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## PROFILE OF THE PROFESSION DATA (AS A PERCENTAGE OF SOLICITORS)<sup>2</sup>

	2001	2006	2015	2016
Gender (male/female)	64.2/35.8	57.6/42.4	50.8/49.2	50.0/50.0
Solicitors born overseas	22.5	25.1	27.2	27.5
Solicitors working part time (both male and female)	9.0	13.0	16.4	18.4
Female solicitors working part time	15.9	19.0	22.1	22.8
Male solicitors working part time	-	8.0	10.8	14.1
Average age	40.2	41.1	42.5	42.8
Disability	-	-	4.8	6.3

- **The Value of Diversity and Inclusion**

- **Recruitment and retention of highly skilled staff**

- Employers that have diverse and inclusive work cultures, policies and practices attract more people and are able to draw from a larger recruitment pool.
    - Diverse and inclusive work cultures can be related to increased staff retention. Employees who feel valued and respected by their organisation are likely to remain in their role for a longer period of time.
    - As well as the opportunity cost of losing talented staff, there are costs associated with recruiting and replacing staff, and a potential loss of clients.

- **Improved productivity and performance**

- Data from one organisation suggests that if just 10% more employees feel included, the company will increase work attendance by almost one day per year (6.5 hours) per employee.
    - Diverse workforces that include people with global experience and multicultural identities display more creativity, are better problem solvers and are more likely to create new businesses and products.

- **Increased competitiveness and growth**

- Firms and solicitors with diverse and inclusive workplaces and practices can expect to benefit from an enhanced reputation in the broader community and improved access to an increasingly diverse client base. A diverse workforce has knowledge of communities and sectors that they represent and can help your organisation expand beyond traditional markets and customers, promoting itself in a culturally appropriate way.
    - Conversely, complaints or findings of discrimination or harassment can cause serious reputational damage to a law firm or organisation, reducing your ability to attract and retain clients and adversely impacting business outcomes.

- **Compliance with legal obligations**

- Commonwealth and NSW anti-discrimination laws make it unlawful to discriminate, harass, victimise or vilify anyone in certain areas of public life on the basis of specific characteristics.
    - Promote diversity and inclusion, both internally and in the way that you engage with clients, the risk of breaching existing legislation is dramatically reduced. This reduces the risk of costly liability for the organisation and individuals.

- For how to promote diversity and inclusion see the article.

## **WEEK 3 – REGULATION AND ADMISSION**

### **1. REGULATION OF THE LEGAL PROFESSION**

- **Sources of Lawyers' Professional Responsibility**

- General law, statute, professional rules. Professional bodies may also issue further guidelines from time to time re professional conduct

- **General law**

- Between lawyer and client, relationship is one of **contract**, which attracts a **duty of care** in tort
    - **Fiduciary** law overlays, impacts on retainers a lawyer cannot accept, disclosures which must be made, transactions which can and cannot be engaged in.
    - **Confidentiality** lies at the core of the relationship – whether sourced in contract or in equity, forms the main foundation in restraining lawyers from acting against former clients and the **doctrine of legal professional privilege**

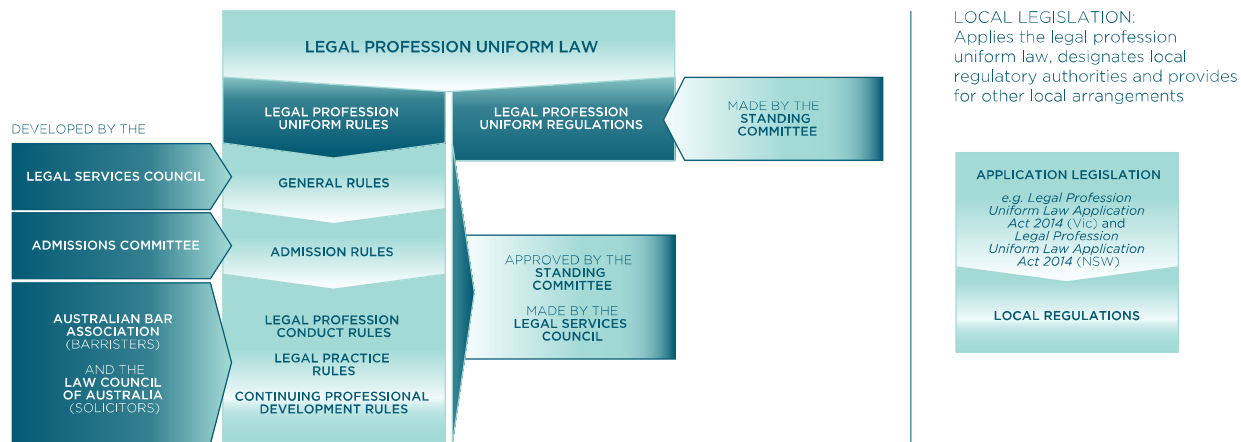
- **Duty to the Court:** Overriding each of these duties is the paramount duty to the court

- **Role of Professional Rules**

- Serve as a “standard of conduct in disciplinary proceedings, a guide for action in a specific case, and as a demonstration of the profession’s commitment to integrity and public service”
- “Express[es] the profession’s collective judgment as to the standards expected of its members”
- A “reliable and important indicator of the accepted opinion of the members of the profession”; *Chamberlain v Law Society of the ACT* (1993), Black CJ
- The court may also have regard to professional rules as an indicator of the requisite standard of care in tort cases, and of reasonable expectations of the parties in cases of alleged conflict of interest or breach of confidentiality BUT the rules “**cannot supplant legal principles** as set out in judicial decisions”; *Canada Southern Petroleum v Amoco Canada Petroleum*
- **NOTE:** caveat that professional rules **cannot be viewed as exhaustive of lawyers’ ethical responsibilities**, and so the absence of a rule directed at a specific form of misconduct does not preclude a disciplinary finding. Nor should professional rules be construed as legal rules - Brennan J, Ethics and Procedure, Bar Association of QLD Conference, Noosa (3 May 1992)

