

Legal Profession PQ- full notes

NOTE – topic numbers in this outline do not directly match topic numbers in course outline BUT all content related to the problem questions is nonetheless included

| | |
|-------------------------------------------------------------------------------------|-----------|
| Topic 1 Sexual Harassment in the profession..... | 2 |
| Topic 2 Law Practice Management: Costs..... | 4 |
| Trust money..... | 4 |
| Costs and Billing..... | 5 |
| Topic 3 Legal Education – Pre and Post Admission to the Profession..... | 8 |
| General requirements – Uniform Law..... | 8 |
| Process/Determination of Admission – Admission Rules..... | 9 |
| Topic 4 (A) Duties to the Court and the Administration of Justice..... | 16 |
| Topic 4 (B) Duties of Representation and the Lawyer-Client Relationship..... | 22 |
| Rules specific to Barristers – Cab Rank Rule..... | 22 |
| Duties Owed to clients (both solicitors & barristers)..... | 26 |
| Topic 5 (A) Communication and Interviewing..... | 30 |
| Topic 5 (B) Duty of Confidentiality..... | 31 |
| Topic 5 (C) Client Legal Privilege..... | 35 |
| Topic 6 Conflicts of Interest..... | 40 |
| Topic 7 Duties in Specific Areas of Practice..... | 47 |
| Criminal Law..... | 47 |
| Government Lawyers..... | 51 |
| In-House Counsel..... | 54 |
| Topic 8 Liability and Immunity..... | 55 |
| Topic 9 Complaints and Discipline..... | 58 |
| Topic 10 Technology and the Future of the Legal Services..... | 68 |

Topic 1 Sexual Harassment in the profession

Sexual harassment → Unwelcome sexual behaviour that a reasonable person would anticipate would make someone feel offended, humiliated or intimidated.

There are 3 relevant set of rules :

1. Sex Discrimination Act 1984 (Cth) s 28A → defines what constitutes sexual harassment
2. Solicitors Rules → highlights solicitor duty to not harass
3. Barristers Rules → highlights barrister duty to not harass

Sex Discrimination Act 1984 (Cth) s 28A

1. For the purposes of this Act, a person **sexually harasses** another person (the person harassed) if:
 - a. the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; OR
 - b. engages in other unwelcome conduct of a sexual nature in relation to the person harassed;

in circumstances in which **a reasonable person**, having regard to all the circumstances, would have anticipated the **possibility** that the **person harassed would be offended, humiliated or intimidated**

- (1A) For the purposes of subsection (1), the circumstances to be taken into account include, but are not limited to, the following: list includes:
 - Age,
 - Gender identity,
 - Disability
 - Status of the person harassed;
 - Relationship between the harassed person and the person
- 2. In this section: "**conduct of a sexual nature**" includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.

Solicitors Rules

42 Anti-discrimination and harassment

- 42.1 A solicitor must not in the course of, or in connection with, legal practice or their profession, engage in conduct which constitutes—
- 42.1.1 discrimination,
 - 42.1.2 sexual harassment,
 - 42.1.3 any other form of harassment, or
 - 42.1.4 workplace bullying.

Barristers Rules

123 Anti-discrimination and harassment

1. A barrister must not in the course of, or in connection with, legal practice or their profession, engage in conduct which constitutes:
 - a. Discrimination,
 - b. sexual harassment, or**
 - c. bullying.
2. For the purposes of subrule (1), conduct in connection with a barrister's profession includes, but is not limited to:
 - a. conduct at **social functions** connected with the bar or the legal profession, and
 - b. interactions** with a person with whom the barrister has, or has had, a **professional relationship**.

Legal profession approach to the issue:

1. Case law:

- Emphasises that a solicitor exploiting their position over a vulnerable employee constitutes sexual harassment → **Hughes v Hill [2020] FCAFC 126**
 - Noted both the professional status and breach of confidentiality as heightening severity of the misconduct and justifying aggravated damages
- Upheld sexual harassment for comments made under the guise of jokes → **EFA [2021] NSWCA 339**
 - BUT → there seemed to be a reluctance to punish barristers in those circumstances:
 - Penalty Considerations: While the barrister's actions were serious, financial penalties were adjusted due to pre-existing insurance costs.
 - Unfitness to Practice: The conduct, though vulgar and inappropriate, was not deemed sufficient to justify a finding of unfitness to practice.

Topic 2 Law Practice Management: Costs

Trust money

Trust Money = money paid by a client to a legal practitioner to be used in the provision of legal services.

- The money is owned by the client, and the practitioner is the 'trustee' – *ie they hold and administer the money for the benefit of the client*

1. When are funds 'Trust Money'? s 129 Legal Profession Uniform Law

1. Trust money is money entrusted to a law practice in the course of or in connection with provision of legal services, including:
 - a. Money received **for legal costs before the services have been provided**
 - b. **Controlled or transit money** received by the practice
 - c. Money received by the practice that is **subject to a deal to handle money on behalf** of another person
2. Trust money **does not include**:
 - a. Money received for **services which have already been provided**
 - b. Money held by a practice for **purposes of investment, mortgage financing or other financial services**

2. Rules re handing of Trust Money

- **Rules under Legal Profession Uniform Law:**
 - Mixing: Trust money must not be mixed with other money → s 146
 - Records: Permanent trust records must be held by a practice → s 147
 - Maintaining funds: Practitioner must not, *without a reasonable excuse*, cause a deficiency in a trust account (ie must not exhaust all funds unless reasonable excuse) → s 148
 - Permission requirements: Trust money must be deposited into the firm/practitioner's general account, and must only be disbursed in accordance with directions given by the client → s 138

