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1(b): Diversity & Role of Lawyers; Regulatory Framework

a) Systemic barriers

- i) That may limit entry, progression and retention of individuals/certain groups and consider possible solutions and strategies
- ii) Examine the nature of **sexual harassment** and appropriate strategies to respond – cases: **Hughes v Hill; EFA**

b) Introducing the regulatory framework

- i) Understand the key features of the regulatory framework for regulation of legal professionals in NSW/AU
- ii) Evaluate the adequacy of the current regime for regulating the legal profession in NSW and its strengths/weaknesses
- iii) Identify and analyse the factors that have/are impacting on the structure and organisation of the legal profession and delivery of legal services (nationally and internationally) and consider the implications for regulation of the legal profession

Systemic barriers

1) Unconscious Bias

- a) Underlying attitudes and stereotypes that people unconsciously attribute to another person or group of people that affect how they understand and engage with a person or group often based on mistaken, inaccurate, or incomplete information.

2) Diversity

a) Importance:

- i) Allow you to approach problems with different perspectives – facilitate creativity
- ii) People won't get routinely filled out by things like subconscious bias – understand clients they are representing

b) Solicitors in AU (URBIS, 2022 National Profile of Solicitors):

- i) **Location** – Majority in city (56%); suburbs (31%); **country/ rural (9%)**
- ii) **Sector** – Majority work in private practice (67%), corporate legal (16%), government (12%)
- iii) **Aboriginal/Torres Strait Islander solicitors** – less than 1% nationally
- iv) **Ethnicity – (30%) solicitors born overseas** – mostly in Asia (42%)

v) **Gender** – As of Oct 2022, female solicitors (54%) outnumber male solicitors (46%)

- (1) Trend first observed in 2018. **However women are still underrepresented in certain sectors, particularly in high paying roles in private practice.**
- (2) Eg. One third (35%) of private practice partners/principals were female

c) Kate Altmann, 'A profession for the wealthy?' (2021):

- i) **'Most lawyers in Australia come with pockets lined by wealthy families and relatively privileged backgrounds'**
- ii) **'Until this changes, the legal profession cannot hope to achieve true diversity.'**
- iii) Eg. Fleming: "I would spend hours every semester trying to track down second-hand textbooks..."
- iv) Barrier eg: Grattan Institute, just 10% of high school students enrolling in law degrees across Australia between 2005-2015 came from the lowest quartile of socio-economic status
- (1) Bc high ATAR entry requirement for law, disadvantages students from low socio-economic backgrounds.

Sexual harassment

a) Prevalence:

- i) 25% legal professionals experienced sexual harassment in the 12 month (Victorian Legal Services Board and Commissioner's 2019 investigation,)

b) Factors:

- i) Often occurs in the context of unequal power relations (AHRC, Sex Discrimination)
- ii) Victims more likely to be younger + junior roles (Victorian Legal Services Board and Commissioner's 2019 investigation)
- iii) **Bullying:** 1 in 2 female respondents and 1 in 3 male respondents experienced bullying (K Pender (2019))

c) Women:

- i) One of the main reasons women leave the law is due to experiences of **sexual harassment** (Pauline Wright, Law Council President, (2020))
- ii) **Largely experienced by women (82%)** compared with 15% of men (Victorian Legal Services Board and Commissioner's 2019 investigation)

d) Systemic issue:

- i) Recognised by Law Council of Australia (Sep 2024) that far more needs to be done and that this is a systemic issue

e) Changes?

i) **s 47C – Sex Discrimination Act – Duty to eliminate unlawful sex discrimination**

- 1) A new/recent provision to eliminate as far as possible sex discrimination/harassment

ii) **Law Society of NSW's Charter for the Advancement of Women**

- 1) Focuses on the **recruitment, retention and development of women** in the legal profession.
- 2) By assisting the solicitor profession to develop cultures which promote diversity and inclusion, prevent sexual harassment and bullying,

2(a): Legal Needs, Access to Justice and Delivery of Legal Services

- a) **Legal needs**
- b) **Access to justice:**
 - i) Barriers;
 - ii) Implications of poor access to justice;
 - iii) How to improve access to justice
- c) **Access to justice and technology** (Toohey et al – the 4 waves)