#### a. Legal Profession Uniform Law

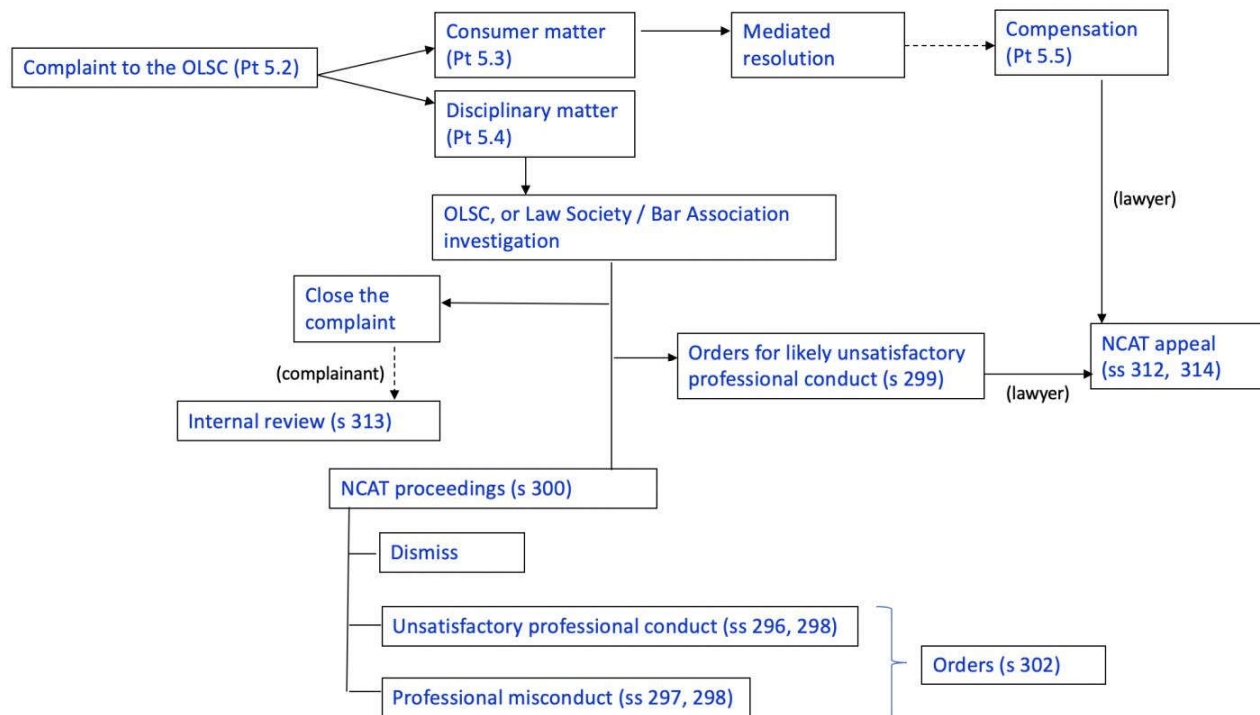
LEGAL PROFESSION UNIFORM FRAMEWORK:  
APPLIES IN ALL PARTICIPATING JURISDICTIONS



- The Framework is designed to be applied by any Australian State or Territory to establish a common legal services market. At present only NSW, VIC and WA are part of it.
- Provides regulatory arrangements for the legal profession, including:
  - Admission
  - Legal practise
  - Business practice and professional conduct
  - Legal costs between a legal practitioner and their client
  - Dispute resolution and professional discipline
  - Functions and powers of the Legal Services Council, the Commissioner and local authorities
  - Uniform rules
- **Standing Committee** – comprised of Attorneys-General of participating jurisdictions.
  - Has supervisory role in respect of Legal Services Council, Commissioner for Uniform Legal Services Regulation as well as local regulatory authorities (s391).
  - Approves Uniform Rules (see Part 9.2 and s428).
- **Legal Services Council (est under s394).**  
**Objectives:**
  - (a) to monitor the implementation of the Legal Profession Uniform Law and ensure its consistent application across participating jurisdictions
  - (b) to ensure that the Legal Profession Uniform Framework remains efficient, targeted and effective, and promotes the maintenance of professional standards;
  - (c) to ensure that the Legal Profession Uniform Framework appropriately accounts for the interests and protection of clients of law practices.
- **Commissioner for Uniform Legal Services Regulation (est under s398).**  
**Objectives:**
  - (a) to promote compliance with requirements of this Law and the Uniform Rules;
  - (b) to ensure the consistent and effective implementation of the provisions of Chapter 5 and supporting Uniform Rules, through the development and making of appropriate guidelines;

- (c) to raise awareness of the Legal Profession Uniform Framework and its objectives.
- **Admissions Committee (est under 402).**
  - Admission committee develops the Admission Rules, and provides advice to the Legal Services Council in respect of admission and related matters.
  - Develops and makes the Uniform Law Admission Rules, implemented in NSW as the Legal Profession Uniform Admission Rules 2015. They cover:
    - qualification and training required for admission
    - procedure for admission to the legal profession
- **Local regulatory authorities still responsible for day to day regulation**
  - Law Society Council (which governs the Law Society of NSW)
  - Bar Council (which governs the NSW Bar Association)
  - Legal Profession Admissions Board
  - Office of the NSW Legal Services Commissioner

## b. Office of the Legal Services Commissioner (OLSC)



## • Definitions

### Section 296 Uniform Law – Unsatisfactory Professional Conduct

- Unsatisfactory professional conduct includes conduct of a lawyer occurring in connection with the practice of law that **falls short of the standard of competence and diligence** that a member of the public is entitled to expect of a reasonably competent lawyer.

### Section 269 Uniform Law – Consumer Matter

- (a) A **consumer matter** is so much of a complaint about a lawyer or a law practice as relates to the **provision of legal services** to the complainant by the lawyer or law practice and as [OLSC] determines should be resolved by the exercise of functions relating to consumer matters.
- (b) A **costs dispute** is a **consumer matter** involving a dispute about **legal costs payable on a solicitor-client basis** where the dispute is between a lawyer or law practice and a person who is charged with those legal costs or is liable to pay those legal costs (other than under a court or tribunal order for costs), whether as a client of the lawyer or law practice or as a third party payer

### Section 270 Uniform Law – Disciplinary Matter

- A **disciplinary matter** is so much of a complaint against a lawyer or a law practice as would, if the conduct concerned were established, **amount to unsatisfactory professional conduct or professional misconduct**.

