

# The Legal Profession

## 2 Key Parts

1. Legal Practitioners
2. Judiciary22319

## Legal Profession

– consists of Barristers, Solicitors and Members of the Judiciary

### *History/Development of Legal Profession*

- \* 13<sup>th</sup> Century – Pleaders and Attorneys
- \* 17<sup>th</sup> Century – clear distinction between Pleaders and Attorneys
  - *Pleaders = members of Inns of Court*
  - *Attorneys = Solicitors (grew in influence) + Barristers (alone had the right of appearance)*

### *Legal Profession in Australia*

- \* Formal division between Barristers and Solicitors removed (share Common Admission)
  - BUT --> still a Functional separation
- \* Each state will have a separate Bar
- \* For NSW – governed by Legal Profession Act 2004 (NSW)
  - Maintain Common Admission
  - Functional Separation now (of earlier act – Legal Profession Reform Act 1993 (NSW))
  - **Barrister – s81(1)** --> practice as barrister under barristers rules
  - **Solicitor – s82(1)** --> practice as solicitor under solicitors rules
  - **‘Cab Rank’ Rule – s85 (a-d)**
    - \* Barrister must accept brief from Solicitor if:
      - a) brief within B’s capacity, skill and experience
      - b) barrister work as a barrister under its rules (ie, represent client’s interest, not committed to other engagements)
      - c) fee offered in brief is acceptable to the barrister
      - d) not obliged or permitted to refuse the brief
- **‘Law Society Rules’ – Statement of Principal for Rules 1-16**
  - \* Serve competently and diligently
  - \* Aware of r’ship with clients + deal with them fairly and free from any conflicts of interests
  - \* Maintain confidentiality of client’s affairs, but give client all info available
  - \* Should not engage in conduct that is in breach of the law
- **‘Duties to the Court’ – Statement of Principal for Rules 17-24**
  - \* Should act with competence, honesty and candour (straightforwardness of speech or behaviour)
  - \* Frank and diligent
  - \* Duties include – obtain/present evidence ; prepare & file docs ; instruct/appeal as advocate
- **‘Relations with other Practitioners’ - Statement of Principal for Rules 25-31AA**
  - \* Act honestly, fairness and courtesy
  - \* Transact lawfully and competently with clients
  - \* Consistent with public interest

**DUTIES** – owed to various parties (ie, the Law, the Courts, the Clients, the Profession, and Each Other)

\*\*Summary of Quote from *De Jersey CJ* – nature of a true professional has unique ethical responsibilities and will be disciplined if in breach, not entered for financial gains, those fit in this role has fairness and decency.

### - **‘Elements of Admission to practice’ – s24 & s25**

- \*\***s24 (Eligibility)** --> academic qualifications & completion of practical legal training
- \*\***s25 (Suitability)** --> whether person is ‘fit & proper’ and of good character

### *Do’s and Don’ts in the Legal Profession*

\*Don’t (*Clyne v The NSW Bar Assoc.*)

- lie to a judge who rely on him for information
- misrepresent the law to inferior court
- don’t ask a witness whether he/she’s been guilty of evil conduct unless its related to the case
- \*Don’t (*NSW Bar Assoc. v Hamman*)
- defraud client (worse than doing it for personal gain)
- fraud is bad (when disclosing income)

\*Don't Plagiarise/ Cheat

- Eg cases – Re Liveri [2006] QCA 152 ; Re Humzy-Hancock [2007] QSC 34

## Judiciary

### Characteristics of judicial system:

- \* Adversarial system
- \* Judge as neutral umpire
- \* Parties control issues through pleadings
- \* Judge does not decide the truth – but the rights as between the parties

### Historical Development

- Act of Settlement 1701 → provided: a) security of tenure  
b) security of income  
c) security of reputation – public confidence maintained

- Subsequently – s72 of Constitution explains the above

#### - Theory of Separation of Powers:

- \* Legislative, Executive and Judicial arms of government function independently
- \* Judicial arm not dependent on other arms

#### - **s72 of Constitution**

\* Talks about the appointment of tenures where only misbehaviour in eyes of Parliament is only way of removal

- \* Issues – involvement of political parties in removal process  
- meaning of 'misbehaviour' and 'incapacity' (different views)

