

LEGAL PRACTICE & ETHICS

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LEGAL PRACTICE & ETHICS

TOPIC 1: ETHICS, MORALITY & THE LEGAL PROFESSION

ETHICS & MORALITY:

- ✚ Ethics relate to a set of principles, rules or standards that govern the conduct of a person or the members of a profession/organisation.
 - Non-compliance with ethical standards of behaviour may lead to disciplinary action and disapproval among peers.
- ✚ Morals are based on a person's ideals and principles that guide their personal conduct in respect of what is right and wrong.
 - Morals are based on one's own personal beliefs, and are not connected with that the profession sees as correct conduct.
- ✚ Ethics governing the profession may conflict with a lawyer's personal morals – eg required to defend someone charged with murder (morals state murder is intrinsically bad and requires punishment, yet ethics require the lawyer to defend the accused).

SOURCES OF ETHICAL OBLIGATIONS:

- ✚ Two sources of lawyers' ethical obligations:
 - Common law (contract law, fiduciary law, tort and equity); and
 - The regulatory framework (legislation, regulations and professional rules).

COMMON LAW:

- ✚ Common law requires a person to be of 'good fame and character' and a 'fit and proper person' (Chapter 2).
 - Lawyer's relationship is initially governed by contract law as a result of a retainer.
 - Relationship between lawyer and client is a fiduciary one.
 - Law of equity imposes a number of obligations on a lawyer:
 - The requirement to disclose the costs related to providing a legal service to a client (Chapter 3);
 - The conditions under which a lawyer may act on behalf of a client where a conflict may arise (Chapter 3 & 4); and
 - Maintaining a client's confidence a privilege (Chapter 4).

- ✚ Tort and contract law impose on a lawyer an obligation to exercise reasonable care (Chapter 4).
 - Lawyer who fails to maintain the required standard of care may face concurrent liability in tort and contract.

- ✚ A lawyer's paramount duty is to the court – a lawyer is considered to be an officer of the court (Chapter 5).
 - This governed by common law.
 - Common law plays a significant role in relation to the discipline of a lawyer (particularly in relation to professional misconduct).

- ✚ Lawyer owes a duty to TP's with whom they may come into contact through the provision of legal services (Chapter 6).
 - Relationship with TP's governed by contract, tort and equity law.

REGULATORY FRAMEWORK:

- ✚ Regulatory framework which governs the ethical behaviour of lawyers made up of:
 - **Statute:** Legal Profession Uniform Law Application Act 2014 (Vic) (LPULAA).
 - **Regulations:** Legal Profession Uniform Law Application (Savings and Transitional) Regulations 2015.
 - **Professional conduct rules:**
 - Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (Vic) (LPULASCR).
 - Legal Profession Uniform General Rules 2015 (LPUGR).
 - Legal Profession Uniform Legal Practice (Solicitors) Rules 2015.

- ✚ A number of **regulatory bodies** exist:
 - Victorian Supreme Court (has inherent jurisdiction to control and discipline a lawyer).
 - Victorian Legal Services Board and Commissioner.
 - Law Institute of Victoria.
 - Bar Council of Victoria.
 - VCAT.

TOPIC 2: ADMISSION TO PRACTICE

- ✚ Admission to the profession: Part 2.2 of the Legal Profession Uniform Law.
- ✚ Eligibility: Rules 5 and 6 of the LPUAR.
- ✚ Suitability: Ss 16, 17 and 19 of the Legal Profession Uniform Law.

APPLICATION FOR ADMISSION:

- ✚ Authority – Victorian Legal Admissions Board.
 - Pt 3, Div 1 LPULLA.
- ✚ Legislation:
 - Legal Profession Uniform Law (Sch 1 of the *Legal Profession Uniform Law Application Act 2014* (Vic)); and
 - *Legal Profession Uniform Admission Rules 2015* (LPUAR).
- ✚ Prerequisites for admission:
 - Educational requirements.
 - Must complete equivalent of a full time Australian law degree (including Priestley 11 subjects listed pg 14): r 5 LPUAR.
 - Supervised legal training in a workplace (traineeship) or enrol in a PLT course: r 6 LPUAR.
 - Fit and proper person test.
- ✚ Admission requirements under LPUAR relating to **PLT course** set out on pp 17 – 18 table.
- ✚ Admission requirements under LPUAR relating to **traineeships** (supervised workplace training) set out on pp. 27 – 30 table.
- ✚ One the educational requirements (degree and traineeship/PLT course) have been met, applicants may then apply to be admitted to practice.
 - Victorian Legal Admissions Board determines whether an applicant meets the character requirements necessary for admission.

