

Topic 1.1 – Professionalism and Uniform Rules

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- Uniform law is driven by top tier firms wanting to ensure continuity between states for admission
- State Supreme Court has the power to deal with lawyers, not the Australian Constitution
- SA & WA are not interested in the Uniform Law

Uniform laws

- Package of laws that have been copied and pasted for each participating State

What is meant by profession?

- No single definition of "profession" that is universally accepted however they share the following three attributes:
 - Specialised skill and learning;
 - Public service as the principal goal; and
 - Autonomy or self-regulation
- "the primary aim of a professional man or woman was not to make money, but to provide, for example, good health care or good legal services. To be sure they usually made a good living...but a member of a profession was an educated person whose knowledge was acquired, not for the purpose of sale, but on trust for the benefit of the profession itself and the community, which it serves. That is to say, professional practice involved the use by practitioners of the knowledge which they acquired through their education, not in the conduct of an enterprise intent on acquiring the largest market share and making the most profits, but as individuals serving their clients and through them, the community."
 - *Sir Daryl Dawson* 1996

Sources of Lawyers' Professional Responsibility

- General law governs most of the relationships relevant to lawyers dealings with their clients, courts and third party
- General law relevant to lawyer/client relationship include:
 - Contract
 - Tort (duty of care)
 - Fiduciary duties
 - Confidential information
 - Doctrine of legal professional privilege
- Lawyers are subject to numerous statutory obligations, including:
 - Legal professional legislation in each jurisdiction; now Uniform Law
 - Laws relevant to the conduct of their business (e.g. Bar Rules)
 - Since 2001 there has been a significant push towards uniform national laws - and since 1 July 2015 Victoria and New South Wales (80% of Australia's lawyers) have adopted the "uniform law"
- According to the Law Council of Australia's Statement on National Practice four aims drove the push towards substantial uniformity:
 - To encourage competition leading to greater choice and other benefits for consumers;
 - To enable integrated delivery of legal services on an Australia-wide basis that is commensurate with existing and future market demand for legal services;

- To streamline state and territory regulation to allow lawyers to practice "seamlessly" within Australia; and
- To enable Australian law firms to compete on a national and international basis and market themselves to international companies looking to invest in Australia

Professional Rules

- Professional rules serve:
 - As a standard of conduct in disciplinary proceedings
 - As a guide for action in a specific case
 - As a demonstration of the professions commitment to integrity and public service
- Professional rules have a statutory foundation - similar to rules of court
- Set objective standard of conduct
- 'reliable' indication of accepted opinion
- PR statement to broader community

Topic 1.2 – Legal Practice & Admission



Legal Practice

- Only 'qualified entities' can engage in legal practice
- A 'qualified entity' includes an Australian Legal Practitioner (an Australian Lawyer who holds a current Australian practising certificate)
- Australian legal practitioners are required to meet a number of responsibilities in order to engage in legal practice
- Advising and representing clients for a fee (not always)

Barristers

- Specialist advocates who traditionally practice as sole practitioners to maintain independence
- Part of a 'fused' profession under the *Uniform Law* which defines a 'barrister' as 'an Australian legal practitioner whose Australian practising certificate is subject to a condition that the holder is authorised to engage in legal practice as or in the manner of a barrister'
- The culture within Victoria is split but the practice is 'fused' between solicitors and barristers
- Barristers generally look more critically at the evidence provided to them than the solicitors do
- Act as a gatekeeper between clients and the courts
- More aligned with the Court than solicitors
- Tends to be more negotiating with your client and solicitor than the opposing counsel/client
- Traditionally work is referred to them by solicitors but they can accept work directly from a client but very rare (1%)
- Barristers required to accept any work referred to them under the 'cab rank rule' provided that it is within the area of expertise, there is no conflict of interest with a former client or self-interest, and an appropriate fee is offered & capacity (grey area)
- Per Bar rules, barristers should not visit solicitors' offices, instead requiring solicitors and clients to attend their chambers for the purpose of giving instructions
- Payment of barrister's fees becomes a responsibility of the solicitor to ensure fees collected from client and passed on to the barrister