Legal needs of Australians & access to justice

- a) **Importance of legal needs:**
 - i) “[E]quality before the law is **meaningless if there are barriers** that prevent people from enforcing their rights”: **LCA (2013)**
 - ii) Disadvantaged Australians in particular face barriers in accessing the justice system, including **financial barriers, communication barriers and lack of awareness of their rights (Independent Review of the National Legal Assistant Partnership)**
- b) **Prevalence of the issue:**
 - i) **Coumarelos et al, Law Survey (2012):**
 - 1) The 2012 survey found that overwhelmingly, legal problems were of **civil law nature**
 - (a) This is **supported by the Mundy Report** except for some sectors of the Aboriginal and Torres Strait Islander peoples need for criminal law related assistance
 - (b) **Most problems were related to:**
 - (i) Consumer issues (20.6%); Housing (11.8%); Government (10.7%)
 - ii) **Mundy Report:**
 - 1) **Unmet geographical need: There are not enough legal assistance/services available in rural areas**
 - 2) Legal assistance services include: legal information/resources online; Services promoting community legal education; Providing initial legal advice and referrals etc.
 - iii) **2019 World Justice Project Report:**
 - 1) 62% of respondents (n = 1067) experienced a legal problem in the previous two years
 - 2) **Only 33% were able to access help.**
- c) **Barriers: Cost, delay, complexity**
 - i) **IRT cost:**
 - 1) “The hard reality is that the cost of legal representation is beyond the reach of many, probably most, ordinary Australians. ...access is limited to substantial business enterprises, the very wealthy, and those who are provided with some form of assistance.” (Wayne, Martin, 2012)
 - 2) Is a **paradox** that legal professions provide such expensive legal services yet they play such an important role in facilitating access to justice
- d) **Consequence:**
 - i) Law Council of Australia (2018) – legal problems often have adverse impacts on many people's lives. These include:
 - 1) Financial strain (29%); Stress-related illness (20%); Physical ill-health (19%); Relationship breakdown (10%) and Moving home (5%).
 - ii) **Compounding disadvantage/systemic issue:** ‘.....For disadvantaged groups, the costs and consequences of an inability to resolve legal problems compounds inequality and feeds into **chronic cycles of disadvantage**.
- e) **How to improve?**
 - i) **A2JP: Access to Justice Partnership**
 - 1) Multi governmental initiative
 - 2) There are parts of Australia where there are little or no legal assistance services provided to disadvantaged and vulnerable people. Governments should work with service providers and organisations... to better understand these geographic areas of legal need – agreed cost of these services should be included in the step funding of the A2JP
 - ii) **Law Council of Australia, ‘Access to Justice for All’ (September 2024)**
 - 1) Calls on all governments to significantly increase their support for Australia's legal assistance sector
 - iii) **However, in 2019, 72% of community legal and advocacy centres reported being unable to completely meet the demand for their services [ACOSS, 2019]**

Access to justice

1) Toohey et al (2009):

a) Two requirements for access to justice (p 133):

- i) **Accessibility** - with access not contingent on financial means or expertise.
- ii) **Ensure that results 'are individually and socially just'**

b) Barriers to access to justice: Four waves of access to justice (drawing on Cappelletti)

- i) First wave (1960s): legal aid schemes
 - (1) To allow litigants of limited financial means to access legal services
 - (2) In Australia it was not until mid-1970s that the Whitlam Government established the Australian Legal Aid Office - but took over by states
- ii) Second wave: procedural rules
 - (1) To assist with procedural barriers to representing diffuse interests (smaller issues) e.g. new standing rules, ombudsmen
- iii) Third wave: shift of emphasis from courts
 - (1) Acknowledging that courts should not necessarily be the dominant institutions for resolution of civil disputes
 - (2) Expansion of tribunals directed towards simplifying processes to reduce costs
 - (3) Alternative dispute mechanisms that effectively sparked a movement towards use of technology
 - (4) Support for mediation, conciliation as a precondition
- iv) Fourth wave: legal technologies can replace 'mundane legal work'
 - (1) Courts offering new ways of delivering conventional services.
 - (2) E.g. eCourts and electronic filing and online call-overs and legal apps
 - (3) Technology is used to distribute conventional legal information eg. free domestic violence website, Ask LOIS, was launched by the Women's Legal Service NSW in 2012.
 - (4) Unbundled legal document (allows clients to complete some of the legal work themselves) through use of legal doc generations like LawHelp

Technology

a) Digital inclusivity:

- i) "...technological innovations can affect societal inequality...policymakers frequently overlook the realities of target groups' digital exclusion (and underlying language and literacy barriers), in their overreliance on online solutions at the expense of more effective and targeted strategies." (Law Council of Australia, Human Rights and Technology 2018)

b) Toohey et al (2009):

i) **For technology:**

- 1) Susskind argues that technology will **greatly accelerate changes** in legal practice, resulting in a commoditised, segmented and unbundled approach to the delivery of legal services

ii) **Against technology**

- 1) Risks and challenges of **safely, ethically, and effectively using 'big data'**, particularly in the criminal sphere
- 2) "...As the legal profession contracts, **the digital divide will increase** in the sense that the elite, well-connected and wealthy will retain access to human lawyers, with others relying on online information and potentially AI to meet our legal needs." (p 147)
- 3) "It remains to be seen whether the current plethora of hackathons and seed grants designed to inspire next generation legal entrepreneurs will revolutionise the system, or **instead create a bewildering array of disconnected and competing apps** without overall addressing the current complexity of the law and its processes." (p 155)
- 4) Algorithmic bias (p 150):
 - (a) Concern that **rights to procedural fairness** are **breached** because the algorithm on which the decision is made is not transparent.
 - (b) Concern about whether **decision-making is biased** (due to machine learning from a biased data)
- 5) Eg. robodebt 2016
 - (a) Senate Committee Report found 'the system was so flawed that it was set up to fail'
 - (b) The Senate report found 'this lack of procedural fairness disempowered people, causing emotional trauma, stress and shame'. The use of this automated process was strongly criticised for unfairly targeting a vulnerable segment of the population
- 6) Eg. US controversy
 - (a) Controversy over use of the Correctional Offender Management Profiling for Alternative Sanctions ('COMPAS') sentencing tool that uses AI and machine learning to predict the chance of recidivism.
 - (b) Technology is growing rapidly but has largely **escaped legal or political accountability**
- 7) Eg. racial bias
 - (a) In NSW, it was identified in the criminal law context that the algorithm used by law enforcement to select suspects was racially biased. Only 3% of the State's population is Indigenous and yet of those chosen by the algorithm, more than 50 per cent were Aboriginal or Torres Strait Islander. 1

3(a)-(b): Legal Education – Pre and Post Admission

- a) Examine & evaluate the criteria and institutions that control admission to and continued membership of the profession
 - i) General **requirements** for admission;
 - ii) **Process** for admission;
 - iii) **Character requirement** for admission – fitness to practise;
 - iv) **Disclosure** requirements;
 - v) **Mitigating** factors;
 - vi) **Readmission**
- b) Key cases
 - i) **Re Lenehan** [misappropriation of Aunt's finances – now fit and proper]
 - ii) **De Castillo** [murder, but protecting wife – now fit and proper]
 - iii) **Re B** [lied in curial process – **unfit**]
 - iv) **Skerritt** [mental health; stalking; suicide – lack of candour issue – **unfit**]
 - v) **XY v Board of Examiners** [mental health; alcohol issue – now fit and proper]
 - vi) **Re OG** [two friends academic misconduct – one of them **struck off**]
 - vii) **Law Society of Tasmania v Richardson** [academic misconduct; parents involved – not struck off]

Overview

- 1) **Overview**
 - a) Legal Profession Admission Board: advises SC as to who should be admitted but final decision by Supreme Court
 - b) **LPUL**
 - i) Part 2.2 provides for admission to the Australian legal profession.
 - ii) Regulates admission requirements and accreditation of law courses and providers of PLT
 - iii) Objectives: To ensure that legal work is only carried out by those suitable and qualified and entitled to do so and thereby protect the administration of justice
 - c) **LPUAR**
 - i) Procedural requirements for admission and academic and PLT prerequisites. Also provide for the assessment of
 - (1) Academic qualifications completed in a foreign jurisdiction and
 - (2) PLT completed by a person admitted in a foreign jurisdiction.
 - d) **NSW Admission Board Rules**
 - i) Provide for the operation of the Board. Also provide for the assessment of:
 - (1) State Australian academic qualifications or PLT and
 - (2) Incomplete academic study undertaken in Australia and/or a foreign jurisdiction.
- 2) **Rationales (Bartlett and Haller (2013)):**
 - a) 'Protecting' the public and the reputation of the profession; Keeping 'bad apples' out of the profession provides **protection for trusting clients**, the **administration of justice** and the appearance of **high standing of members** of the profession.
- 3) **Concerns (Bartlett and Haller (2013)):**
 - a) **'Fluidity' of test** allows the ability to deny admission to those 'others' whom the profession simply wishes to exclude
 - i) "Such a **vague qualification**, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for **arbitrary** and **discriminatory** denial of the right to practise law"
 - ii) However nb: AU judges have denied any suggestion of prejudice in application of the test
 - b) **Rhode (1985)** argues the nature and amount of personal information required to be disclosed by applicants, and how the test is considered to predict personal 'character' is at best suspect and at worst adversarial, elitist, **overly expensive**, invasive, paternalistic and unfair.
 - i) In AU context, concern about "ever **increasing disclosures of personal information, even as to mental health**"
 - c) **AU law application of character test**
 - i) **Legislation**
 - (1) Model Laws legislation prescribe matters that must be considered by SC when determining applications
 - (2) No direction as to weighting of these factors and not exclusive
 - (3) **Practical effect** of this is that applicants must **disclose any matter in their life** that may relate to suitability and an ever increasing demand for personal life details (**like Rhode**)
 - (4) **Fundamental concern = Lack of clarity and legal certainty** as unclear what to disclose, but non-disclosure can lead to non-admission