### Section 271 Uniform Law – Mixed Complaints

- If a complaint contains or may contain both a consumer matter and a disciplinary matter, the [OLSC] may give priority to resolving the consumer matter as soon as possible and, if necessary and appropriate, separately from the disciplinary matter.

### • Statistics

Ground of Complaint	2000-2001 (Parker)	2015-2016	2016-2017
Negligence	19.6%	15.3%	18.2%
Communication	13.1%	15%	15%
Overcharging	11.7%	13.9%	14.1%
Ethical Matters	-	9%	8.7%
Misleading Conduct		10.3%	7.7%
Cost Disclosure		5.2%	5.3%

### • How long does it take to finalise a consumer matter?

- The OLSC receives more than 2,500 written complaints each year.
- Over half are finalised within three (3) months.
- Reasons for delay include:
  - Waiting for people to respond to letters and phone calls
  - Seeking further information from both sides
  - Ongoing court proceedings which must first be finalised

## 2. ADMISSION TO PRACTICE

### a. Legal Profession Uniform Law – Part 2.2

#### Section 16 – Admission

- (1) The Supreme Court may admit an individual aged 18 years or over to the Australian legal profession as an Australian lawyer, but only if-
  - (a) the **designated local regulatory authority** has provided the Supreme Court with a **compliance certificate** in respect of the person and the certificate is still in force; and
  - (b) the person is **not already admitted** to the Australian legal profession; and
  - (c) the person **takes an oath of office**, or **makes an affirmation of office**, in the form required by the Supreme Court.
- (2) **Residence** in, or any other connection with, this jurisdiction is **not a requirement** for admission by the Supreme Court.
- (3) **Any person may object** to the Supreme Court to the admission of a particular person.
  - Board then considers whether any objections may affect the applicant's eligibility or suitability for admission. If so, the applicant is advised and given 3 weeks to respond
- (4) Nothing in this section is intended to interfere with the inherent jurisdiction of the Supreme Court to refuse admission.

#### Section 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 → (see Rule 5 Admission Rules)
  - (b) has **satisfactorily completed the practical legal training requirements** specified in the Admission Rules for the purposes of this section; and → (see Rule 6 Admission Rules)
  - (c) is a **fit and proper person** to be admitted to the Australian legal profession.
    - Note: 'fit and proper' is very broad
- (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. (i.e. Rule 10 Admission Rules)

#### 18 Exemption from certain prerequisites

- (1) The designated local regulatory authority **may exempt** a person from satisfying the specified academic qualifications prerequisite or the specified practical legal training prerequisite or both, if the designated local regulatory authority is **satisfied that the person has sufficient legal skills or relevant experience so as to render the person eligible for admission.**
- (2) The **legal skills or relevant experience or both can be obtained in legal practice, in service**

**with a government authority or in another way considered appropriate** by the designated local regulatory authority. They can be obtained wholly in Australia or overseas or obtained partly in Australia and partly overseas.

- **Section 19** – Applying for Compliance Certificate
- **Section 20** – Conditional Admission of Foreign Lawyers
- **Section 21** – Declaration of early assessment of suitability for a compliance certificate
- **Section 22** – Supreme Court Roll
- **Section 23** – Removal from Supreme Court Roll
- **Section 25** – Australian lawyer is officer of Supreme Court
- **Part 3.5 Variation, Suspension and Cancellation of Certificates**

#### **b. Legal Profession Uniform Admission Rules 2015**

##### **Rule 5 – Specified Academic Qualifications Prerequisite**

- (1) Specified academic qualifications = successfully completing a tertiary academic course in Australia which includes the equivalent of at least 3 years' full time study of law and is accredited by the Board

##### **Rule 6 – Specified Practical Legal Training Prerequisite**

- (2) Requirement is satisfied by successfully completing either:
  - (a) a practical legal training course conducted by a practical legal training provider accredited by the Board; or
  - (b) supervised legal training in a workplace for a period of not less than 12 months, under a training plan approved by the Board

##### **Rule 10 – Determining Whether Someone is a Fit and Proper Person**

- (1) For the purposes of section 17(2)(b) of the Uniform Law, the following matters are specified as matters to which the Board must have regard –
  - (a) any **statutory declaration** as to the **person's character**, referred to in rule 16;
    - **Rule 16:** An application for a compliance certificate must include 2 statutory declarations as to the applicant's character made by persons who are not related by blood, marriage or as a domestic partner
  - (b) any **disclosure statement** made by the person under rule 17;
  - (c) any **police report** provided under rule 18;
    - **Rule 18:** Compliance certificate must include a report from the police on the application's criminal history prepared within 6 months before the application is made
  - (d) any **student conduct report** provided under rule 19;
    - **Rule 19:** Compliance certificate must include report by tertiary academic institution and any PLT detailing whether applicant was subject to any disciplinary action and the outcome of the action
  - (e) any **certificate of good standing** provided under rule 20;
    - **Rule 20:** Application for compliance certificate by person admitted to legal profession in Australian non-participating/foreign jurisdiction must include statement by relevant professional body in that jurisdiction that applicant
      - (a) is member of legal profession in good standing and
      - (b) is not subject to any current or pending disciplinary matters
  - (f) whether the person is **currently of good fame and character**;
  - (g) whether the person is or has been a **bankrupt** or subject to an arrangement under Part 10 of the Bankruptcy Act or has been an **officer of a corporation** that has been wound up in **insolvency** or under external administration;
  - (h) whether the person has been found **guilty of an offence** including a spent offence in **Australia or in a foreign country**, and if so –
    - (i) the nature of the offence; and
    - (ii) how long ago the offence was committed; and
    - (iii) the person's age when the offence was committed;
  - (i) whether the person has been the **subject of any disciplinary action**, howsoever expressed, in **any profession or occupation** in Australia or in a foreign country;
  - (j) whether the person has been the **subject of disciplinary action**, howsoever expressed, in any profession or occupation that **involved a finding adverse to the person**;
  - (k) whether the person is **currently unable satisfactorily to carry out the inherent requirements** of practice as an Australian legal practitioner;
  - (l) whether the person has a **sufficient knowledge of written and spoken English** to engage in legal practice in this jurisdiction.