Solicitors

- Broad range of activities
- More directly involved in advising
- Corporate, government & private practice
- First contact with the client
- Don't have to go to Court if don't want to

Unqualified legal practice

Legal Profession Uniform Law Application Act 2014 (Vic), **Schedule 1**, Part 2.1

- Objectives - 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 to protect clients of law practices by ensuring that persons carrying out legal work are entitled to do so (s.9)
- Prohibits unqualified entities from engaging / advertising legal practice (s.10 & 11)
- Prohibits the use of certain titles: lawyer, legal practitioner, barrister, solicitor, attorney, counsel or proctor, Senior Counsel, Queen's Counsel, King's Counsel, Her Majesty's Counsel or His Majesty's Counsel + anything else in Uniform Rules (s.12)
- Note: "Lay Associates" exemption (s.14)
- This Act ensures that people are adequately trained to provide the legal advice, to protect clients and consumers

Control over admission

Pre LPUL

- Requirements, rules and procedures:
 - *Legal Profession Act 2004*
 - *Legal Profession (Admission) Rules 2008*
- Controlling bodies:
 - Council of Legal Education (s.6.5.2)
 - Board of Examiners (s.2.3.10)
 - Supreme Court (s.2.3.6)

LPUL

- Requirements, rules and procedures:
 - *Legal Profession Uniform Law Application Act 2014* (Vic)
 - *Legal Profession Uniform Law Admission Rules 2015*
 - To be admitted to practice in Victoria, you must comply with the requirements under Part 2.2. of the Act and the Legal Profession Uniform Law Admission Rules 2015
- Controlling bodies:
 - Victorian Legal Admissions Board (VLAB)
 - Supreme Court

What is meant by admission to practice?

- "...to 'practise' as a barrister or solicitor derives from the right conferred by the Supreme Court of each jurisdiction to suitably qualified and honourable persons to appear before those courts in the interests of the administration of justice"
 - Ainslie Lamb, John Littrich and Karina Murray, *Lawyers in Australia* (Federation Press, 3rd ed, 2015) p49
- Each state's Supreme Court looks after admissions, they are the caretakers

Practice v Practise

- 'practice' is a noun, refers to an act itself, not who is doing it
- 'practise' is a verb, meaning to do something repeatedly to improve one's skill
- In order to practise law, you will need to work in a legal practice

LPUL - Part 2.2, Division 1, s.15 Objective - Two limbs

- Object of this Part is to protect the administration of justice and the clients of law practices by providing a system under which persons are eligible for admission to the Australian legal profession only if:
 - a. They have appropriate academic qualifications and practical legal training, whether obtained in Australian or elsewhere; and
 - b. They are fit and proper persons to be admitted
- To ensure that lawyers:
 - Have appropriate academic qualifications
 - Have appropriate practical legal training (PLT or clerkship model)
 - Are 'fit and proper people' to be qualified
- Is seen to be necessary for:
 - The administration of justice; and
 - The protection of consumers of legal services

Eligibility Requirements:

- Three requirements for admission:
 - Must be at least 18 years' old;
 - Must have the approved academic qualifications; and
 - Must have satisfactorily completed the approved practical legal training
- These three criteria are common to all Australian jurisdictions (Uniform Law Chapter 2, Part 2.2, Division 2 ss.16-17)
- Requires applying to VLAB for a Compliance Certificate stating that the applicant s/he has satisfied the specific academic qualifications prerequisite and the specified practical legal training prerequisite (or is exempted under s.18); and is a fit and proper person to be admitted to the Australian legal profession [as referred to in s.17(l)(c)]
- VLAB → "board of examiners" - sign off (check birth certificate, proof of age, academic transcript, PLT transcript/certificate of completion) - then prepare Compliance Certificate

