

## PART VI — REGULATION AND ACCOUNTABILITY

### 1 PROFESSIONAL CONDUCT

#### 1.1 Overview of Processes in Victoria

Parker describes professional conduct as ‘the law of lawyering’. Professional conduct rules govern the structure and operation of the legal profession. They regulate the behaviour of practitioners by setting admission requirements, promotional and customer service standards, and disciplinary consequences for breach of the regulations.

Specific regulations for the legal profession are generally prescribed by the *Legal Practice Act 1996* (Vic), professional bodies, the Victorian Legal Ombudsman, tribunals, and the state Supreme Court. They encompass:

- Admission requirements;
- Disciplinary system;
- Consumer complaints system (resolving lawyer–client disputes); and
- Consumer disclosure obligations (regulating legal promotion and advertising).

Alongside these specific statutory and delegated regulations operate general law duties of care, fiduciary duties, and contractual obligations. Common law rules apply to lawyers and the legal profession and are enforced by courts and the government; the Supreme Court, for example, has inherent jurisdiction to control lawyers’ conduct and thereby retains final disciplinary authority. Relevant general law doctrines include:

- Fiduciary duties (primarily resolving conflicts of interests);
- Negligence (duty of care);
- Contractual obligations; and
- Competition, civil procedure and anti-discrimination laws.

Sanctions for breach differ between regulatory and common law professional conduct rules. At common law, damages or an injunction may be awarded. A much wider array of disciplinary and remedial consequences follow from breach of regulations, including warnings, fines, disbarment and striking off a practitioner from the practice roll.

#### 1.2 Critiquing Professional Conduct Rules

The two systems of regulation reflect different ethical conceptions about what lawyers should be and how they ought to behave. Relatedly, the rules also embody different standards of professional autonomy (ie, how accountable the legal profession should be to external stakeholders). They highlight the difficulty of balancing self-regulation and professional independence against the broader public interest, competition, and social responsibility.

**Issue:** what ethical assumptions are reflected in current professional conduct rules and processes?

Principles of professional conduct may be critiqued by reference to the previously-mentioned ethical standards. It may be seen that rules set by the Law Institute of Victoria, the Victorian Bar and other Recognised Professional Associations emphasise lawyers’ obligations to their clients

and more heavily penalise breaches of client obligations than breaches of a lawyer's duty to the integrity and administration of law. To this extent, then, such rules prioritise an adversarial conception of lawyers' roles.

Other rules, such as admission requirements and civil procedure rules, privilege the administration of justice over obligations to individual clients. Lawyers must act responsibly and in accordance with the values and standards of the profession as a whole. This has the effect of preventing prospective lawyers from acting in accordance with their personal moral beliefs where they conflict with objective legal constraints. The effect is to enforce an legal ethic internal to law and the legal institution.

Three further questions might be asked of existing professional conduct rules:

- To what extent do they succeed, or fail, in putting into practice a particular ethical approach?
- Should the rules and processes put into practice a different ethical ideal about lawyers?
- If so, how would such rules and processes need to be changed?

Parker:

- Traditional profession conduct rules institutionalise lawyer autonomy.
- They adopt a self-regulatory model (sets ethical standards for itself)
- Traditional ethical theory of lawyers in society is one of isolation from general community ethics and values
  - Adversarial advocacy: lawyers' duties of loyalty and zealous advocacy
  - Extreme partisanship and moral non-accountability (for client's ends or means of pursuing those ends, provided both are lawful)
- Broader morality and community values (including those of the lawyer) are irrelevant to the lawyer's role as advocate
- Only other considerations for lawyers are interpreted weakly:
  - Obligation not to break the law
  - Duty to the court, the integrity of law and to the administration of justice
- Justifications for this view of legal ethics:
  - Rule of law requires partisan lawyers who advise citizens and advocate their rights amidst increasing legal complexity
  - Lawyers cannot fear being held ethically responsible for their client's actions
- Lawyers assume that the client's interests are maximising legal rights and financial interests
  - Agency paradox: both agent and principal disclaim responsibility for the other's actions, with the result that neither the agent or principal act within their own boundaries of moral acceptability
- The result is that professional rules are not concerned with preserving relationships, considering the impact of their actions upon the public interest or broader notions of morality
  - Only a very limited capacity to object to the client's instructions is recognised