3. Sanctions for improper handling of Trust Money

- The extent to which a practitioner handles trust money with reliability and integrity is fundamental to the question of **whether they are a fit and proper person to be entrusted to practice law** → *Law Society of NSW v Jones 1977*
- Depending on the circumstances, improper handling of trust money can amount to (and give rise to consequences under) either:
 - a. Unsatisfactory Professional Conduct (s 296), **or**
 - b. Professional Misconduct (s 297) depending on severity

Costs and Billing

Uniform Law sets out various requirements as to how legal services must be billed

1. Costs Must be 'Fair and Reasonable'

- **172 – Costs must be fair and reasonable**
 1. A law practice must charge costs that are no more than fair and reasonable in all circumstances (and that are proportionate)
 2. In considering whether costs are reasonable, courts will consider:
 - Skill/experience of lawyer
 - Level of complexity and labour involved
 - Circumstances of matter – urgency, time spent, number of documents etc
 4. A cost disclosure is *prima facie* evidence that legal costs in the agreement are fair and reasonable
- **173 – Avoidance of Increased Costs**
 - A law practice must not act in a way that unnecessarily results in increased legal costs – should particularly act reasonably to avoid unnecessary delay resulting in increased costs
 - *A contravention can amount to UPC or PM as can charging more than is fair and reasonable*

2. Costs Must be Disclosed

a. What must be disclosed:

As soon as practical, practice must provide client with information including:

1. **Costs Information:** Information disclosing the basis on which legal costs will be calculated in the matter and an estimate of the total costs → **s 174(1a)**
2. **Changes:** Where there is a change to anything previously disclosed, must provide the client with information disclosing the change and any significant change to the legal costs **s 174(1b)**. Information must be sufficient to allow the client to make an informed decision as to whether to continue with matter → **s 174(2b)**.
3. **Additional information:** Information provided under (1)(a) must include info about the client's rights to → **s 174(2a)**
 - i. negotiate the costs
 - ii. negotiate billing method (e.g. by reference to timing or task)
 - iii. request an itemised bill where they have received one that isn't or only partially is
 - iv. seek the assistance of the designated local regulatory authority in the event of a dispute about legal costs

b. How information must be disclosed

- Disclosure must be written → s 174 (6)
- Practitioner must take all reasonable steps to satisfy itself that the client understood and gave consent to the proposed course of action and costs → s 174 (3)
- Note additional requirements if conditional fee arrangement (below) → s 181

c. Exceptions

- A disclosure is not required for matters unlikely to exceed total costs of \$700 → s 174 (4)
- A standard, less detailed disclosure is required for matters unlikely to exceed total costs of \$3000 → s 174 (5)

d. Consequences

- Non-compliance with disclosure obligations makes the agreement void → s 178
 - Client not obliged to pay legal costs until they are determined by a regulatory authority
 - Law practice must cease any proceedings for recovery of costs until the determination has been made
- This is capable of amounting to unsatisfactory professional conduct or professional misconduct → s 178

3. How Costs must be calculated (Cost Agreements/Billing Method)

- Clients have a right to negotiate the billing method to be adopted → s 174 (2)
- Practices generally free to choose their own method of calculating costs, and may choose to enter into a cost agreement as to how payable costs are to be determined → s 180
- Any agreements not meeting below conditions are void → s 185

a. **Conditional Cost Agreements (generally allowed)** → s 181

- Agreements where **payment of costs are conditional upon the successful outcome** of the matter. These are allowed except in family or criminal matters
- Conditions:
 - Must set out circumstances which constitute a 'successful' outcome, must be signed by client and must include a statement that the client has been informed of right to seek independent advice before entering agreement
 - Must include cooling off period of at least 5 days, in which client can change mind and terminate agreement
- **Pros and cons:**
 - Positives – no need to pay for a loss, allowing people who would not otherwise be able to fund litigation to take matter on
 - Negatives – 'winning' is often defined broadly, meaning you pay even when you haven't done very well (i.e. bad settlement)
 - If you lose you still have to pay winner fees – this might not always be explained

b. A Type of conditional cost agreement: Uplift Agreements (allowed) → s 182

- Agreements where the lawyer is entitled to **regular fees + percentage extra if the litigation is successful**. These are allowed
- Conditions:
 - Only allowed if the practice reasonably believes that a successful outcome is reasonably likely
 - Agreement must include an estimate/range of the uplift fee
 - Uplift fee cannot exceed 25%.
 - Not allowed in family law + criminal law cases

c. Contingency/ Percentage Agreements (not allowed) → s 183

- Arrangements where costs to lawyers are calculated based on a percentage of the amount won in the case. These are prohibited

4. Must provide a Bill

- **Requirements**
 - A bill must be given → **s 189**
 - Bills can be provided as either lump sum or itemised → **s 186**
 - Bills are void unless signed by responsible principal lawyer → **s 188**
 - Must provide progress reports if reasonably requested → **s 190**
- **Requests for Itemised Bills**
 - Clients have the right to request an itemised bill within 30 days after the legal costs become payable → **s 187**
 - If an itemised bill is requested, the law practice must provide the itemised bill within 21 days → **s 187**

5. Consequences (General)

Failure to comply with any of requirements re costs/ money can lead to finding of either **unprofessional conduct** or **professional misconduct** on behalf of either the responsible principal or any legal practitioner involved in giving the bill → **s 207**