Admission Requirements - Academic

- Persons wishing to be admitted to practice as an Australian lawyer as a local applicant must complete a course of study approved by the Council of Legal Education under Rule 2.04 and complete the 11 prescribed academic areas
- The compulsory "Priestley 11" subjects are:
 - Criminal law and procedure
 - Company law
 - Torts
 - Administrative law
 - Contracts

- Federal and state constitutional law
- Ethics and professional responsibility
- Property
- Civil procedure
- Equity (including Trusts)
- Evidence

Admission Requirements - Practical Legal Training (PLT)

- Once a candidate has completed an approved academic course, which includes all 11 Priestley subjects, he/she must complete the Practical Legal Training (PLT) requirements
- There are two options for completing PLT:
 - Supervised Workplace Training (SWT)
 - An approved PLT course (Leo Cussen, College of Law, ANU etc.)

Supervised Workplace Training (SWT)

- 12-month period of supervised training under an eligible supervisor
- 220 performance criteria
- Responsibility, lawyers skills, risk management must be completed through an approved PLT provider
- File or workbook must be maintained to demonstrate competence in each element
- Only one trainee per supervisor
- Some employers may not be able to adequately provide training in any of the optional areas due to the nature of their practice. In this case, the employer may apply to the Board for approval to provide training in a different nominated practice area

Practical Legal Training (PLT)

- Victorian approved PLT providers are:
 - Leo Cussen Institute
 - The College of Law
 - ANU
 - South Australia and Tas also have programs

Application Process: Local / PLT & SWT Graduates

- Personal details
- Academic qualifications
- Student conduct reports
- Disclosure re 'fit & proper' person
- Police report (national / including spent convictions)
- Character affidavits

Character statements

- Any person who supplies a statutory declaration of character to support an application:
 - a. Must be aware of any disclosure made by the applicant; and
 - b. Must attest to that knowledge in the person's affidavit of character
- Form attestation - where disclosures are made:
 - "I have read the applicant's disclosure affidavit's / sworn/affirmed [*insert date/s*] and notwithstanding the contents believe the applicant to be a fit and proper person and of good fame and reputation"
- Because of the privacy implications of disclosures about an applicant's capacity, a person who supplies an affidavit of character need not be aware of any disclosure relating to physical impairment, mental illness or addictions if any disclosure about capacity has been set out in a separate affidavit

Suitability requirements

"Fit and Proper Person"

- Supreme Court may rely on the VLAB's recommendation
- VLAB must consider the suitability matters - s.17(2)(b) / Admission Rules:
 - Character - content of any statutory declaration (rule 16)
 - Disclosures (rule 17)
 - Police reports (rule 18)
 - Academic conduct reports (rule 19)
 - Certificate of good standing (rule 20)
 - Current reputation and character
 - Any previous bankruptcy etc.
 - Previous offences (including overseas)
 - Previous disciplinary actions in any profession or occupation (including overseas)
 - Whether the applicant is currently unable to satisfactorily carry out the inherent requirements of practice (mental illness)
 - Sufficient knowledge of written and spoken English
- See VLAB "Disclosure Guidelines for Applicants for Admission to the Legal Profession" (2015)
- Balance between the consumer and the profession

Requirements continued

- Good fame and character
- Fit and proper person
- Can seek an early determination via s.21
- Entrusted with affairs of the public
- Issue with past behaviour used as predictor of future conduct
 - Criminal justice system geared towards rehabilitation, therefore past behaviour as predictor of future conduct is not great

Ongoing suitability

- 'suitability matters' may also be grounds for suspending or cancelling a practising certificate if the holder is no longer regarded as 'a fit and proper person' to hold the certificate
 - Mental health is an issue here
 - Renew practising certificate every year

'Good fame and character'

