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Week 1 – Introduction: Ethics, Morality & the Legal Profession

Introduction

What do we mean by ethics?

Generally: knowing the difference between right and wrong and choosing to do the right thing.

Ethics in the legal profession:

- Separate concept to morals – ethics are grounded in external responsibilities while morals are a more personal and internal sense of right and wrong.
- Values and rules of conduct governing a legal professional's behaviour – minimum standards which a lawyer must maintain.

Enforcement of professional standards:

- Academic and practical requirements to be met before admission.
- Continuing Professional Development obligations.
- If breach: unsatisfactory professional conduct or professional misconduct.
 - Consequences? Loss of right to practice as a lawyer, suspension, reprimand.

Three core attributes of law as a profession:

1. Special skill and learning.
2. As public service as principal goal means that the practice of the profession is not and cannot be motivated by profit.
3. Autonomous and independent of outside control (conditional on attributes 1 & 2).
Self-regulating in nature (LSB).

Challenges facing the legal profession

- Traditional core attribute of profession – public service as primary goal.
- Number of business-like characteristics today – e.g. marketing, law firms set up as corporations instead of partnerships, non-legal services also offered.

Challenges:

- Shift in priority from provision of legal advice to making money (e.g. focus on billable hours)?
- Lack of client loyalty – duty to the court/administration of justice and duty to the client may collide. E.g. client dictates course of matter. Clients willing to change lawyers if you cannot do what they want.
- What was traditionally legal work can now be undertaken by non-lawyers and paralegals – e.g. licensed conveyancers.

Sources of ethical obligations ('the law of lawyering'): Common law

1. Common law

Governs most aspects of lawyer's relationship with:

- clients – contract (e.g. retainer), tort duties (e.g. duty of care), fiduciary law duties (e.g. act in best interests of client), equity duties (e.g. duty of confidentiality);
- the court; and
- third parties – contract (e.g. where fail to make it clear entering into as agent), tort and equity (e.g. non-disclosure of information) in certain circumstances.

2. Statute:

Legal Profession Uniform Law (Schedule 1 of the *Legal Profession Uniform Law Application Act 2014* (Vic)) (Uniform Law – UL) – commenced 1 July 2015.

3. Professional rules:

Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (SCR)

Legal Profession Uniform General Rules 2015

Legal Profession Uniform Legal Practice (Solicitors) Rules 2015

Legal Profession Uniform Admission Rules 2015

Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015

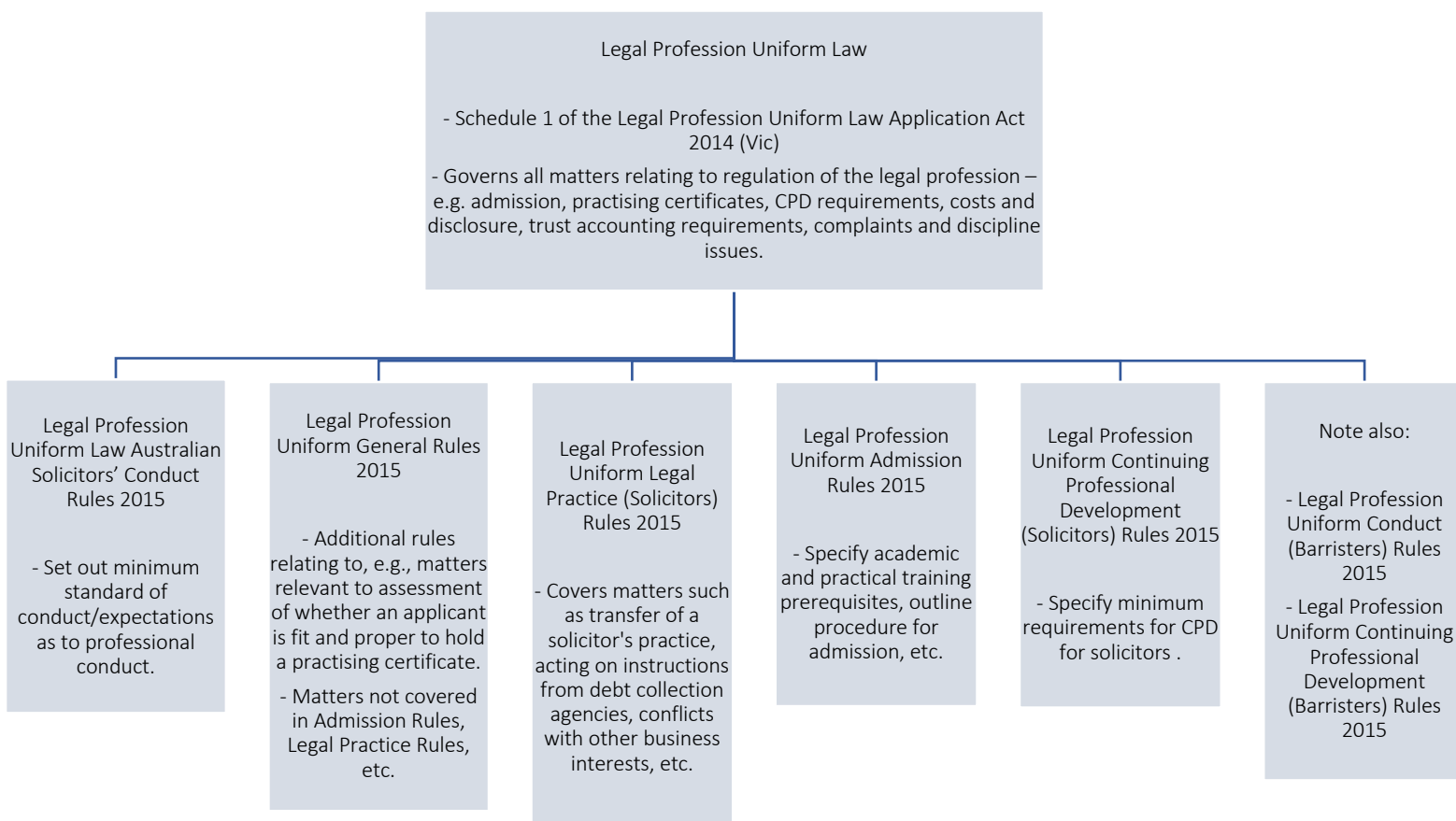
Also: *Legal Profession Uniform Conduct (Barristers) Rules 2015* and *Legal Profession Uniform Continuing Professional Development (Barristers) Rules 2015*.

