach of s 21 of the South Australian Act, because he was not acting for fee or reward. We could speculate that the term ‘fee or reward’ might be interpreted very broadly<sup>57</sup> because of the inherently ‘protective’ nature of the prohibition.<sup>58</sup> The courts have repeatedly stated that the aim of practitioner regulation is not about punishment but about acting in the public interest: a ‘public interest (which) is understandably demanding of proper behaviour and accountability from members of the profession’.<sup>59</sup> On the other hand, the ever-shrinking access to legal aid and prohibitively high legal fees charged by lawyers<sup>60</sup> present a scenario where it could be argued that it is in the public interest for members of the public to have a level of access to gratuitous advocacy services and legal assistance. In 2013, the Law Council of Australia reported that:

... funding for the legal assistance sector has continued to contract and has failed to keep pace with increasing demands for legal services. The

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<sup>57</sup> *Maguire v Modra* [2010] SASC 74, [4], [6].

<sup>58</sup> *Legal Practitioners Conduct Board v Figwer* [2013] SASC 135, [9]-[11].

<sup>59</sup> *Legal Practitioners Conduct Board v Patterson* (2011) 110 SASR 500, 502 [10].

<sup>60</sup> See Law Council of Australia, *Inquiry Into Access to Justice Arrangements* (Law Council of Australia, 2013) 39.

number of those disadvantaged under the civil and criminal justice systems has continued to grow.<sup>61</sup>

It could be argued that members of the public have a right to access such services from those with legal skills who have never qualified as legal practitioners or equally from persons who have a law degree and have even been admitted but who do not have a practising certificate. It is necessary to examine the rationale for the current prohibition.

#### IV THE RATIONALE FOR THE PROHIBITION

The principal justification for the prohibition against unqualified persons from engaging in legal practice is couched in terms of the need to ensure the proper administration of justice and the protection of the public. This is made explicit in all the State and Territory regulatory statutes, except South Australia.<sup>62</sup> These key provisions are replicated in Chapter 2 of the *Legal Profession National Law*.<sup>63</sup> This chapter, which is entitled: *Threshold requirements for legal practice* contains in Part 2.1 six provisions concerning 'Unqualified legal practice'. Part 2.1.1 sets out the objectives as follows:

- (a) to ensure, in the interests of the administration of justice, that legal work is carried out only by those who are properly qualified to do so; and
- (b) to protect clients of law practices by ensuring that persons carrying out legal work are entitled to do so.<sup>64</sup>

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<sup>61</sup> Ibid.

<sup>62</sup> *Legal Profession Act 2006* (ACT) s 15; *Legal Profession Act 2004* (NSW) s 13; *Legal Profession Act 2006* (NT) s 17; *Legal Profession Act 2007* (Qld) s 22; *Legal Profession Act 2007* (Tas) s 12; *Legal Profession Act 2004* (Vic) s 2.2.1; *Legal Profession Act 2008* (WA) s 11.

<sup>63</sup> See National Legal Profession Reform Project (31 May 2011), above n 4.

<sup>64</sup> Ibid 17.



The same rationale is constantly alluded to by judges in applications to strike solicitors from the roll of practitioners<sup>65</sup> and expressly informed Hall J's observation in *Giraudo* that the purpose of the prohibitions in ss 76 and 77 of the *Legal Practitioners' Act 1893* (WA) was to:

... protect members of the public by ensuring that legal work is only carried out by those persons who have obtained a proper legal education, leading to appropriate qualifications and who are subject to the disciplinary supervision of the courts in their practice of law.<sup>66</sup>