- Fame relates to reputation and character involves an objective assessment of a person's quality (by reference to previous acts)
- Negative test
- Assumed to be of good fame and character unless you show otherwise
- Relevant matters include:
 - Criminal history
 - Political activity
 - Dishonesty
 - Worst one to fail

Duty of Disclosure

- Applicants are required to disclose any matter which might be relevant to their 'good fame and character' or 'fit and proper person'

- Recent cases demonstrate that the Courts believe there is an increasing expectation that any matters relevant to the assessment of an applicant's honesty will be disclosed

Matters that may need disclosure

- Criminal conduct - possibly charges
- Intervention and apprehended violence orders
- Infringement offences / traffic offences
- Academic misconduct
- General misconduct
- Making false statutory declaration
- Social Security offences
 - e.g. Centrelink
- Tax offences
- Corporate insolvency / penalties where the applicant was a director
- Matters relevant to capacity

Re Davis (1947) 75 CLR 409

- Davis, was refused admission for failing to disclose a conviction for breaking, entering and stealing that had been recorded eight years before his application. Despite the fact that the original offence had occurred in unusual circumstances and in a time of great personal hardship for Mr Davis, the court found that his lack of candour in disclosing the offence was a bar to admission. This bar remained in place for Mr Davis for many years. Despite several further applications, he was not admitted until 1978, some 32 years after his initial application

Re Hampton [2002] QCA 129

- The applicant failed to disclose a disciplinary finding of inappropriate conduct on his part in his previous employment as a nurse (accessing a patient's confidential information to pursue a relationship with her). This was held to warrant refusal of admission as a lawyer. The court found that, in addition to the lack of candour in failing to disclose this matter, his past behaviour showed a lack of appropriate professional judgement and discretion

Re The Application of Del Castillo To Be Admitted As A Legal Practitioner [1999] FCA 626

- The applicant failed to disclose in his application to be admitted in the ACT that he had been acquitted of murder. The applicant claimed that he had received legal advice that he need not make the disclosure because he had been acquitted. Both the ACT Supreme Court and the Full Federal Court found otherwise
 - Should still disclose acquittals, not just convictions

Failure to Disclose Past Academic Misconduct

- Relatively recent development - in response to the apparent increase in the number of matters relating to plagiarism in particular
- Uniform Admission Rules require specific disclosure of any adverse findings in relation to disciplinary proceedings in a tertiary institution (with some discretion)

Re OG (A Lawyer) [2007] VSC 520

- Allegations of colluding on an assignment. Two students (OG & GL) awarded zero marks for the assignment
- Students had different understandings as to whether a formal adverse finding had been made
 - GL failed, OG passed
- GL disclosed, OG did not

- OG was questioned about failed assignment and stated he didn't attend classes and misunderstood requirements. OG was admitted
- GL's application came for further hearing and OG was identified as the other student involved. Refused to issue certificate because disclosure less than candid
- The Board then reported to the Supreme Court that OG had made inadequate disclosure on his application for admission. After a hearing in which OG made serious allegations against GL the court found that OG had made a deliberate misrepresentation to the Board about the facts surrounding the assignment that attracted the zero mark and revoked its previous order admitting him to practice

Student Conduct

- Adverse findings of academic misconduct or failure to disclose that finding are most serious
- *Re Application by Saunders* → disclosed conviction for failure to declare earnings for casual employment whilst receiving AUSTUDY, denied admission because in his application he appeared to regard the offence as a triviality

Disclosures about capacity

- "to be a fit and proper person for admission to the legal profession an applicant must possess the capacity to make the judgements necessary to meet appropriate professional standards in legal practice or otherwise 'discharge the important and grave responsibilities of being a barrister and solicitor'
 - *Frugtniet v Board of Examiners* [2002] VSC 140 per Pagone J, as referred to in the VLAB guidance

Mental Illness or 'Infirmity'

- Based on protection of public
- High bar
- Must prevent them from fulfilling duties in honest and competent way
 - *S v LP Board of WA* (2004)