Requirements for admission

- 1) Generally:
 - a) **LPUL s 9 Objectives:** (a) to ensure, in the interests of the **administration of justice**; and (b) to **protect clients** of law practices by ensuring that persons carrying out legal work are entitled to do so.

- 2) Overview of requirements:

Summary:

- 1) Academic qualifications + PLT (s 15(a))
- 2) Fit and proper persons (s 15(b))
- 3) Compliance certificate (s 16(a)) – further requirements for this below in LPUAR

LPUL – Part 2.2 – Admission:

- a) **s 15 Objective:** to **protect the administration of justice** and the **clients** 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 **PLT**; and
 - (b) they are **fit and proper persons**.
- b) **s 16 Admission**
 - (1) SC **may admit an individual aged 18 years as an Australian lawyer, but only if—**
 - (a) (NSW Admission Board) has provided the SC with a **compliance certificate**; and
 - (b) not already admitted to the Australian legal profession; and
 - (c) takes an oath of office.
 - (2) **Residence not a requirement for admission**
 - (3) **Any person may object** to the SC to the admission
 - (4) Nothing is intended to interfere with the inherent jurisdiction of the SC to refuse admission.

LPUL – Part 2.2 – Roll:

- 1) **s 22 – Supreme Court roll**
 - (1) SC must maintain a roll of Australian lawyers containing the names of persons admitted
 - (2) A person's **admission is effective from the time the person signs the Supreme Court roll**.
- 3) **s 25 – Australian lawyer is officer of Supreme Court**
 - a) An Australian lawyer is an **officer of the Supreme Court** of this jurisdiction for **as long as his or her name remains on the Supreme Court roll for any jurisdiction**.
- 4) **s 23 – Removal from Supreme Court roll**
 - (1) SC **may order removal of the name on—**
 - (a) its own motion; or (b) recommendation of the designated local regulatory authority; or (c) the recommendation of the designated tribunal.
- 5) **Notice of removal:**
 - a) Person removed in another jurisdiction must give notice to local roll authority (**LPUL s 24(1)**)
 - b) If authority/tribunal under corresponding law made recommendation for removal, person must give notice to local roll authority (**LPUL s 24(2)**)

3) Duty of disclosure:

- a) **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 (**LPUAR r 17(1)**)
 - i) Applicant has a **duty to make a full and complete disclosure** (**LPUAR r 17(2)**)
 - ii) Must include original or certified copies of documentary evidence for matters disclosed (**LPUAR r 17(3)**)
 - iii) Can make separate statutory declaration re physical or mental capacity (**LPUAR r 17(4)**)
 - iv) Nb: Any disclosure made is confidential.
- b) **Frugtniet** [duty of disclosure]:
 - i) **"Revealing more than might strictly be necessary counts in favour of an applicant..."**
 - ii) Full account must be provided re honesty, candour, respect for law or ability to meet professional standards

4) Early assessment of suitability:

- a) Student can ask the Admission Board about their suitability prior to finishing their studies: **LPUL s 21**
- b) **Can appeal – LPUL s 27 – Right of appeal about early assessment of suitability**
 - iii) (1) An applicant for a declaration of early assessment of suitability for a compliance certificate **may appeal** to the **SC against the refusal** of the designated local regulatory authority to make the declaration.
 - iv) (2) SC may make any order it considers appropriate on the appeal
 - v) (3) **A declaration made under this section is binding** on the designated local regulatory authority **unless the applicant failed to make a full and fair disclosure** of all matters

Process for admission – Compliance certificate application

Twofold requirement for ADMISSION – reflected in s 17 LPUL

(1) **Character:** fit & proper person (suitability matters) = **r 10 LPUAR**

(2) **Competence:** educational qualifications = academic + PLT = **rr 5 & 6 LPUAR**

Documents for CC:

1) LPUAR r 12

- a) (1) an application for a compliance certificate must (a) be made by statutory declaration and (b) include any documents required by r 15, 16, 17, 18, 19 or 20
- b) (2) .. the Board must **ensure that notice is published** on the Board's website of the name of every person who makes an application for a compliance certificate, promptly after the Board receives that application.