These are minimum standard rules, they are not the bar of expectation.

Key definitions – s 6 Uniform Law

Cannot engage in legal practice unless a qualified entity.

- **Australian legal practitioner:** an Australian lawyer who holds a current Australian practising certificate.
 - **Australian lawyer:** a person admitted to the Australian legal profession in Victoria or any other jurisdiction.
 - **Law practice:** sole practitioner, law firm, community legal service, incorporated legal practice and unincorporated legal practice.
 - **Barrister:** restricted Australian practising certificate – ‘solicitor’ vs ‘barrister’?
- Provision of **legal services** – work done or business transacted in the ordinary course of legal practice
- **Participating jurisdictions** and **non-participating jurisdictions.**



Australian Solicitors' Conduct Rules

- Codify a number of ethical obligations for contemporary practice.

- Provide a *minimum* standard of conduct that will meet disciplinary proceedings if standards are not met.
- Failure to follow may amount to unsatisfactory professional conduct or professional misconduct.
- Important: if it is not prohibited by the rules, it does not mean it is ethical conduct!
 - Rules as guide to how professionals should conduct themselves in certain circumstances.
 - ‘The first and perhaps the most important thing to be said **about ethics is that they cannot be reduced to rules**...If ethics were reduced merely to rules, a spiritless compliance would soon be replaced by skilful evasion.’ (Former High Court CJ Brennan).

The role of the LSB (legal services board) + Commissioner

- Known as ‘local regulatory authorities’ under the Uniform Law.
- Victorian Legal Services Board (<http://lsbc.vic.gov.au/>) – Pt 3, Div 2 Uniform Law Application Act.
 - Independent statutory authority – responsible for regulating the legal profession in Victoria.
 - Objectives (s 30 Uniform Law Application Act).
 - Responsibilities include handling practising certificates, monitoring trust accounts, prosecuting breaches of the Uniform Law Application Act, etc.
 - Can delegate responsibilities, e.g. to the LIV and Victorian Bar.
- Victorian Legal Services Commissioner (<http://lsbc.vic.gov.au/>) – Pt 3, Div 3 Uniform Law Application Act.
 - CEO of Vic LSB.
 - Manages complaints against legal practitioners who have potentially breached their ethical obligations.
 - Educative role, to ensure that the legal community is up to date and current in its knowledge going forward into practice.

The role of the LIV and VLAB

- Law Institute of Victoria (<https://www.liv.asn.au/>): professional association for lawyers –
 - represents member interests (e.g. drafting of Uniform Law);
 - provide services such as bookshop, library, CPD events;
 - is responsible for a specialist accreditation scheme;

- provides community resources (e.g. lawyer referral services, fact sheets).
- Victorian Legal Admissions Board (VLAB) (<https://www.lawadmissions.vic.gov.au/>) – Pt 3, Div 1 *Uniform Law Application Act*: manages admission to practice process.
 - Assessing applications for admission.
 - Providing compliance certificates.

New bodies under the Uniform Law

- Legal Services Council –
 - Monitors implementation of Uniform Law.
 - Ensures consistency in application.
 - Sets the rules under the Uniform Law – e.g. Australian Solicitors’ Conduct Rules 2015.
- Commissioner for Uniform Legal Services Regulation – CEO of LSC.
 - Supports Council in performing functions.
 - Oversees implementation of dispute resolution and discipline elements of Uniform Law (Ch 5 Dispute Resolution and Professional Discipline).
- Admissions Committee – part of the LSC.
 - Develops admission rules for use by VLAB and determines whether someone should be given a practicing certificate.