## i. Disclosure; Rule 10, 17

### Rule 17 – Disclosure statement

- (1) 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.
- (2) It is the duty of every applicant to make a **full and complete disclosure** of every matter referred to in subrule (1).
- (4) A person **may** make any disclosure relating to that person's **physical or mental capacity** in a separate statutory declaration from that referred to in subrule (1).
- Statutory test is in the **present tense** – 'is currently'
- Applicant's present understanding and estimation of their past conduct is relevant
- If applicant makes a **full disclosure** of a conduct relevant to capacity and **demonstrates** that the **condition is appropriately managed**, it is **unlikely the disclosure** will lead to an **adverse assessment** of suitability
- **Law Admissions Consultative Committee Guidelines**
  - Emphasise that **the duty and onus to disclose is squarely on the applicant**
  - Indicate that a failure to make full and frank disclosures could have "catastrophic consequences"
  - Note that matters referred to in Admission Rule 10 (e.g. – prior criminal offences or bankruptcy) **MUST** be disclosed
  - Notes other matters that are likely to require disclosure, including:
    - Social security overpayments or offences
    - Tax offences
    - Academic misconduct/general misconduct
      - NSW and VIC now have a provision (LPUAR 2015 r.19) requiring applicants to obtain a 'student conduct report' from any Aus university they have studied at, stating whether the student was subject to any disciplinary action and its outcome
    - Inappropriate or criminal conduct (whether or not you were charged or convicted)
    - Interventions and AVOs
    - Making false stat declaration
    - In some cases, infringement or traffic offences
  - **Overall: 'Revealing more than might strictly be necessary counts in favour of an applicant.** Revealing less than may be necessary distorts the proper assessment of the applicant may itself show an inappropriate desire to distort by selecting and screening relevant facts: *Frugniel v Board of Examiners* [2002] VSC 140 per Pagone J
- Sometimes it is the **failure to disclose** some past events which is the **basis of a finding** that an applicant is not a fit and proper person to be admitted rather **than the past event itself**; *In Re Davis*.
  - **Facts:** D had previously had breakdown resulting in hospitalisation (had to support mother) → conviction for breaking and entering → did not disclose conviction
  - **Held:** Appeal dismissed, admission refused
    - D's good behaviour since 1994 → may be said he was a person of good fame but intrinsic character is a different matter
    - A man may be guilty of grave wrongdoing and may subsequently become a man of good character → 'If the appellant had frankly disclosed to the Board the fact of his conviction, that disclosure would have greatly assisted him in an endeavour to show that he had retrieved his character. But his failure to make such disclosure in itself, apart from the conviction, excludes any possibility of holding that he was a man of good character'

## ii. Previous Criminal Behaviour; Rule 10(1)(h)

- The commission of a criminal offence or offences does not automatically result in a person's permanent disqualification from admission as a legal practitioner; *Re Application by Hinds* [2003].
- **Dishonesty is regarded as prima facie evidence of unfitness to practice:** *Thomas v LPAB* [2005]
  - Appellant failed to disclose to the LPAB his conviction for fraudulent misappropriation when he was almost 21 years old and was fined \$2500. In addition, he also mischaracterise the charge as a 'debt charge'
- Any conduct which would have led to disciplinary action for a legal practitioner (e.g. improper conduct in curial process)

- Case law recognises that **charges for criminal offences are relevant** to an applicant's good fame and character and **should be disclosed. Even those that did not lead to conviction**, or those for which the applicant had been **acquitted** – *Re Del Castillo* (1998)
- **Factors:**
  - (i) the nature of the offence; and
  - (ii) how long ago the offence was committed; and
  - (iii) the person's age when the offence was committed;
    - *Age as a mitigating factor:* The false steps of youth and early manhood are not always final proof of defective character and unfitness. An unsatisfactory beginning may be displaced by a completely satisfactory subsequent career sustained over a lengthy period of time – *Ex parte Lenehan* (1948), 424–5 per Latham CJ
    - Cf: But conduct extending 'beyond youth and towards maturity [... which] constitute a sustained course of conduct' is highly relevant for assessing present fitness and propriety – *Re B* (1981), 381 per Moffitt P
- **Onus:** In light of the significance of convictions for certain offences, the **onus on applicant** to establish he or she is **nonetheless a fit and proper person** to be admitted; *Re Application by Hinds* [2003].
- **Failure to Disclose:** Where a person has since the offence led an honest life, **concealment of the crime at the time of admission** is an **important indicator of present unfitness**
  - Concealment and thus presently unfit: *Re Davis* (1947) 75 CLR 409 per Dixon J
  - No concealment and thus presently fit: *Ex parte Lenehan* (1948) 77 CLR 403
- **Examples:** see cases