2) LPUAR r 15-20 – need to submit application form with:

- a) **Original academic transcript** of academic qualification setting out results (LPUAR r 15(1)(a))
- b) Original evidence of **completion of PLT** (LPUAR r 15(1)(b))
- c) **Disclosure statement** (LPUAR r 17)
 - i) (1) Disclosing any matter to which a **reasonable applicant** would consider might regard as **not being favourable** when considering whether **currently of good fame/character** and a **fit/proper**
 - ii) (2) It is the **duty** of every applicant to make a full and complete disclosure
- d) **Two character references** signed before an adult witness that's not related (LPUAR r 16(1))
- e) Consent to the LPAB arranging a compulsory **National Police History Check** (LPUAR r 18)
- f) Consent to the LPAB obtaining **student conduct reports** (LPUAR r 19)
- g) **Certificate of good standing** for persons admitted in an Australian non-participating J or foreign J, including statement in that J that the applicant is (a) member in good standing and (b) is not subject to disciplinary matters (LPUAR r 20)

Prerequisites for CC:

a) LPUL s 17:

- (1) The prerequisites for the issue of a compliance certificate are that he or she—
 - (a) attained the **academic qualifications** specified under the Admission Rules; and
 - (b) satisfactorily completed **PLT requirements**; and
 - (c) is **fit and proper person** to be admitted
- (2) In considering (1)(c) —
 - (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.
 - 1) IE. r 10 LPUAR factors (see below)

b) LPUL s 18 – Exemption from certain prerequisites:

- (1) may **exempt person from satisfying academic or PLT** prerequisites if they are satisfied that the person has sufficient legal skills or relevant experience so as to render them eligible
- (2) relevant experience can be obtained in **legal practice**, in service with govt authority, or another appropriate method. **Includes overseas.**

Others:

a) LPUL s 19 – Compliance certificates:

- (1) **...May apply...to the designated local regulatory authority for a compliance certificate**
- (2) may require applicant to provide further info
- (3) may issue and provide compliance certificate to SC outlining the applicant has satisfied the requirements
- (4) designated local authority **may revoke compliance certificate** on the basis of info being **false, misleading, or incomplete**
- (5) however revocation does not necessarily affect admission if he/she is already admitted
- (6) designed local authority must ensure **notice is given**
- (7) **Any person may object** against the issue by of a compliance certificate to a particular person.
- (8) **DLR authority is not to issue a compliance cert until after:**
 - (a) It gives **notice**
 - (b) Afford reasonable opportunity for persons to object
 - (c) Has – (i) given applicant a copy of objection (ii) afford to respond to objection within reasonable period
 - (d) Has considered all objections received and all responses received within reasonable period
- (9) but failure to give notice under (6) or give notice does not affect validity of applicant's submission

b) Further inquiries and hearings

- i) The Board may (c) seek and obtain any further information re academic qualifications or PLT and (d) require the applicant to appear before the Board (LPUAR r 22(1))

c) LPUL s 26 – Right of appeal about compliance certificates

- (1) An applicant may appeal to the SC against the refusal of to issue a compliance certificate.
(2) Can also appeal against the revocation of the compliance certificate.
(4) The SC may make any order it considers appropriate on an appeal under this section
(5) If the SC decides that an appeal should be granted, the order may include a direction that the order has the same effect as a compliance certificate provided to the Court by the designated local regulatory authority.

d) LPUL s 20 – Conditional admission of foreign lawyers:

- i) (1) designated local regulatory authority may recommend in a compliance certificate, that a foreign lawyer be admitted (subject to conditions eg:)
(a) limit period of admission (b) undertake PLT, academics (c) to engage in supervised legal practice (d) limiting the area of law (e) otherwise restricting
(2) the foreign lawyer is subject to those conditions recommended
(3) the SC may revoke a condition
(4) the SC order removal from roll for a contravention of a condition
(5) contravention is capable of constituting UPC or professional misconduct
- ii) **Right of appeal: A foreign lawyer admitted subject to any conditions may appeal against the recommendation (LPUL s 26(3))**

Breakdown of the TWOFOLD requirement:

(1) COMPETENCE REQUIREMENT – rr 5 & 6 LPUAR, reflected in s 17 LPUL:

1) LPUAR r 5 – Specified academic qualification prerequisite

- (a) (1) For the purposes of s 17 (1) (a) requires completion of tertiary course which:
(a) includes the equivalent of at least 3 years' full-time study of law,
(b) is accredited by the Board, and
(c) demonstrate appropriate understanding and competence set out in Schedule 1, or otherwise
(b) (2) If academic qualifications more than 5 years... may require:
(a) further academic subjects, (b) further examinations, and (c) apply for a compliance certificate within any period,

2) LPUAR r 6 – Specified PLT prerequisite

3) LPUAR r 11 – If completed in FOREIGN JURISDICTION:

- (a) (1) person who has completed academic requirements in a foreign J may apply for a direction about additional academic qualifications to be acquired to meet r 5
(i) (3)(a) Board must consider extent to which the academic qualification is substantially equivalent
(b) (2) same for PLT r 6
(i) (3)(b) Board must consider the extent to which the PLT in foreign J is substantially equivalent

4) LPUAR r 7 – Accrediting law courses and PLT providers:

- (a) (1) the Board may... accredit (a) a law course for academic qualifications (b) PLT provider
(b) (5) The Board must publish on its website the name of each course/provider
(c) (7) The Board can give notice in writing to withdraw/vary/impose conditions on accreditation

5) LPUAR r 8 – Monitoring and reviewing accredited law courses and PLT providers:

- (a) (1) The Board must monitor and may review performance of (a) accredited law course (b) accredited PLT
(b) (5) The Board (a) must give a copy of any review report received and (b) may publish copy/summary of report

6) LPUAR r 13 – Admission of NZ practitioners in VIC

- (a) (2) If SC of Victoria advises the Board that a NZ practitioner is seeking registration in Victoria under the mutual recognition legislation, the Board may make any enquiries it sees fit concerning that person's proposed registration.
(b) (3) If the Board is satisfied that such documents comply.... with the mutual recognition legislation, it must issue a compliance certificate
(c) (4) If the Board is not satisfied of the matters referred to in subrule (3), it must refer the notice and accompanying documents to the SC for determination

(2) FIT & PROPER PERSON REQUIREMENT – r 10 LPUAR, reflected in s 17 LPUL:

- 1) General principles
 - a) **Onus:** applicant to establish fitness
 - b) **Statutory test** is in present tense: whether applicant “**is** currently of good fame/character” “**is** a fit/proper”
- 2) Recall – duty of disclosure from above
 - a) **At the heart of duties to discharge as a lawyer is a commitment to honesty and open candour and frankness (Frugtniet)**
 - i) **Full and frank disclosure** is essential - although in most circumstances disclosure of past indiscretions will not result in being denied admission.
 - ii) Applicant's present understanding and estimation of applicant's past conduct is relevant.
 - b) **Legal profession has long required the highest standards of integrity (Cummins)**
 - c) Four interrelated interests (Cummins):
 - i) **Clients** must feel secure in confiding their secrets and entrusting their most personal affairs
 - ii) **Fellow practitioners** must be able to depend implicitly on the word/behaviour of their colleagues
 - iii) **The judiciary** must have confidence in those who appear before the courts
 - iv) **The public** must have confidence in the legal profession
- 3) LPUAR r 10 – Determining whether someone is a fit and proper person
 - a) (1) For the purposes of s17 (2) (b) of the Uniform Law, **the Board must have regard:**
 - (a) any **statutory declaration** as to the person's character, referred to in rule 16,
 - (b) any **disclosure statement** made by the person under rule 17,
 - (c) any **police report** provided under rule 18,
 - (d) any **student conduct report** provided under rule 19,
 - (e) any **certificate of good standing** provided under rule 20,
 - (f) whether the person is currently of **good fame and character**,
 - Previous criminal behaviour/charges (Del Castillo)
 - Previous improper conduct in curial process (Re B) – particularly relevant if it would have led to disciplinary action for a legal practitioner
 - Previous improper conduct in a profession/employment (Re Lenehan)
 - Infirmary (Skerritt)
 - Disclosure of criminal charges (Del Castillo)
 - Disclosure of academic misconduct (Re OG; Richardson)
 - Mental health (Skerritt; XY v Board of Examiners)
 - **Mitigating factors:**
 - **Age** of applicant at time of misconduct, lapse of time since misconduct (Re Lenehan)
 - Evidence of **redemption/rehabilitation** (Re Lenehan)
 - **External stressors** (Re Del Castillo)
 - (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,
 - Not if they merely went through the process but one with **adverse** findings.
 - (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.
 - (a) (2) The Board may require a person to:
 - (a) take an **examination**, and
 - (b) obtain a **result** in that examination, specified by the Board for the purposes of subrule (1) (l).

