

**LAWS2013 The Legal Profession**

**Problem Question Scaffolds**

## Topic 1(a) | Legal Culture and Approaches to Legal Ethics and Professional Responsibility

- State the paramount duty of a lawyer / barrister

**NOTE: The paramount duty of barristers and solicitors is to the administration of justice**

### What barristers must not do

- 1) According to **Legal Profession Uniform Conduct Rules (Barristers) Rules 2015, Rule 8**
  - a. **8 General**
  - b. 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.

### Solicitors have a paramount duty to the administration of justice and the court

- 1) According to the **Legal Profession Uniform Law Australian Solicitors Conduct Rules 2015. Rule 3.1**
  - a. **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.

### Statement of Ethics – The Law Society of NSW

#### “The true profession of law is based on an ideal of honourable service” – Riley, NSW Solicitors Manual

- We acknowledge the role of our profession in serving our community in the administration of justice. We recognise that the law should protect the rights and freedoms of members of society. We understand that we are responsible to our community to observe high standards of conduct and behaviour when we perform our duties to the courts, our clients and our fellow practitioners.
- Our conduct and behaviour should reflect the character we aspire to have as a profession
- This means that as individuals engaged in the profession and as a profession:
  - Our paramount duty is to the administration of justice.
  - We act competently and diligently in the service of our clients.
  - We advance our clients' interests above our own.
  - We act confidentially and in the protection of all client information.
  - We act together for the mutual benefit of our profession.
  - We avoid any conflicts of interest and duties.
  - We observe strictly our duty to the court of which we are officers to ensure the proper and efficient administration of justice.
  - We seek to maintain the highest standards of integrity, honesty and fairness in all our dealings.
  - We charge fairly for our work.
- Things that emanate:
  - Service
  - Protect rights and freedoms of members of society
  - Maintain highest standards of integrity, honesty, fairness in all our dealings
  - Independence
  - Services of highest standard
  - Act honestly, skilfully, diligently, fairly

## Topic 1(b) | Diversity and the role of lawyers; Introducing the regulatory framework in Australia

- What type of lawyer are they?
  - Are they admitted?
  - Do they hold a practicing certificate?
- Has the lawyer completed all CPD requirements?
  - Have they completed the required ones?
  - Are they keeping a record?
- Has there been sexual harassment?
  - Definition
  - Consequence
- Cases

### What type of lawyer are they? *Legal Profession Uniform Law (NSW) No 16a of 2014, Section 6 (Definitions)*

- 1) Australian Lawyer
  - a. means a person admitted to the Australian legal profession in this jurisdiction or any other jurisdiction.
- 2) Australian Legal Practitioner
  - a. means an Australian lawyer who holds a current Australian practising certificate
- 3) Legal Services
  - a. means work done or business transacted, in the ordinary course of legal practice
- 4) Engage in legal practice
  - a. includes practise law or provide legal services, but does not include engage in policy work (which, without limitation, includes developing and commenting on legal policy);

### Facts – Solicitors in Australia

- 1) As of October 2022, there were 90,329 practicing solicitors in Australia (38,265 in NSW)
  - a. State – NSW (42%) Vic, Qld
  - b. Location – City, Suburbs, Rural
  - c. Sector – Private (67%)
- 2) Gender Diversity – Significantly more women than men have entered the profession
- 3) 2416 Barristers in NSW with 25.7% being female and 74.21% being male
- 4) Almost 60% of law students come from the top two quartiles and only 10 percent of high school students enrolling in law degrees across Australia between 2005-2015 came from the lowest quartile of socio-economic status [Grattan Institute Research – ‘A profession for the wealthy? Enduring problem for diversity in law \(2020\) Law Society Journal Online](#)

### Have they complied with CPD requirements?

#### Have they completed the required CPD units?

- 1) A condition of a practicing certificate is to comply with the requirements for CPD *LPUL s52*
  - a. Must complete 10 CPD units per year with 1 unit in each of these fields
    - i. Ethics and professional responsibility
    - ii. Practice management and business skills
    - iii. Professional skills
    - iv. Substantive law

#### Have they recorded the CPD units?

- 1) Solicitors must keep their own record of CPD activities and evidence of the activities for three years *CPD rule 12*
  - a. Solicitors should review the record at the end of the CPD year (31 March) and ensure they have complied with all the units and compulsory fields
- 2) Solicitors must certify they have complied with the CPD requirement when they apply for their practicing certificate *CPD Rule 13*
  - a. Solicitors can be randomly audited *Rule 14*

### Sexual Harassment

#### Definition of sexual harassment

- Unwelcome sexual behaviour that a reasonable person would anticipate would make someone feel offended, humiliated or intimidated