### iii. Previous Improper Conduct; Rule 10(1)(i)/(j)

- **Previous Improper Conduct in the Curial Process**
  - Likely to be relevant, suggesting a lack of appropriate professional judgment and discretion which may raise risks in the practice of law
  - Filing affidavits **threatening judicial officers** "demonstrated an **inability** to distinguish between vigorous but **legitimate advocacy** of a position and a **reaction to an adverse decision** of the courts which is entirely unacceptable in an officer of the court.": *Re Bell* [2005], [19] per McMurdo P and Wilson J
  - Making baseless allegations of serious misconduct and being a vexatious litigant – *Wentworth v New South Wales Bar Association* (1994) NSWCA
- **Previous Improper Conduct in the Course of a Profession or Employment**
  - Proven disciplinary charges against a lawyer in another jurisdiction is highly relevant – can shed light on the applicant's character which is crucial to the practice of law (not displaying appropriate professional judgment and discretion); *Re Hampton*
- **Non-Disclosure of Prior Impropriety Upon Admission**
  - There is a **general law requirement** that an applicant be candid regarding anything in his prior behaviour or experience that **may impact negatively on fame and character**, namely as regards his '**honesty, candour, respect for the law or ability to meet professional standards**'
  - **Test:** what a reasonable applicant would consider the Board might regard as not being favourable to the applicant when considering whether or not they are a fit and proper person to be admitted; *Re OG*
    - **NB secrecy v genuine oversight:** 'Applicants **need not fear** that the court will seek to substitute a demand for perfection for the requirement that fitness to practice be demonstrated by showing good fame and character'; *Del Castillo*
  - **Complete candour and disclosure crucial** – full disclosure demonstrates proper perception of her duty, while a failure to do so substantiates a lack of good fame and character
    - It is **prudent to err on side of disclosing** as recent cases suggest there may be an increasing expectation of disclosure of relevant matters
    - **Example:** *Re Davis* (HCA 1947): HCA confirmed refusal of admission for failure to disclose prior conviction for breaking, entering and stealing on application for admission; HCA dismissed appeal; ultimately readmitted in 1978;
  - **Failure to disclose** certain conduct could **bar admission even if disclosure at the time may not have prevented admission.**
    - "the absence of candid and forthright disclosure" meant that the applicant had not demonstrated good fame and character; *Thomas v Legal Practitioners Admission Board*
- **Failure to Disclose Prior Professional Disciplinary Proceedings**
  - Failure to disclose prior professional disciplinary proceedings was regarded as a significant omission; *Morrissey v NSWBA* (2006).



- Because it either shows that the applicant has '**failed to appreciate**' the expectations of **lawyers**, or that the applicant 'determined not voluntarily to place those matters before the board'  
– *Re Hampton* [2002] QCA 129 [28] per De Jersey CJ

#### iv. Disclosure of Academic Misconduct; Rule 10(1)(d)

- Inappropriate to accept as fit and applicant who responds to stress by acting dishonestly to ensure his personal advancement
- **Failure to disclose** academic dishonesty is **especially serious** if the conduct occurred close to the time of admission – *Re AJG* [2004] QCA 88 per De Jersey CJ
  - **Fact:** academic misconduct during the PLT course → disclosed this when applying for admission
  - **Held:** 'Cheating in an academic course which leads to the qualifications central to practice and at a time so close to the application for admission must preclude our presently being satisfied of this applicant's fitness'.
    - The applicant's knowledge that academic misconduct could be a bar to admission worked against him.
    - The court emphasised that applicants for admission now had ample warning about the potential consequences of academic misconduct.
- Cf: *Law Society of Tasmania v Richardson* [2003]
  - **Facts:** Richardson, on advice from his parents, who were both lawyers, did not disclose the finding of an academic misconduct.
  - Held: Crawford J did not find that this lack of disclosure made him unfit to practice and characterised it as an 'error of judgment'.
  - As Dal Pont notes, **this case is anomalous** because of its unique facts and goes against the current judicial trend.
- **See Re OG below**

#### v. Infirmary/Mental Illness; Rule 10(1)(k)

- **Law Admissions Consultative Committee – Disclosure Guidelines for Applicants**
  - Any mental, physical or other health condition or disability which you have or may have had in the past, will only be relevant if it affects your current ability to carry out the inherent requirements of practice.

▪ **Note:** no definition of 'inherent'

##### 8.3 When a health condition may be relevant

- Very occasionally, *the mere existence* of a health condition or disability may directly affect your current ability to carry out the inherent requirements of practice. For example, if you earlier had a car accident, or an illness, that means you are no longer able to remember instructions which you are given, you may not currently be able to carry out the inherent requirements of practice. You need to disclose any such difficulties to your Admitting Authority.
- Sometimes your *past conduct* (whether by act or omission) might raise questions about whether you are currently able to carry out the inherent requirements of practice. Repeated instances of certain conduct might cast doubt on your insight, or on your ability to make sound judgments. You need to disclose any such conduct to your Admitting Authority.
- If you think that conduct might be wholly or partly explained by, or associated with, some physical, mental or other health condition or disability (whether diagnosed or not), you can choose to disclose that condition or disability; and may provide any supporting medical evidence that you think might assist your Admitting Authority to decide whether you are currently able to carry out the inherent requirements of practice. Such information may well explain the reasons underlying your conduct; and demonstrate that the underlying cause has been effectively dealt with or appropriately managed.

If you seek to demonstrate that your condition or disability is appropriately managed and stable, a certificate to that effect from one or more of your treating medical practitioners would greatly assist your Admitting Authority.

- **Note the requirements of Rule 23 and 24 of Legal Profession Uniform Admission Rules 2015**
- Issues regarding the mental health of the applicant would necessitate inquiry to the extent that they would impact the applicant's fitness to practice.
- Long standing depression even one leading to an attempted suicide, coupled with the taking of anti-depressant medication by itself does not make one unfit for practice: *Skerritt v Legal Practice Board of Western Australia* [2004]
  - **Key question** is whether **depression is so severe** and of such long standing that it was thought that it might lead an applicant to **neglect the affairs of his or her clients**

- See *XY v Board of Examiners* below

#### vi. Mitigating Factors

- **Age of applicant** at the time of misconduct – *Lenehan, Re B*
- Evidence of **redeeming behaviour** reflective of expressions of remorse
  - Cf. where indiscretions and attitudes persist beyond youth, revealing a sustained course of conduct; *Re B*
- **External stressors** at time of conduct– that are unlikely to be replicated in legal practice may incline the court not to refuse admission
  - *Prothonotary v Del Castillo* – the lack of disclosure of a murder charge and a subsequent acquittal had denied him admission in the ACT. However, these facts matter little for the case regarding his admission to practice in NSW as the Court considered relevant that Del Castillo had “**showed very great contrition**” and “**had led a blameless life**” other than events surrounding murder charge – a “**sudden response to a wholly unforeseen calamity placing extraordinary pressures on him 10 yrs ago**”