OBLIGATIONS:

- ✚ Applicants must prove to the VLAB they are suitable to become legal practitioners: ss 17 and 19 LPULLA.
 - See criteria to take into account in r 10 LPUAR.

✚ A summary of 'suitability matters':

- Is the applicant of good fame and character and a fit and proper person?
- Has the applicant been an insolvent under administration?
- Has the applicant been convicted of an offence in Australia or a foreign jurisdiction?
 - If so, what is the nature of the offence, the length of time since committing the crime and the person's age at the time of the offence?
- Has the applicant engaged in legal practice in Australia or a foreign jurisdiction while not admitted or while not holding a practicing certificate?
 - If certificate validly held, was there any contravention of a condition?
- Is the applicant currently subject to an unresolved complaint, investigation or charge in Australia or a foreign jurisdiction?
- Has the applicant currently or previously been the subject of disciplinary proceedings in Australia or a foreign jurisdiction?
- Has the applicant's name been removed from a local, interstate or foreign roll?
- Has the applicant's right to engage in legal practice been suspended or cancelled in Australia or a foreign jurisdiction?
- Has the applicant contravened a law about trust money or trust account in Australia or a foreign jurisdiction?
- Has any legal practice engaged in by the applicant had a supervisor, manager or receiver appointed?
- Has the applicant been disqualified from being employed by, or a partner of, an Australian legal practitioner or from managing a corporation that is an incorporated legal practice?
- Is the applicant currently unable to satisfactorily carry out the inherent requirements of practice as an Australian legal practitioner?

✚ First criterion, 'good fame and character and a fit and proper person', provides admission board and Supreme Court with a wide scope of interpretation.

- Interpreted in cases discussed below.

✚ Residence in Victoria not a requirement for admission by the SC: s 16(2) LPULAA.

CHARACTER REQUIREMENTS:

✚ Requisite characteristics are that an applicant be 'fit and proper' and of 'good fame and character'.

✚ Applicant may prove to be fit in one of these requirements but not the other.

- Eg *Victorian Lawyers RPA Ltd v X* – Applicant failed to disclose that she had pleaded guilty to 6 counts of making a false report in relation to sexual assaults. Held the applicant was a person of good fame and character but was not a fit and proper person.
 - Was deemed by the board that she had misled it and had no insight into the effect her false accusations had on innocent people.

- ✚ SC controls the profession by admitting applicants who will maintain public confidence.
 - During the process, applicants must prove they meet the character-based requirements.
 - Admitting body focuses on the reputation of the applicant and refers to the quality of the person by looking at their former acts and motives.
 - Honesty is utmost.

- ✚ See summary pg 34.

- ✚ Applicants have an obligation to disclose any facts in their knowledge that may indicate that they might not be fit for practice.

- ✚ The words ‘of good fame and character’ have been given their ordinary meaning: *Health Care Complaints Commission v Karalasingham*.
 - Case law provides examples of what is taken into account by admissions board when considering an applicant’s characteristics of good fame and character and it for practice.
 - *Ex Parte Lenehan* – Applicant worked as a law clerk in his 20’s at a firm where dishonesty was commonplace. Clerk paid himself from the trust account without authority as he had been underpaid. Later in life he went on to be respectable and achieved good work. He had been in the armed forces.
 - Board initially refused his application but he appealed successfully.
 - HC held during his time as a law clerk, he was not favoured by good role models and had since led an exemplary life.
 - There had been a significant gap from when we worked as a law clerk to the time he sought admission.
 - Applicant was honest and made full admissions.

‘FIT & PROPER PERSON’ REQUIREMENTS:

- ✚ ‘Fit and proper person’ has been given their general meaning.

- ✚ Character (because it provides indication of likely future conduct) or reputation (because it provides indication of public perception as to likely future conduct) may be sufficient to ground a finding that a person is not fit and proper: *Toohey and Gaudron JJ in ABT v Bond*.
- ✚ Candour (openness/honesty/frankness) and full disclosure essential.
 - Not for an applicant to decide what is or isn't relevant to place before the Court on the question of whether that person is a fit and proper person to be admitted. Applicant's duty is to place before the Court any matter that might reasonably be regarded by the Court as touching on the question of fitness to practice: *Re Evatt*.

