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## WEEK 1: LEGAL ETHICS & PROFESSIONAL PRACTICE

The *Legal Profession Uniform Law Australian Solicitors' Conduct Rules* 2015 (NSW) sets out the ethical and professional obligations of solicitors in NSW. The principles in the *Legal Profession Uniform Conduct (Barristers) Rules* 2015 (NSW) apply to barristers in NSW.

Important rules applying to barristers include:

Barristers owe their paramount duty to the administration of justice;

Barristers must maintain high standards of professional conduct;

Barristers must act honestly, fairly, skilfully, bravely, and with competence and diligence;

Barristers owe duties to the court, to their clients, and to their barrister and solicitor colleagues.

Rule 4.1 of the *Solicitors' Conduct Rules* states that a solicitor must be honest and courteous in all dealings in the course of legal practice.

**Amoral:** An indifference to moral responsibility

**Immoral:** A failure to conform to what is generally accepted by a culture as correct behaviour

**Positivism:** The separation of law and morals or cultural norms

**Deontology:** The science of duty or moral obligation

**Teleology:** The doctrine of final causes; reality is determined by final goals and purposes

The paramount duty of a lawyer is the court and the administration of justice, this duty prevailing over any other inconsistent duty (*ASCR* r 3.1).

### The Amoral Lawyer

Wasserstrom stated that the lawyer-client relationship requires lawyers to be amoral to a variety of consequences, that would be immoral in other contexts. The lawyer has a duty to the client to use their expertise, irrespective of morality, provided that the conduct is not unlawful. The problem with morality is that a moral approach may not be acceptable to the client or acceptable in society at large.

### What is Being Professional?

Courtesy, honesty, integrity, diligence, and candour are all characteristics / attitudes consistent with being a professional. Penalties for unacceptable behaviour on the part of a lawyer include a reprimand or even a costs order against the lawyer. An example of unacceptable behaviour is in *Baker v Legal Services Commissioner* [2006] QCA, in which case a solicitor used profane language to a client, calling them, inter alia, a “fucking moron”.

### Legal Ethics Code?

A code must be able to ‘permit the coercion of ethical delivery of professional services and ... offer a prospect of deterrence of professional misconduct’. G Mackenzie, in *The Valentines Card in the Opening Room: Codes of Ethics and Failing Ideas of the Legal Profession* (2015), states that, codes of ethics help ‘to remind the profession and inform the public of the public service dimension of the practice of law’. He claims that, ‘codes that seek to regulate the profession cause more problems because they cannot help but at least dilute the public service orientation ... detailed codes to control ethical behaviour are doomed to fail ... there is a need for flexibility which is destroyed when ethical codes become too specific’.

Mackenzie also adds that, ‘an exhaustive code of black-letter rules is unlikely to attract the support of a professional consensus which is important in any system of self-government, partly because voluntary compliance is preferable to disciplinary sanctions’.

## ADMISSION TO PRACTICE

In order to be admitted to practice as a lawyer, the regulatory body must assess whether the applicant is a 'fit and proper person' to practice. The act of admission is done by the NSWSC, which admits a person who meets the requirements of the admission rules, pays the admission fee, and takes the oath or affirmation required by the court. The applicant then signs the roll of practitioners and becomes an officer of the court.

In NSW, the *Legal Profession Uniform Admission Rules 2015* Schedule 2 provide for requirements of an applicant in order to be admitted, including the priestly 11 subjects. An additional requirement is 2 years of legal practice after completing a PLT program. The *Legal Profession Uniform Admission Rules 2015* Schedule 2 also sets out the objectives and required competencies of the mandatory practical training.

An applicant for admission is required to satisfy the Admitting Authority that the applicant is "currently of good fame and character" [*Legal Profession Uniform Admission Rules 2015* r 10(1)(f)] In NSW, the legislation also requires the Admitting Authority to consider whether the applicant is "a fit and proper person" for admission to the legal profession [*Legal Profession Uniform Law (NSW)* section 17(1)(c)].

In accordance with the *Legal Profession Uniform Admission Rules 2015* (NSW) r 12(1)(a), an application must be made by statutory declaration in a form determined by the Board. R 16(1) states that an application for a compliance certificate must include 2 statutory declarations as to the applicant's character (non-relative). R 16(3) states that a person making a statutory declaration under this rule must have known the applicant for a period of at least 2 years. R 16(6) states that the Board may require an applicant to provide any other evidence determined by the Board about the applicant's fame and character.

## DISCLOSURE

Under the *Legal Profession Uniform Admission Rules 2015* (NSW) r 17(1) states that an application for a compliance certificate must include a statutory declaration by the applicant disclosing any matter, to which a reasonable applicant would consider that the Board might regard as not being favourable to the applicant when considering whether the applicant is currently of good fame and character and a fit and proper person to be admitted to the Australian legal profession. R 17(2) requires every applicant to completely disclose matters referred to in r 17(1). R 17(3) states that an application including a statutory declaration under r 17(1) must also include original or certified copies of any available documentary evidence relating to any matter disclosed.

For applicants wishing to practice in another state, this practise is governed by the *Mutual Recognition Acts 1995* of the States and Territories and by the *Mutual Recognition Act 1992* (Cth).

In *Re OG*, the applicant and another student (GL) colluded on a university assignment, and consequently both received zero. One of the students applied for admission revealed the incident but said that the assignments were similar due to a group project and partly due to coincidence. GL gave a false reason why the incident occurred. The fact is that there was never a group involved in the project. OG was admitted, and the board asked GL to write his particulars in an affidavit. In his affidavit, he did not write that OG was involved in the assignment. OG was later identified and investigated. It was found that the standard of proof should be higher in cases of misconduct and full disclosure is required. It was held that a court can charge criminally, but the court is not confined to placing criminal consequences. OG was eventually struck off the role.

### GOOD FAME AND CHARACTER

In *Re B*, person seeking admission was a social activist, who at one point in time, as part of her activism, had paid bail for a prisoner in the past. The court was unaware of this fact. The court refused admission, and the court said that you must disclose everything and let the court decide whether or not it was acceptable. The applicant was held not to be a 'fit and proper person' for admission; it was held that she was misleading the court and was not fit to be a barrister, as she wanted to be a barrister so badly that she was prepared to lie before the court.

In *Re Davis*, the applicant had forgotten to tell the court that when he was younger, he had been convicted of a break and enter. He appealed to the HCA and the court held that he was not a 'fit and proper person' to be admitted as a barrister. He had already been admitted as a barrister; however, his past had caught up with him one year later.

In *Re: Application by Hinds*, had been convicted of drink driving offences and 5 counts of domestic violence; however, since he admitted all convictions in court, he was admitted.

### FIT & PROPER PERSON

#### **Legal Profession Uniform Law (NSW) s 17: Prerequisites for compliance certificates**

(1) The prerequisites for the issue of a compliance certificate in respect of a person are that he or she-

- (a) Has attained the academic qualifications specified under the Admission Rules for the purposes of this section; and
- (b) Has satisfactorily completed the practical legal training requirements specified in the Admission Rules for the purposes of this section; and
- (c) Is a **fit and proper person** to be admitted to the Australian legal profession.

(2) In considering whether a person is a fit and proper person to be admitted to the Australian legal profession-

- (a) The designated local regulatory authority may have regard to any matter relevant to the person's eligibility or suitability for admission, however the matter comes to its attention; and
- (b) The designated local regulatory authority must have regard to the matters specified in the Admission Rules for the purposes of this section.