The central assumption that underpins this rationale is that in order to advise clients properly, people need to be qualified. It is difficult to take issue with this. Generally the more qualified one is in one's field the better service one will give. Take a commonplace example of a car mechanic. Anyone can hang up their sign but before entrusting a car for repairs, a car owner might obtain references and consider the reputation of the mechanic. But equally, other people might not do so. They might rationally reason: 'This person is not so well qualified but the price is good or the job will be completed tomorrow when I need the car so I'll just take a chance'. As autonomous actors, that could be argued to be simply a matter for them. Should it be any different with lawyers? If a person discloses the extent of his or her qualifications – for example, 'obtained a law degree with First Class Honours from XYZ University'; or 'obtained LLB and completed practical legal training but have not been admitted to the roll of practitioners', then a consumer of legal services might argue for the right to take a chance on that person's ability to give him or her legal advice. The average consumer may ask: 'What is so special about the practice of law that it merits such stringent requirements for qualification and practice?' The lay person may reason that it cannot be solely about expertise and having a specialist advocate acting for one in a court or tribunal, given the fact that numbers of unrepresented litigants are increasing exponentially and some of those unrepresented litigants actually end up having judgment given in their favour. On the other hand, increasing specialisation within

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<sup>65</sup> *Legal Practitioners Conduct Board v Figwer* [2013] SASC 135, [9]-[11]; *Legal Services Commissioner v Nguyen* [2013] VSC 443, [25]-[26].

<sup>66</sup> *Legal Practice Board v Giraudo* [2010] WASC 4, [11].

the legal profession means that consumers not only need the right type of legal assistance but they also need a particular lawyer. Certainly the requirement of lawyers to hold professional indemnity insurance provides consumer protection that might be diluted if assistance is sought from an unqualified adviser.

Some guidance about the value of the stringent requirements for membership of the legal profession is given in *Wellington v Police*<sup>67</sup> by Kourakis J (as he then was) when he considered the question of awarding costs for the attendance in court of a lay person who was given leave to appear in the Magistrates Court on behalf of an accused. Kourakis J held that:

... a person who is given leave to appear before the Magistrates Court is not subject to the prohibition against legal practice by unqualified persons enacted by S21 of the *Legal Practitioners Act 1981*. However, the discretion to allow lay persons to represent others must be exercised judicially and *with a keen appreciation of the special responsibilities of those who assist in the administration of justice*. Unless there is good reason to do so, having regard to the objects and purposes of the *Legal Practitioners Act 1981*, the discretion should not be exercised in a way which encourages representation by persons who are neither legally trained nor subject to the professional ethics and discipline of legal practitioners.<sup>68</sup>

The lawyer's duty to the court is at the heart of the requirement for legal practitioners to be not only appropriately qualified but most importantly to be 'fit and proper' to carry out the role. For example, as explained by Mason CJ in *Giannerelli v Wraith*:

The performance by counsel of his paramount duty to the court will require him to act in a variety of ways to the possible disadvantage of his client. Counsel must not mislead the court, cast unjustifiable aspersions on any party or witness or withhold documents and authorities which detract from his client's case. And, if he notes an irregularity in the conduct of a criminal trial, he must take the point so

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<sup>67</sup> *Wellington v Police* [2009] SASC 294.

<sup>68</sup> *Ibid* 13 (emphasis added).

that it can be remedied, instead of keeping the point up his sleeve and using it as a ground for appeal.<sup>69</sup>

Unqualified persons appearing as ‘advocates’ are neither trained in such professional ethical issues, nor are they bound by lawyers’ codes of conduct. The adversarial system is reliant upon officers of the court being trustworthy and reliable. They must be able to trust each other and to be trusted by the courts. For example, any undertaking given by a practitioner must be taken seriously because lawyers are officers of the court.<sup>70</sup> Breach of an undertaking may be contempt of court, may be professional misconduct and may give rise to liability to compensate any affected party who has suffered a loss because of the breach. Lawyers have a duty not to mislead the court in relation to law and facts, a duty to act with honesty and candour towards the court, and to conduct cases competently, efficiently and expeditiously.<sup>71</sup> The multitudinous and complex ethical rules applicable to the conduct of litigation exist in order to sustain the adversarial system of justice. Lawyers and judges need to be able to trust each other and uphold the rules of ethics that underpin legal practice. The adversarial system as we know it would be unsustainable if legal practitioners could not be relied upon to comply with undertakings, to speak frankly in court, to uphold all of the rules relating to clients who are pleading to criminal charges, and to raise all issues of law relevant to a matter, even if they are not favourable to a client’s case.<sup>72</sup> A person who engages in legal practice by representing someone in court but who does not comply with these ethical rules could seriously disrupt the adversarial process. The oft-quoted explanation by Kitto J is of value here:

[T]he Bar is no ordinary profession or occupation. These are not empty words, nor is it their purpose to express or encourage professional pretensions. They should be understood as a reminder that a barrister is more than [the] client’s confidant, adviser and advocate, and must therefore possess more than honesty, learning and forensic ability. [A barrister] is, by virtue of a long tradition, in a relationship of intimate

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<sup>69</sup> (1988) 165 CLR 543, 556.

<sup>70</sup> *Law Society of NSW v Malouf* [2007] NSWADT 54, [26].

<sup>71</sup> *Kyle v Legal Practitioners’ Complaints Committee* (1999) 21 WAR 56.

<sup>72</sup> See, eg, Rules 17 and 19 of the *Australian Solicitors Conduct Rules* (in force in South Australia and Queensland).

collaboration with the judges, as well as with ... fellow-members of the Bar, in the high task of endeavouring to make successful the service of the law to the community. That is a delicate relationship, and it carries exceptional obligations. If a barrister is found to be, for any reason, an unsuitable person to share in the enjoyment of those privileges and in the effective discharge of those responsibilities, [that barrister] is not a fit and proper person to remain at the Bar.<sup>73</sup>

The qualifications of lawyers extend beyond knowledge of and expertise in the application of the law. The role of the lawyer encompasses, in Kitto J's words above, 'a relationship of intimate collaboration with the judges, as well as with ... fellow-members of the Bar'. This is a complex relationship that necessitates the requirement that lawyers be 'fit and proper' persons to comprehend it and to properly exercise the function of officer of the court.

The second assumption that underpins the public interest rationale that informs the prohibition of unqualified lawyers, is that judicial control over all legal practitioners, recalcitrant and otherwise is essential to secure the proper administration of justice and to 'maintain public confidence that professional standards are being upheld, and with that, the maintenance of the public's confidence in the mechanisms for supervising professional conduct'.<sup>74</sup> For example, in a joint judgment in *Legal Practitioners Conduct Board v Patterson*,<sup>75</sup> Gray, Sulan and Blue JJ strongly denounced the conduct of a practitioner who had undertaken legal work for a 'secret client base'. Whilst employed by a law firm, the practitioner had acted for a number of clients on criminal charges (mostly drug-related matters) without opening files, recording times, entering any fee arrangement and without accounting in any way to the firm. He received cash payments totalling many thousands of dollars for his services. The Legal Practitioners Disciplinary Tribunal considered that this amounted to unprofessional conduct and the Full Court agreed, saying that:

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<sup>73</sup> *Ziems v The Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279, 298.

<sup>74</sup> *Legal Practitioners Conduct Board v Figwer* [2013] SASC 135, [14].

<sup>75</sup> *Legal Practitioners Conduct Board v Patterson* (2011) 110 SASR 500.