To some extent, this ethic is self-perpetuating. The legal institution values autonomy and moral non-accountability, so it creates rules protecting and upholding these ideals. However, as a result, many lawyers feel compelled to act in accordance with these rules and the ethical assumptions they embody, producing an autonomous and morally non-accountable institution which then goes on to create further rules maintaining that practice ethic. In this way, the agency paradox manifests itself in all aspects of the legal institution: neither the agent (actors within the legal community) nor the principal (the rules) engage with the content or implications of the interests (ethic) they purport to uphold, resulting in a regulatory model fundamentally unsuited to modern and emerging contexts.

- Many rules of professional conduct aim to protect clients from their lawyers
  - Eg, fiduciary duties (disclosing conflicts or personal gains), seeking independent legal advice, disclosing all material information to the client, maintaining confidentiality, accounting for all trust monies
- However, these rules do not consider the clients' actual capacities (to protect themselves) and wishes (to conduct their legal affairs in a particular manner)
  - It thus overprotects clients who are capable of protecting themselves or trading fiduciary protection for other benefits
    - Eg, where commercial clients consent to a potential conflict and agree to monitor the risk themselves
  - However, the law of fiduciary obligations under-protects clients from more basic breaches, such as the quality and costs of legal service
- There may also be circumstances in which ordinary ethics requires lawyers to breach client confidence (or another duty) in order to avert injustice or serious physical or financial harm
  - The public interest defence provides some leeway to accommodate these interests
  - However, this is an exception to the norm of professional conduct rules
  - We need to balance the client's interest in confidentiality against broader considerations of justice
  - Currently, professional conduct rules side too closely with the client, which is often unnecessary and frequently damaging to the public interest
- Breaches of lawyers' duties to the Court are rarely disciplined
  - The effect of legal practitioners upon the integrity of the law, the courts and justice has not traditionally been examined
  - This is consistent with the adversarial advocate conception of the lawyer as an amoral entity: broader moral or social concerns are irrelevant; lawyers can only satisfy the administration of justice if they act according to their 'role morality' of zealous advocate
  - Contemporary rules of conduct consider wider dictates: extralegal interests and perspectives, and moral values (corresponds to emerging ethical paradigms in legal practice, and increasing moral activism)
- A morally activist conception of professional conduct rules entails responsiveness to broader ethical concerns (integrity of the legal system, other social/environmental values)
  - Share ethical responsibility for the lawyer's actions between client and lawyer
  - The lawyer should not continue to act against their own conscience or the broader dictates of conscience regardless of what the client says
  - Contemporary regulatory controls: emphasise the desirability of expediency, fairness, ADR, efficiency, and client empowerment
  - Equalise the lawyer–client relationship: empowers the client to deal with bad customer service and recognises their equal accountability for the 'means'
  - Lawyers, through legal controls, must be more responsive to community values
  - Governments and professional associations have not sufficiently altered traditional controls to make them more responsive
    - In Victoria, eg, consumer satisfaction has not increased substantially
    - Self-disciplinary processes hinder responsiveness; independent industry regulators are not powerful enough
  - Disciplinary rules and processes still reflect the traditional model of ethical autonomy
    - Need more proactive reform
    - Regulatory reform is more effective when key stakeholders are engaged in dialogue about the changes
    - The way in which new controls are formulated and applied should permit greater ethical responsiveness

## 2 ADMISSION TO PRACTICE

### 2.1 Requirements for Admission

Victoria's present admission requirements were inherited from the United Kingdom. They comprise two elements:

- Qualifications; and
- Character.