- **Appointment of Justices** – Attorney General require consultation with Attorney General from the States  
(refer to High Court of Australia Act 1979 – s6)

#### - **Judicial Commission of NSW**

- \* Assists the courts to achieve consistency in sentencing
- \* Organises and supervises an appropriate scheme of continuing education and training for judicial officers
- \* examines complaints against judicial officers
- \* gives advice to the Attorney General on matters concerning judicial officers

### Judicial independence include:

#### 1) Security of Tenure

- Judges cannot be removed unless guilty of misbehaviour or misconduct satisfied by Parliament
- be a judge until 70 years old
- Issue – difficult to remove a judge (however, need to review how judges are removed to protect public)

#### 2) Financial Security

#### 3) Institutional Independence

- \*\*Must ensure – there is a guarantee that there's judicial independence  
- but that guarantee should not be caused by misuse of executive power

### Lack of Judicial Independence shown where:

- a) Criticism of judges as individuals
- b) Criticism of judges as authority of court
- c) Abolition of courts (eg, NSW Magistrates Court, VIC Compensation Tribunal)
- d) Appointment of judicial officers
- e) Acting judges / part time judges
- f) Finances - Overdependence upon admin and financial resources from government departments
- g) Transferral of powers to tribunals

- h) Tension between Executive and Judicial Arms
  - On authority of Judges to decide on social or community importance (eg, human rights)
  - Judges are elected by Executive and basically cannot be removed. (affect decisions of future Governments)
- i) Judicial arm must rely on other arms to work effectively.
  - (eg, depend on Executive to provide remuneration, courts, equipment and staff.) – Australian courts experiences
- j) Subject to administrative regulations
- k) Lack of training to be judges (Aust – appointed by Executive who are members of political party - bias)
  - ideally – should be appointed by politically neutral bodies

## Examples of misuse of executive power (affect Judicial Independence)

1. Malaysia – decisions made by HC re: PM and his party overruled by the King as he is the Head.

### 2. OLD Supreme Court of QLD Act 1991

- strips Chief Justice of all power to administer the Court based on the new Act passed by new Govt
- new govt empowered themselves to appoint new judges with powers (President of Court of Appeal)
- no consultation with Chief Justice when Act was passed
- lack of knowledge, thus no public outcry or concern

### 3. NSW Abolition of Courts

- Govt abolished the Magistrates Court with Local Court (6 magistrates not appointed to this court)
- **Issue** – wasn't about protecting their tenure (the court was abolished, they were not removed)

### 4. VIC – The Accident Compensation Tribunal

- 12 judges dismissed when Govt abolished the Tribunal (Govt claimed they were specialists in compensation therefore not qualified for appointment elsewhere)
- Most judges (former barristers) have made successful transitions to Supreme/District Courts (esp. in NSW) and able to function successfully in other areas of law
- **Issue** – security of tenure irrelevant when Govt justifies the reasoning behind their removal
  - whether Tribunals should give Judges their title and authority

## Judicial Activism (Justice Kirby) – Hamlyn Lecture 2003

### 1. Old Testament (History)

- Tudor Times --> fundamental doctrine = judge applied the law (not make the law)
  - > Authority of the Church (excessive power, indulgences and luxuries – not follow the bible, eg, women bishops, gay marriages etc...)
- Judges reluctant to change past words (noble lie)
  - \* Eg, 1978 case with Darcy Dugan – convicted felon couldn't sue because of ancient English Law of attainder and corruption of blood
  - \* Continue in 80s – most judges follow signals from Privy Council in London
- Sir Owen Dixon – influenced many legal professionals with his philosophy of:
  - a) strict and complete legalism (or judicial passivity) – some thought to be excessively legalistic
- Today – this 'strict and complete legalism' is neither possible nor desirable
  - judges are not in that mechanical frame of mind (more creativity)

### 2. Reformation

- 3 institutional features of common law (reinforce elements of judicial creativity)
  - a) *Personal characteristics of senior judiciary* – share common socio-economic background (all were once barristers)
  - b) *Judicial obligation to give reasons* – duty to deliver and publish reasoning based on past and present & uniqueness