The totality of the circumstances before the court indicate that the practitioner lacks the quality of character and trustworthiness which are necessary attributes of a person entrusted with the responsibilities of a legal practitioner. The practitioner's conduct is of such a kind that, if tolerated, would bring the legal profession into disrepute. The conduct represented a gross departure from proper professional standards. The conduct amounted to an abuse of privileges which accompany a practitioner's admission to this court. The conduct is of a nature that would erode public confidence in the legal profession. There is a need to protect the public from unprofessional and dishonest practitioners. The public is to be protected from legal practitioners who are ignorant of the basic rules of proper professional practice or indifferent to rudimentary professional requirements.<sup>76</sup>

Implicit in this judgment is the overriding dichotomy of self-regulation. The profession controls the admission of its own members so that it can control their behaviour and conduct. At the same time, it needs all persons who engage in legal practice to be members, so that their conduct can be monitored and regulated. Anyone who engages in legal practice who is not an admitted member of the profession, is untouchable by the regulatory bodies, except the Supreme Court (which is of course the ultimate regulatory body for legal practitioners through its inherent jurisdiction in relation to the admission of practitioners). However, in cases heard by Supreme Courts in relation to persons who are not legal practitioners engaging in legal practice, the Supreme Court is not exercising its inherent jurisdiction. It is acting in its appellate role (because breaches of the *Legal Practitioners Act 1981* (SA) and other equivalent Acts are dealt with as summary offences in the Magistrates Court).

In addition, clients who are victims of negligence by unqualified persons have no recourse to actions in professional negligence, and the perpetrators are unlikely to carry any kind of professional indemnity insurance. Nor would such victims have recourse to any kind of statutory indemnity fund, such as the Legal Practitioners' Fidelity Fund (formerly the Solicitors' Guarantee Fund) in South

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<sup>76</sup> Ibid 502 [11] (citations omitted).

Australia.<sup>77</sup> Arguments can be put forward to suggest other ways of protecting clients and ensuring proper regulation of the legal profession. A lawyer who has been fraudulent or negligent or who has breached her fiduciary duty to her client can be sued in civil law for breach of duty in tort, contract or equity. Alternatively, the legal profession could be controlled by enacting legislation which makes breaches of duties the subject of criminal as well as civil proceedings. In other words exclusive judicial control over the legal profession is one but not the only means of ensuring a proper system of the administration of justice. Indeed a critic of the current system might argue that it cannot be rationalised on reasoned, principled grounds. That it is, in truth, none other than a monopoly that arose as a matter of historical accident and is now fiercely defended by those with vested interests who appeal to notions like the public interest to justify the continued cartelisation of law and are slow to put forward legislative reform to change it. Of course a weakness in the suggestion that people can enforce their rights against lawyers in courts is that they might not have the resources to do so and in that way, slipshod or fraudulent lawyers escape all consequences of their actions. That is a real concern given the costs of accessing justice. But again it is a circular argument. Arguably we have access to justice issues today because lawyers have priced themselves out of the market. If lay people could give legal advice or act as legal advocates, costs might be reduced and more people might be able to afford to have their day in court. Alternatively, the provision of unsound or incomplete advice might jeopardise a litigant's case and end up being more costly.

Attempts have been made to facilitate access to justice by allowing non-legally qualified advocates to appear in tribunals and small claims courts. In addition, patent and trade mark attorneys have for many years legally performed work which otherwise ordinarily might fall within the definition of 'legal practice', although Bartlett and Burrell point out the fragility of their 'safe harbour'.<sup>78</sup> McKenzie friends are not legally trained, but are permitted in courts to assist

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<sup>77</sup> Legal Practitioners Amendment Bill 2013 (SA) s 37 (at the time of writing). After 1 July 2014, see *Legal Practitioners Act 1981* (SA) s 57.

<sup>78</sup> Bartlett and Burrell, above n 9.

unrepresented litigants and provide moral support.<sup>79</sup> However, the literature suggests that tribunals have not been wholly effective in promoting access to justice, especially because litigants who are unrepresented are invariably disadvantaged compared to those who have advocates to appear on their behalf, even when those advocates are not legally qualified.<sup>80</sup> For example, unrepresented litigants are disadvantaged against real estate agents who manage investment properties for private landlords and regularly appear in the Residential Tenancies Tribunals. These agents are conversant with the forms, the terminology and the procedures. The same can be said for unrepresented litigants who face insurance clerks appointed by insurance companies to act on their behalf in contesting minor civil motor vehicle property damage claims.