#### vii. Readmission

##### Rule 14 Legal Profession Uniform Admission Rules 2015 – Application for Readmission

- (1) An application for a compliance certification by someone who’s name has been removed from the Supreme Court roll must set out
  - (a) the circumstances which led to the applicant's name being removed from the Supreme Court roll;
  - (b) the applicant's views about those circumstances and the decision to remove the applicant's name from that roll;
  - (c) events which tend to re-establish the applicant's good fame and character;
  - (d) the applicant's law-related experience since the applicant's name was removed from that roll;
  - (e) any other matters that the applicant considers relevant to the application.
- (3) If the board issues a compliance certificate, it may provide a written report to the SC setting out nature of the application and reasons for issuing the certificate
- May reapply on becoming fit → no time limit/no set time required to elapse
- Readmission may be subject to conditions
- **Requirements:**
  - The applicant for readmission has a **heavy onus** as he or she must ‘**displace**’ the **original decision** as to unfitness that resulted in her or his removal. *Ex parte Lenehan* at 422
  - **Requires evidence of redemption and rehabilitation** – Contrition is relevant because it amounts to recognition by the applicant of the wrongfulness of the earlier conduct and an outward expression of renunciation of that conduct – *Kennedy v Legal Profession Admission Board of New South Wales* [2012]
    - Work experience in the legal industry conducted with utmost integrity during the period of disqualification is probative of redemption
  - Must have candour upon readmission
- The court’s role continues to be a protective one and in the public interest. *Dixon v Legal Practice Board of Western Australia* [2012] WASC 79, [38] per Newnes JA, Chaney and Kenneth Martin JJ
- See *Dixon v Legal Practice Board of Western Australia* below

#### viii. Cases

##### *Prothonotary v Del Castillo* (2001) → Nondisclosure of Crime

**Facts:** DC did not disclose that he had been charged and tried for murder (acquitted). DC stabbed friend upon finding out they had affair with wife → refused to let DC call ambulance

- DC left and lied about dumping knife in the river → friend died

**Issue:** Had non-disclosure of details, or the circumstances of the charge amounted to improper conduct such that DC was not a fit and proper person?

**Held:** Conduct fell below appropriate standards, but **did not reveal he lacked standards**.

- The conduct **stemmed from a sudden response to a wholly unforeseen calamity** placing extraordinary pressures on him nearly 10 years ago
- **Court considered:**
  - Error in judgement did not prove unfit to practice law – demonstrated emotion, contrition and distress in circumstances so remote from those which a lawyer is likely to encounter in practices so as not to be indicative of how he would react in practice

- Amounted to an error in judgement rather than a present lack of fitness and propriety
  - Lies re knife not indicative of unfitness – **must be viewed in circumstances**
  - **Protecting one's family** – lies to police not unfit conduct in the circumstances – DC went to police voluntarily and arguably was trying to protect his wife
- **'Avoidance of lying is not a moral absolute.** Lying **can be wrong**, but is **not always wrong**...if the opponent was trying to protect his wife, his culpability must be judged in light of the fact that many circumstances not blameworthy'

#### **Re Legal Profession Act 2004: Re OG (2007) → Academic Dishonesty**

**Facts:** OG did not disclose an informal academic investigation into collusive assignment (business subject) → both got 0. Both disclosed 0 mark

- GL disclosed the collusion BUT OG said it was misunderstanding instructions → GL was refused admission, while OG was admitted.

**Issue:** Was non-disclosure improper conduct?

**Held:** Yes

- The obligation of disclosure requires that an applicant be frank and honest with the Board about anything which might reflect adversely on their fitness and propriety to be admitted to practise. **Candour does not permit of deliberate or reckless misrepresentation pretending to be disclosure.**
- **Admission to practice is conditioned upon** an applicant having a **complete realisation** of his or her **obligation of candour to the court** in which he desires to serve as an agent of justice. An applicant must at least disclose anything which he or she honestly believes should not be left out.
- Here, **OG deliberately/recklessly misrepresented to the Board** the circumstances in which he came to be awarded a 0 grade. This was the **antithesis of a realisation** of his **obligation** of candour to the court.
- It could not be doubted that the Board of Examiners would not have granted OG a certificate if it had been aware of the misrepresentation. He should not be permitted to benefit from the fact that he managed to mislead them.

**Commentary:** Michelle Evans 'Plagiarism and academic misconduct by law students: the importance of prevention over detection'

- Concerning case → whilst OG's conduct was proven to have been dishonest and worthy of a denial of admission, the much less blameworthy GL still appears to have been treated somewhat harshly.
- At worst, GL was guilty of a one-off incident of academic dishonesty (collusion). He acted ethically in disclosing that he had been suspected of collusion, and despite the fact that there was only an allegation of collusion with no definitive finding, GL was nevertheless denied admission.
- This highlights the serious nature and impact of even an allegation of plagiarism on the future legal career of a student.'

#### **CF Law Society of Tas v Richardson [2003]**

**Facts:** R did not disclose academic misconduct on advice from lawyer parents → misconduct involved giving a photocopy of his substantially completed assignment to a fellow student who had missed the relevant lectures and then handed in the same doc (without permission).

**Held:** Allowed admission

- An applicant 'need not disclose all aspects of his past life that might be open to criticism or arguably amount to examples of imperfection of character or performance'
- Mitigating factors
  - It was not clear why the applicant's conduct amounted to academic misconduct in the subsequent misconduct hearing by the university. Crawford J was unsure of what he had done wrong from reading the Committee's determination.
  - In an appeal to the university, the initial finding was set aside for denial of natural justice
  - All circumstances need to be taken into account –here, the applicant had made an error of judgement in relying on parent's advice given to him about whether to disclose a matter that was uncertain and did not necessarily show him to be less than fit and proper

**Commentary:**

- Textbook suggests judge focused too heavily on whether R would have been denied admission had disclosure been made, at expense of separate issue of non-disclosure itself and the motivation for doing so (p332)
- Le Mire – 'the result of the decision undermines the standard procedure for admission which relies on the candour of applicants'

#### **Dixon v LPB of WA (2012) → Crime + Disciplinary Proceedings + Illness → Readmission**

**Facts:** D committed repeated acts of **perjury** in regard to Family Court proceedings against his ex-wife +

made **false statutory declaration** (when applying for practicing certificate in Qld) that he was not the subject of disciplinary proceedings. D was struck off (aged 57) and applied for readmission.

- Evidence that D suffered from a **depressive illness** across the period of his professional misconduct. D had obtained a compliance certificate from the Board that he was a proper person to be admitted.