4(a): Duties to the Court & the Administration of Justice

1. Examine **lawyers' duties to the court and the administration of justice** and consider what this requires from lawyers, including
 - a. Independence
 - b. Duty of honesty and candour [Not misleading the court + Assisting court with relevant law]
 - c. Maintaining integrity of evidence – witnesses
 - d. Not misusing the resources of the court/abuse of process – **White Industries** [abuse of process eg]
 - e. Facilitating efficient administration of justice
 - f. Pell's lawyers in the **Ellis case** [attack dog strategy]
2. Consider factors and circumstances that may pose **challenges** for lawyers in fulfilling their duty to the court
3. Consider the importance of **lawyer's duty** to the court and how the duty **promotes fairness and justice**

Lawyer's duty to the court and the administration of justice

- a) **Duty derives from common law + conduct rules**
 - i) Recall – on admission, lawyers become '**officers of the court**' (LPUL s 25)
 - ii) Recall – **paramount duty to the court** (SR 3; BR 23)
 - 1) **SR 3.1** A solicitor's duty to the court and the administration of justice is paramount + prevails to the extent of inconsistency
 - 2) **BR 23** A barrister has overriding duty to court to act with independence in the interests of administration of justice.
 - iii) "...as an officer of the court concerned in the administration of justice, he has an **overriding duty to the court, standards of his profession, and public**, which may... lead to a conflict with his client's wishes" (Rondel v Worsley, Lord Reid)
- b) **Content of lawyer's duty to the Court**
 - i) According to Ipp J, the **duty to the court is arguably at its core, a duty to the community**
 - ii) Ipp J (1998) summarised the many seemingly disparate manifestations of a lawyer's duty to the court under 4 categories:
 - 1) a general duty of **candid disclosure** to the court;
 - 2) a general duty **not to abuse** the court's process;
 - 3) a general duty **not to corrupt** the administration of justice; and
 - 4) a general duty to conduct cases **efficiently** and **expeditiously**.
- c) **Fundamental duties:**
 - i) **Solicitors' Rules**
 - 1) **SR r 3: Paramount duty to the court and the administration of justice**
 - 3.1** a solicitor's duty to the court and the administration of **justice is paramount** and prevails to the extent of inconsistency with any other duty.
 - 2) **SR r 4: A solicitor must also**
 - 4.1.1** act in the **best interests of a client**
 - 4.1.2** be **honest** and **courteous** in all dealings
 - 4.1.3** deliver legal services **competently, diligently** and as **promptly** as **reasonably possible**,
 - 4.1.4** **avoid any compromise** to their **integrity** and **independence**, and
 - 4.1.5** comply with these Rules and the law.
 - 3) **SR r 5: Standard of conduct — dishonest or disreputable conduct**
 - 5.1** A solicitor **must not engage in conduct, which**
 - 5.1.1** demonstrates that the solicitor is **not a fit and proper person**, or
 - 5.1.2** is likely to (i) be **prejudicial** to, or **diminish the public confidence** in, the administration of justice, or (ii) bring the **profession into disrepute**.
 - 4) **SR 6 Undertakings in the course of legal practice**
 - 6.1** A solicitor who has given an undertaking in their legal practice must honour that undertaking and **ensure the timely and effective performance of the undertaking**, unless released
 - 6.2** A solicitor **must not seek from another solicitor**, undertakings in respect of a matter, that would require the cooperation of a third party who is not party to the undertaking.
 - ii) **Barristers' Rules**
 - 1) **BR 8** A barrister **must not engage in conduct** which is:
 - (a) **dishonest** or otherwise **discreditable** to a barrister,
 - (b) **prejudicial** to the administration of justice, or
 - (c) likely to **diminish public confidence** in the legal profession or the administration of justice or otherwise bring the legal profession into **disrepute**.
 - 2) **BR 23 Duty to the Court** A barrister has an **overriding duty to the court** to act with **independence** in the interests of the **administration of justice**