Additionally members of the public are now able to obtain legal information from a variety of sources, most particularly with the proliferation of internet sites. Will kits and Do-It-Yourself divorce kits are a consumer response to the high costs of legal services, although these ‘self-help’ devices are often the cause of later difficulties for people who are forced to seek appropriate advice from specialist lawyers because they were not properly advised in the first place. Additionally, it would appear that preparing one’s own will using a kit is legally sound; using a will kit to prepare a will for another person may be illegal.<sup>81</sup> In *Law Institute of Victoria v Maric*, Osborn J said that:

[a] will is intended to effect a change in legal relationships. The preparation of a will necessarily carries with it implied advice that the document is effective to realise the intentions of the testator in this regard.<sup>82</sup>

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<sup>79</sup> *McKenzie v McKenzie* [1970] 3 All ER 1034.

<sup>80</sup> See Hazel Genn, ‘Tribunals and Informal Justice’ (1993) 56 *Modern Law Review* 393; Robert Nicholson, ‘Can Courts Cope with Self-Represented Litigants?’ (2005) 8 *The Flinders Journal of Law Reform* 139.

<sup>81</sup> See *Attorney-General (WA) v Quill Wills Ltd* (1990) 3 WAR 500; *Australian Competition and Consumer Commission (ACCC) v Murray* (2002) 121 FCR 428.

<sup>82</sup> *Law Institute of Victoria v Maric & Home Conveyancing Reservoir Pty Ltd* [2006] VSC 361, [91].

Just as medical information from the Internet and other sources can be useful in a general sense but inadequate for a complete diagnosis of a unique medical condition, some would argue that legal information can never be a substitute for legal advice based on a particular and unique set of circumstances and that the practice of law is necessarily complex. To reiterate what was said by Hall J:

Work of a merely clerical kind such as filling out blanks in a printed form or drawing instruments of a generally recognised type that does not involve the determination of the legal effect of special facts and conditions should not be regarded as legal work. However, that is to be distinguished from the situation where an instrument is shaped from a mass of facts and conditions, the legal effect of which must be carefully determined by a mind trained in the existing laws in order to ensure a specific result and to guard against others. In such a case more than the knowledge of the layman is required and a charge for such services brings it within the practice of the law.<sup>83</sup>

And that brings us back to Mr Walter. If Mr Walter, based in South Australia provided sage advice to a group of people about the planning laws around wind farms to enable them to institute proceedings for no fee or reward, it would appear that he would not be in breach of the South Australian legislation. Whether or not he *should* be prohibited from doing this is a separate question.

## V CONCLUSION

It is worth considering why the State should spend valuable resources prosecuting a person who is genuinely trying to assist a fellow citizen for no reward. Perhaps, in the litigation context anyway, the answer lies in the need to maintain the appropriate relationship between officers of the court (lawyers) and the court itself. The ethical framework within which lawyers and judicial officers assist in the administration of justice is complex. Members of the public have a right to expect that they are dealing with a

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<sup>83</sup> *Legal Practice Board v Girardo* [2010] WASC 4, [13] citing *Brinsden J in Barristers' Board v Palm Management* [1984] WAR 101, [108].



professional advisor who is bound by an ethical framework and who knows how to operate within its boundaries. This includes the complexity of the ethical notion of legal professional privilege. However, the legislative caveat of 'fee or reward' in South Australia leaves a curious gap in the otherwise watertight regime of insisting on tertiary qualifications, passing the 'fit and proper person' test and annual applications for practising certificates and professional indemnity insurance. The real problem that the legal profession faces is that justice for most citizens is becoming more and more elusive. If the profession insists on maintaining its monopoly over legal services, the profession must act quickly to develop ways of widening the very narrow opening that provides access to justice. In South Australia, whether or not the narrow opening is stretched to allow unqualified advisers to provide assistance if they do not charge for their services remains to be adjudicated.