**Issue:** D argued that his illness was resolved such that there was no significant risk of any repetition of his conduct, which is 'basically' the exclusive consideration of the court

**Held:** Admission refused

- The court's task extends beyond an assessment of the applicant's likelihood of future infliction of harm upon potential clients if readmitted to the protection of the reputation and standards of the profession
- **Principles as to non-admission** include:
  - Non-punitive nature of the court's jurisdiction
  - **Heavy onus** carried by applicant seeking to **re-establish fitness** and disadvantageous position relative to an original applicant (to displace decision to remove which is 'probably permanent')
  - Need for applicant to demonstrate fitness on '**solid and substantial grounds**' – '**strong measure of assuredness, not hopeful speculation**' necessary
  - Decision in each case **depends on the facts proved**, including considerations as to applicant's **rehab, redemption** and **economic benefit to the community** from the provision of legal services
- **Relevant considerations:**
  - D **refused to accept he had been affected by depression in the past**, suggesting that it was unlikely he would seek out proper treatment in the future should his illness relapse
  - D's **deceitful conduct** was **inadequately explained** by either youthful discretion or the illness, which did not negate appreciation that he was doing wrong
  - Further, swearing false affidavits and giving false testimony are extreme transgressions of the CRL
  - D failed to render any substantial public service to the community since being struck off
  - D's misdeeds brought disgrace upon himself and **besmirched the reputation of the legal profession in 2 states**

#### **Re Lenehan (1948) → Crime**

**Facts:** From 25-28 yo, L acted dishonestly with money belonging to employer and clients as a managing clerk

- Later employed by other solicitors, the army and a bank, who all commended his character and conduct → all entrusted him with large sums of money which were properly accounted for
- L's admission was rejected.

**Held:** Overturned previous decision → admission granted

- Court is to use its discretion with regard to the circumstances proved. L had a completely satisfactory subsequent career, sustained over a long time, which worked to displace the adverse conclusions that marred his start.
- **Majority [28]:** Q to be decided is **not one of law determined by reference to previous decisions**, but to determine in **what manner** the court should **exercise its discretion** in the **particular circumstances of the case**
  - Redemption and time lapse important [31] – war service (including handling of money) and unblemished record since
- Rich J (dissenting): Redemption not sufficient given seriousness of previous conduct
  - '**Solicitors are officers of the court** and the **public expects** that the court will, so far as it can, ensure **upright and honourable** conduct on the part of its officers'
  - The **interests of the court, profession and applicant must be considered** – the **fact** that a **person is a solicitor gives him the stamp of trustworthiness** and marks him as a person in whom confidence may be reposed'
- Starke J (dissenting): Emphasised grave misconduct and if SC decision overturned, L would be in a different position, less able to be controlled and thus endangering the public.

#### **Morrissey v NSW Bar (2006) → Nondisclosure of Crime**

**Facts:** M was debarred in Virginia for repeated misconduct over a 20-year period including contempt of court, assault, bribery, breach of local practice rules, lack of civility, assault and violating terms of probation.

- He also failed to inform a client of settlement money distributed to charities and threatened a judge (for which he was imprisoned) → On applying for admission in NSW did not disclose many issues

**Held:** Admission refused

- M was not a fit and proper person, due to his wilful disobedience of court orders and rules, episodes of violence, failure to appropriately disclose and lack of candour.
  - M exhibited a pattern of disrespect for the judiciary, the rules of practice & laws of Cth.

<ul style="list-style-type: none"> <li>○ He often exhibited disrespect for authority of courts in which he has appeared and flagrantly disregarded ethics and standards necessary to maintain public confidence in the legal profession.</li> <li>○ 'His character is marked by wilful disobedience of court orders and rules, episodes of violence, a failure to make appropriate disclosure and a lack of candour when dealing with his colleagues.'</li> <li>• As per <i>Re Davis</i>, the <b>duty of the applicant for admission is one of full and frank disclosure</b>; however, in appropriate circumstances an initial failure to make full disclosure <b>may be remedied by later provision of material</b>.</li> </ul>
<p><b><i>Porthonotary of the NSWSC v Tatar [2005]</i></b></p> <p><b>Facts:</b> T convicted of criminal charges in 1999-2000, and he failed to make a full and frank disclosure when applying to be admitted in 1999 → crimes related to fraudulently obtaining bank cards → he was admitted</p> <ul style="list-style-type: none"> <li>• Subsequent to his admission, he was convicted of forgery and opening of fictitious bank accounts.</li> </ul> <p><b>Held:</b> NSWSC removed him from the roll in light of his pre and post admission lack of disclosure and dishonest conduct.</p> <ul style="list-style-type: none"> <li>• T had failed to make full and frank disclosures, and the fraud committed was an instance of professional misconduct such that he was not a fit and proper person</li> </ul>
<p><b><i>Prothonotary of the NSWSC v Darveniza (2001)</i></b></p> <p><b>Facts:</b> D was admitted to practise in Queensland and NSW. Previous year D was found guilty of two counts of supplying a dangerous drug.</p> <ul style="list-style-type: none"> <li>• D argued that he held honest and reasonable beliefs that the circumstances around his conviction did not concern his fitness to practise</li> </ul> <p><b>Held:</b> D was struck off the roll</p> <ul style="list-style-type: none"> <li>• D's belief that his conviction did not go towards his fitness to practise showed that he failed to understand the standards of behaviour expected of a practitioner.</li> </ul>
<p><b><i>Re Bell (2005)</i></b></p> <p><b>Facts:</b> B had been bankrupt, had 12 breaches of domestic violence orders (he was fined) and conviction for unauthorised meat production. → B admitted 1<sup>st</sup> and 3<sup>rd</sup></p> <ul style="list-style-type: none"> <li>• Family law proceedings: B filed threatening affidavits against court personnel → unsupported scandalous claims about members of the court</li> <li>• B also claimed that the refusal of his admission was a result of an anti-paedophilia lobby within the Qld govt.</li> </ul> <p><b>Held:</b> Admission refused</p> <ul style="list-style-type: none"> <li>• B's original application not being full and frank</li> <li>• Family law proceedings → despite emotionally charged circumstances that the statements did reflect he was a fit &amp; proper person to practise</li> <li>• Making unsupported statements/allegations regarding opposition to his admission was linked to undermining public confidence in courts he seeks to serve</li> <li>• Actions demonstrate he lacks proper regard for the authority of the judicial system &amp; that he is prepared to act improperly to achieve an end that he believes is desirable; and unresolved contempt allegation; unsupported statements</li> </ul>
<p><b><i>Re B (1981)</i></b></p> <p><b>Facts:</b> B's application accepted by Barristers Admission Board → applied to be admitted → disclosed certain political convictions → B was convicted of contempt, successfully appealed conviction → admission rejected</p> <ul style="list-style-type: none"> <li>• Basis of contempt charge: B was a McKenzie friend → handed out pamphlets to jurors that give instructions on how they should decide cases</li> <li>• Additionally, B was accused of obtaining \$10,000 illegally from a friend for bail of someone else → person later skipped bail and the money was forfeited → lied about paying the bail in application and in paying it she undermined the bail conditions/legal process</li> </ul> <p><b>Held:</b> Admission refused</p> <ul style="list-style-type: none"> <li>• B was not a fit and proper person to practice as a barrister because she was knowingly involved in getting a person out of jail in an illegal manner and the court did not accept her denial that she was implicated.</li> </ul>
<p><b><i>Thomas v LPB (2004)</i></b></p> <p><b>Facts:</b> T disclosed his traffic history and plead to a debt charge (excluding 9 other charges and using incorrect dates), but failed to disclose full details of charges of fraudulent misrepresentation of \$2500 when he was 21. He was asked multiple times for further info.</p> <ul style="list-style-type: none"> <li>• Board rejected T's application, citing lack of candour and premeditated dishonesty over an extended period.</li> </ul> <p><b>Held:</b> Fraud misrepresentation on that scale, albeit 7 yrs prior, suggests present unsuitability to practice</p>