(1) Independence

- a) Generally:
 - i) Solicitors must 'avoid any compromise to their integrity and professional independence' (SR 4.1.4).
 - ii) Barristers "have an overriding duty to act with independence in the interests of the administration of justice" (BR 23)
- b) Forensic judgment:
 - i) **Lawyers must exercise forensic judgment and not act as 'mere mouthpiece' of the client (SR 17.1/ BR 42)**
 - ii) "A barrister must not act as the mere mouthpiece of the client or of the instructing solicitor and must exercise the forensic judgments called for during the case independently..." (BR 42)
 - iii) **HOWEVER – can go against client instructions sometimes (BR 43 and SR 17.2)**
 - 1) **BR 43** A barrister does not breach the barrister's duty to the client...**simply by choosing, contrary to wishes, to exercise the forensic judgments so as to:**
 - (a) **(a) confine any hearing to those issues** which the barrister believes to be the **real issues**
 - (b) **(b) present the client's case as quickly and simply** as may be consistent with its robust advancement, or
 - (c) **(c) inform the court of any persuasive authority against the client's case.**
- c) Personal opinions/familiarity not allowed:
 - i) **Personal opinion:** Barrister cannot make submissions on material that conveys their personal opinion (BR 44)
 - ii) **Familiarity:** A barrister/solicitor must not in the presence of parties/solicitors deal with a court on terms of informal personal familiarity which may reasonably give the appearance that they have special favour with the court (BR 45; SR 18.1)
- d) Gifts/influence
 - i) Barrister **may not make a payment/gift** by reason of/connection with the introduction of professional work (BR 46)
 - ii) Barrister **must not exercise any undue influence** intended to dispose the client to benefit the barrister in excess of the barrister's fair remuneration for the legal services provided to the client (BR 47)
 - iii) Barrister **must not receive any money or property by way of loan from any client**, the relative of a client or a business entity of which a client is a director, partner or manager, during the course of a retainer with that client unless the ordinary business of the client, client's relative or the business entity includes lending money (BR 48)

(2) Honesty & candour [duty to assist the court with the law; duty not to mislead the court]

- b) Generally
 - i) A solicitor must: "be **honest** ... in all dealings in the course of legal practice" (SR 4.1.2. see also SR 5)
 - ii) Barristers "must act **honestly**" (BR 4(c), see also BR 8)
- c) Duty to assist court by identifying relevant law
 - i) **Lawyers have a duty to inform the court of the relevant law (SR 19.6 and BR 29).**
 - ii) Includes informing the court of (SR 19.6; BR 29):
 - 1) Any **binding authority** (BR 29(a))
 - 2) Where there is no binding authority, any **authority decided by an Australian appellate court**, and (BR 29(b))
 - 3) **Any applicable legislation**, which the solicitor has reasonable grounds to believe to be directly in point, against the client's case (BR 29(c))
 - iii) "Court **expects counsel to proceed beyond the textbook and cite and explain the leading cases...**" (*Jones v Baker*, Young CJ)
 - iv) **Exceptions – Barristers need not inform the court of matters:**
 - 1) At a time the opponent's whole case will be **withdrawn** OR the **opponent will consent to final judgment in favour of the client**, unless the appropriate time for the barrister to have informed the court of such matters in the ordinary course has already arrived or passed (BR 30)
 - 2) Authority or legislation for evidence the court has ruled **inadmissible** without calling on the defence (BR 32)
- d) Duty not to mislead the court (applies to both fact + law)
 - i) **Not to mislead:**
 - 1) S/C "**must not deceive or knowingly or recklessly mislead the court**" (SR 19.1 and BR 24)
 - 2) Must not advise or suggest to witness that false/misleading evidence should be given, nor condone another person doing so, or coach a witness (BR 69; SR 24).
 - ii) **Correct misleading statements:**
 - 1) S/C "**must take all necessary steps to correct any misleading statement made by the [S/C] to a court as soon as possible after the [S/C] becomes aware that the statement was misleading**" (SR 19.2 and BR 25)
 - iii) If opponent makes a mistake:
 - 1) **Khudados v Hayden, per Ward:** "A barrister is not bound to disclose evidence favourable to the other side to the court. He would fail in his duty to his own client were he to supplement the deficiencies in opponent's evidence..."
 - (a) BUT a barrister **must alert the opponent** and if necessary **inform the court** if any express concession made in the course of a trial in civil proceedings by the opponent about **evidence, case-law or legislation** is to the knowledge of the barrister **contrary** to the true position and is believed by the barrister to have been made by mistake (BR 26)
 - 2) **SR 19.3** A solicitor will not have made a misleading statement to a court simply by failing to correct an error in a statement made to the court by the opponent or any other person (See also SR 22.3/BR 51)