#### Facts

- 25% of legal professionals experienced sexual harassment in the last 12 months, 57% within the last 5 years in the profession
- 82% were women and 15% were men
- 81% of lawyers who experienced such harassment did not report, though it was common to discuss incident with colleagues 46%
- There exists a public leadership statement on Sexual Harassment and Discrimination
  - Statement discusses how the Australian Legal profession prides itself on upholding the principles of justice, integrity, equity and pursuit of excellence in service and how sexual harassment offends these foundations - Support by all professional bodies in the States and Territories

#### Has there been sexual harassment? *Sex Discrimination Act s 28A*

- 1) A person has sexually harassed another person if they have made either
  - a. An unwelcome sexual advance, or a 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.
- 2) The standard is that of a reasonable person:

- a. Would a reasonable person, having regard to all the circumstances have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.
- b. Consider (not limited to): age, gender, disability, relationship

**Have they breached the conduct rule?**

<b>Solicitor</b>	<b>Barrister</b>
<p><b>SR Rule 42</b></p> <p>42.1 If the solicitor in the <b>course of, or in connection with, legal practice or their profession</b>, engages in conduct that constitutes;</p> <p>42.1.1) Discrimination</p> <p>42.1.2) Sexual harassment</p> <p>42.1.3) Any other form of harassment</p> <p>42.1.4) Workplace bullying</p> <p>Then they have breached this threshold</p>	<p><b>BR Rule 123</b></p> <p>(1) If the barrister in the <b>course of, or in connection with, legal practice or their profession</b>, engages in conduct that constitutes.</p> <p>(a). Discrimination</p> <p>(b). Sexual harassment</p> <p>(c). Bullying</p> <p>(2)(a) This includes conduct at social functions connected with the bar or the legal profession; and</p> <p>(2)(b) Interactions with whom the barrister has, or has had a professional relationship</p> <p>Then they have breached this threshold</p>

**Hughes v Hill**

**Facts**

- Hughes was the employer of a paralegal Hill.
- He acted for Hill in a mediation with her former husband and had access to both confidential and personal information regarding Hill.
- There was a obvious power in difference.
- **Conduct**
  - a. Sent emails to about wanting a personal relationship with the applicant.
  - b. Insisted the applicant hug him before going home on multiple occasions.
  - c. Entering the room of Ms Hill and waiting in her bed in his underwear awaiting her return.
  - d. Threatened to replace her with a different woman who would be personally involved with him.
  - e. Large power imbalance – principle versus paralegal.

**Issue**

- Hughes argued the emails were **not work related** as they **occurred after hours**.
- Hughes argued the **hugs** were not work related as they **occurred** at the **end of the work day**.
- Hughes argued the **applicant was flirty with him** which suggested she **was interested in him**.
- **Claimed the acts were not sexual in nature**.

## Held

- The judge held:
  - Breach of confidentiality and Aggravated Damages
    - Awarded largely due to the fact that Hughes used Hills confidential information during the trial against him (that he obtained from acting for her in a mediation against her husband).
    - He also attempted to discourage her from making a complaint
  - Was the advance sexual in nature?
    - Overall the pursuit of Ms Hill was sexual in nature.
  - There may be a 'substantial increase in general damages for cases of sexual harassment'.
- We can consider the relationship between the harasser and the harassment.

## EFA

### Facts

- 1) A barrister at a social dinner walked up to a female clerk who he did not know and pushed her head towards his crotch and said 'suck my dick'
- 2) The barrister wrote an apology after but did not recall the incident except that he recalled 'horsing around'.

### Held

- 3) The court did not find that he pushed her head towards his crotch.
- 4) **HOWEVER**, they did find the offensive remark was made in conjunction with the two reports being made.

Was the accused not fit and proper person to engage in legal practice?

- 5) It was not found that the conduct was not fit and proper person to engage in legal practice.
  - a. This is because it was an isolated instance.
  - b. It was poorly judged, vulgar, and inappropriate.
  - c. However, did not make him unfit.
  - d. The question focuses on not just his conduct but also the objective circumstances and personal qualities of being a lawyer – i.e. professional misconduct is harder to amount to as there is a requirement of them having substantial or consistent failure to maintain a reasonable standard of competence