STUDENT CONDUCT REPORTS:

- ✚ Applicants required to obtain a student conduct report that outlines any disciplinary action.
 - Student conduct reports are required from any tertiary academic institution and any practical legal training provider attended by an individual.
- ✚ Academic misconduct described by Board of Examiners to include, but not limited to, plagiarism, impermissible collusion, cheating and any other inappropriate conduct whereby the applicant has sought to obtain an academic advantage (either for himself or another person).
- ✚ *Re OG (a lawyer)* – SC revoked admission of a lawyer for lack of candour. OG and fellow student GL were found to have colluded on an assignment in a non-law course. Both students complete their law degrees. GL took advice of a lecturer and disclosed that he had received a zero mark due to collusion. OG also disclosed the zero mark but stated that the assignment was a group one rather than an individual one (this was not the case). OG was admitted. GL was required to produce a number of affidavits to provide full disclosure of the collusion. He did not name OG in them. GL was then asked to give evidence at a special hearing. GL was denied admission. OG's declined to give evidence and his admission was revoked. SC said:
 - OG had deliberately or recklessly misrepresented to the Board of Examiners the circumstances in which he was awarded a zero mark.
 - His actions were thus in contrast of a 'realization of his obligation of candour to the court'.
 - OG's behaviour during the proceedings (shifting all the blame on GL) fell short of what is expected of a legal practitioner.
 - The Board would not have granted a certificate had it been aware of the misrepresentation.

- ✚ *Law Society of Tasmania v Richardson* – R found guilty of academic misconduct, and was advised to make full disclosure upon seeking admission. Senior lecturer advised him that he did not have to make the disclosure. Court subsequently admitted R, stating his failure to disclose was a mere error of judgement (hence appears to be a lower standard of disclosure required in Tas than in Vic).

- ✚ *Re Liveri* – Admissions board opposed L’s application on the basis that L had not demonstrated that she was fit for admission. L had been found to have severely plagiarised at uni. L originally said she accidentally submitted the assignment rather than her own, before later admitting she plagiarised. L could not grasp the significance this behaviour had on her application for admission.
 - Court said that L’s unwillingness to acknowledge the misconduct establishes a lack of genuine insight into the gravity and significance of the act.
 - Court thus said L was unfit for admission.

- ✚ *Re AJG* – S found to have breached copyright by copying the work of another student. This cheating was at exam time and was so close to the application for admission that the court said the applicant was not fit.

- ✚ Rr 10, 19 LPUAR addresses the issue of full disclosure and academic conduct.
 - Essentially, admission boards will look at whether the applicant has revealed any past misdeeds and has accurately and fully disclosed the nature of any such misdeed.

CRIMINAL BEHAVIOUR:

- ✚ Past criminal behaviour not always a bar to admission.

- ✚ *Re Owen* – Applicant had, at age 25 and 27, been convicted of burglary. At the age of 30, he completed a law degree, ‘turned a new leaf’, and sought admission at 38. NZ HC took into account his reformed character.
 - Court said they must look forward and not punish the applicant’s past conduct.

- ✚ *Frugtniet v Board of Examiners* – F had a 25 year criminal history including theft, perjury and fraud. He failed to make full disclosure of that history.
 - Court commented on the long list of offences of dishonesty over a substantial period of time. F thus not admitted.

- ✚ *Prothonotary of the SC of NSW v Tatar* – T removed from the SC roll as he had not disclosed upon admission two recent convictions for fraudulent application of credit cards. One conviction had been quashed, but court said full disclosure was still required.
 - After admission, T also convicted of multiple charges of forgery. This entrenched the court's decision.

- ✚ Full disclosure still required even where an applicant has been charged and convicted.
 - *Re Del Castillo* – C charged and acquitted of murder. Sought advice from lecturer whether he needed to disclose. Lecturer said he did not as he had been acquitted.
 - Court said it was still relevant and important he disclosed, and thus he ought to have disclosed.
 - Initial advice C sought was wrong, but once he realised this, he ought to have disclosed.

- ✚ Admission board will take into account subsequent conduct – seems that the longer the length of time of good behaviour and full and frank disclosure that passes, the more likely the applicant will be admitted.

PRIOR IMPROPER CONDUCT:

- ✚ An applicant's behaviour in the course of litigation is relevant to their good fame and character.
 - Particularly relevant if the behaviour was displayed by a practicing lawyer and attracted disciplinary action.

- ✚ *Re Bell* – B a family law litigant. B was bankrupt in 1995, and was the subject of 12 breaches of domestic violence orders. B had made threats against officers of the Family Court. Also made unsubstantiated and scandalous claims against those who opposed his admission. Only thing B disclosed was his bankruptcy.
 - B initially deemed unfit and stated that if he reapplied in the future he needed to advertise this. B did not advertise this.
 - Court said an applicant must show an intention to act according to the law, not in contempt of court, as well as other things on pg 41.
 - B found not to be a fit and proper person.

- ✚ *Wentworth v NSW Bar Association* – W made baseless and insupportable allegations of serious misconduct against other. W notorious for bringing numerous legal actions. W stated that her opposition to admission was partly due to sexism.
 - Court held it was proper to conclude that if W was admitted, she would likely conduct herself in a similar way.