- T's manner of disclosing was recent evidence of his unsuitability – e.g. of disclosure as a process for applicant to demonstrate proper perception of his duty
- Mitigating factors did not outweigh failure to disclose, although possibility to reapply in future

### ***XY v Board of Examiners [2005]***

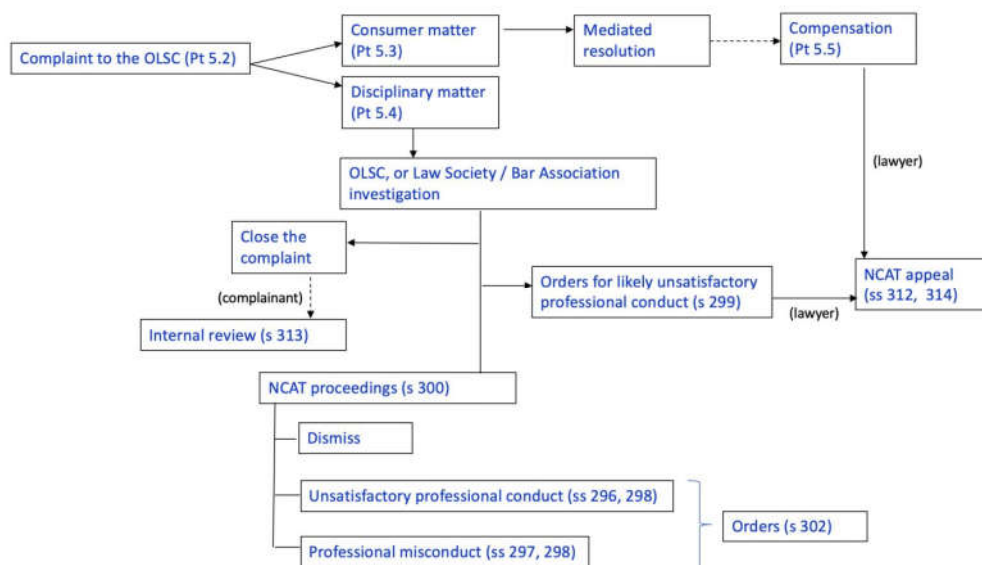
**Facts:** XY had long standing mental health and alcohol issues linked to history of childhood sexual abuse → Some violence related convictions.

- Board denied admission due to mental health issues and a failure to disclose certain matters (although she had disclosed certain mental health problems and all but 4 offence).
  - Legal service incident → received advice from Reverend GH, who was both a minister of religion and currently employed as a solicitor, to omit the section of her draft affidavit which related to the legal service incident
    - Appellant had also been advised by Secretary of the Board that if she was in doubt about a matter to put it into the affidavit of disclosure.
- She had been put into rehab and frequently attended AA.

**Held:** Admission granted

- XY was fit an proper, considering:
  - Past offences did not display dishonesty and lessened moral culpability
  - She was no longer suffering from mental illness (and was involved in rehab through AA)
  - Her failure to disclose legal services incident was viewed as an error of judgement rather than a deliberate attempt to mislead
    - Of course, the appellant must take responsibility for her actions and cannot shift the blame on to others, however, views this failure to disclose as more of an error of judgement than a deliberate attempt to mislead
    - While she should have disclosed the incident at meditation retreat, the time lapse prevented it from being a bar to admission

## **WEEK 4 – MISCONDUCT AND DISCIPLINE**



### **1. DISCIPLINARY PROCEEDINGS**

#### **a. Legislative Framework – Legal Profession Uniform Law**

#### **Part 5.1 – Application of chapter and inherent jurisdiction of Supreme Court preserved**

- Section 260: Objectives
- Section 261: Reference to lawyers
  - 'Lawyer' = an Australian legal practitioner, an Australian-registered foreign lawyer, an Australian lawyer who is not an Australian legal practitioner and a former Australian legal practitioner
- Section 262: Application – generally applies to legal practitioners
- Section 264: Court has inherent jurisdiction regarding control and disputes
  - The court has a right, as well as a duty, to supervise the conduct of its officers and to ensure that the requisite standards are maintained – *Re Morsley* (1925)

#### **Part 5.2 – Complaints**

- Div 1 – Making Complaints and Other Matters about Complaints