## Regulatory Framework

- **Self – Regulation:**
  - Professional associations promulgate, and enforce standards of professional conduct, investigate and prosecute complaints, and establish the disciplinary tribunals to hear charges
  - Social trustee professionalism
    - Self-regulation justified by the ideal of a profession as a coherent moral community that socialises its members into appropriate and ethical behaviour
    - This can therefore be understood as a social bargain characterised by trust (legal community takes on burden of regulating itself and society at large trusts the legal profession)
  - Criticisms
    - Self-regulation not necessary to defend individuals and society from the power of the state
    - Individual lawyers with appropriate expertise can be part of the regulatory process without having to hand over all regulation to self-regulatory professional associations
    - Just because it was self-governing in the past does not mean it needs to be in the future
    - Any professional association will find it hard to represent the interests of all members and this leads to confusion of priorities and concentration of its leadership
- **Regulation today**
  - Individual development of a 'positive morality' (morality actually accepted and shared by a group) is the important answer to the diverse range of values that lawyers encounter in practice **Charles Sampford and Christine Parker**
  - National approach
    - Australian Solicitors Conduct Rules 2015 -> also produced new version in 2022
    - Australian Bar Association drafted set of conduct rules for Barristers in 2010 that has been adopted and updated Legal Profession Uniform Conduct (Barristers) Rules 2015
  - **Legal Profession Uniform Law 2014 (NSW)**
    - Ch 2: Threshold requirements for legal practice
      - Generally: places prohibitions on engaging in legal practice by unqualified entities, discusses admissions and prerequisites for compliance certificates
    - Ch 3: Legal Practice
      - Generally: discusses business structures, responsibilities of principals and their liability, practicing certificates, foreign lawyers, registration
    - Ch 5: Dispute resolution and professional discipline
      - Generally: discusses complaints, investigations, consumer matters and disciplinary matters, appeal or review and roles of tribunals
    - Ch 8: Regulatory Authorities
      - Generally: discusses standing committee, legal services council, commissioner, local regulatory authorities
- **NSW Office of the Legal Services Commissioner**
  - The LSC (5 members from participating jurisdictions) and Commissioner oversee the implementation of the Legal Profession Uniform Law Scheme

- Objectives: monitor laws implementation, that it remains efficient, targeted and effective
  - Functions: sets the rules and policy to underpin the law, oversees dispute resolution
- Role of the OLSC?
- Receives all complaints about solicitors and barristers in NSW
  - Oversees the investigation of complaints
  - Plays a major role in resolving consumer matters
  - May take disciplinary action against a solicitor or barrister, or commence disciplinary proceedings in the NSW Civil and Administrative Tribunal - Occupational division

### What is legal assistance?

- Australia's justice system supports resolution of civil, family and criminal matters covering relationships, child protection, human rights, education, employment, finances, injury, health, housing and dealings with government
- A well-functioning justice system underpins protection of rights, foundations of social cohesion, economic activity and community wellbeing
- Disadvantaged Australians in particular face barriers in accessing the justice system, including financial barriers, communication barriers and lack of awareness of their rights
- Without access to properly resourced legal assistance, Australians suffering financial stress will be unable to get assistance for a wide range of matters affecting their economic wellbeing

### What are legal needs?

- Legal problems are disputes for which there is potentially a legal resolution
- Measuring legal need is about measuring the number type of legal problems that people have
- Unmet legal needs are defined as the legal problems that remain unresolved or are resolved unsatisfactorily, regardless of whether any action is taken and regardless of whether there is any involvement of lawyers or the justice system
- Costs and consequences of unmet legal need
  - According to the LAW survey - legal problems often have adverse impacts on many people's lives
    - Financial strain
    - Stress related illness
    - Physical health
    - Relationship breakdown
    - Moving home
    - Compounding disadvantage
      - Costs and consequences of an inability to resolve legal problems compounds inequality and feeds into chronic cycles of disadvantage

### What is access to justice?

- **Toohey et al (2009)**
  - Two requirements for access to justice:
    - System must be accessible, with access not contingent on financial means or expertise
    - Any system delivering access to justice must ensure that results 'are individually and socially just'
  - The link between a person's formal right to seek justice and the person's effective access to the legal system or legal remedies
  - Why is access to justice important?
    - Fundamental to the rule of law?
    - Enables people to protect their rights
    - Extends beyond formal legal pathways
    - LCA (2013) stated in its submission to the Productivity Commission
      - Equality before the law is meaningless if there are barriers that prevent people from enforcing their rights
  - Barriers to access
    - Cost: legal representation is beyond the reach of many, probably most, ordinary Australians

- Delay
- Complexity
- Improving access to justice
  - Access to Justice Principles
    - Accessibility
    - Appropriateness
    - Equity
    - Efficiency
    - Effectiveness
  - Role of
    - Legal Aid Commissions
    - Community Legal Centres
    - Indigenous Legal Services