First, prospective lawyers must be sufficiently knowledgeable (in the sense that they must have completed a tertiary course approved by the Council of Legal Education, as provided for by the *Legal Practice Act 1996* (Vic)). A lawyer with the requisite qualifications is said to be admitted by the Supreme Court 'on the basis of' the recommendation of the Council.

Second, the requirement of character restricts admission to persons 'of good reputation and character and a fit and proper person to be admitted'.<sup>1</sup> This entails a positive testimony of good character, and admission of any prior examples of bad character. Bad character comprises either dishonesty, or continued disregard for law and legal institutions.

The requirements of qualifications and good character are said to ensure that only ethical and competent persons are able to become lawyers. Historically, disciplinary rules prevented subsequent lapses of character and continuing legal education ensured continued proficiency. Today, character is maintained by strict performance of public duties.

### 2.2 Dishonesty

The negative component of good character requires prospective lawyers to disclose any prior bad character. In deciding whether past behaviour has the effect of rendering an applicant 'not a fit and proper person' to be admitted, courts strongly emphasise the existence of dishonesty.

Dishonesty includes theft, fraud, forgery or other deception, regardless of whether it resulted in a criminal conviction. The admitting court makes its own decision; the presence or absence of a conviction is irrelevant. Instead, the Court will consider the following factors:

- Rehabilitation (whether the applicant has reformed)
- Remorse (whether the applicant is apologetic)
- Time lapse (whether the transgression took place a long time ago)
- Candour (whether the applicant openly and honestly disclosed the transgression)

Importantly, this means that the existence of a prior conviction isn't determinative of bad character. The extent to which the applicant is honest about any potential blemishes on their record is perhaps more significant, as *Davis* illustrates.

#### **Re Davis (1947) 75 CLR 409:**

##### Facts

- Davis is convicted of breaking and entering

<sup>1</sup> *Admission Rules, Victoria* (1999).

- 12 years later, Davis applies to be admitted
- Davis does not disclose the fact of prior conviction

Issue

- Is Davis a person of fit and proper character to be admitted?

Reasoning

- Davis failed to disclose his conviction, which he should have done
- Candour is significant

Decision

- Bad character is established and Davis cannot be admitted to practice

By contrast, in *Lenehan* disclosure had occurred.

***Ex parte Lenehan* (1948) 77 CLR 403:**Facts

- Lenehan commits fraud as a legal clerk
- 20 years later, Lenehan applies to be admitted

Issue

- Is Lenehan a person of fit and proper character to be admitted?

Reasoning

- Lenehan was candid about the prior fraud and was an honest person
- He had also completed war service
- The length of time in which Lenehan had worked without incident is also significant

Decision

- Admission is allowed

*Richardson* suggests that lesser forms of dishonesty, such as plagiarism, may also need to be disclosed.

***Richardson* [2003] TASSC 9:**Facts

- Richardson is embroiled in a plagiarism incident during his undergraduate degree, wherein it is alleged at first instance that he copied an assignment from another student
- On appeal before the university's disciplinary board, it later emerges that Richardson worked collaboratively with the other student who in fact copied Richardson
- Richardson is cleared of any wrongdoing by the board
- Upon graduation, Richardson applies to be admitted to practice in Tasmania
- He consults with his father, a prominent criminal barrister, about whether he ought to disclose the prior incident; his father reassures him it need not be disclosed

Issue

- Is Richardson a person of fit and proper character to be admitted?

Reasoning

- The plagiarism ought to have been disclosed, even though Richardson was not convicted
- However, because Richardson relies on the legal advice of his parents in concealing the incident, he is not necessarily lacking in candour

Decision

- Richardson is admitted to practice

The outcome in *Richardson* may be contrasted with that in *A Solicitor*, where the practitioner was alleged to have committed acts of sexual abuse. The solicitor was cleared of any wrongdoing, but was held to have committed malpractice in failing to inform the professional authority about the investigations.

### 2.3 Continued Disregard for Law

Prospective lawyers are expected to show some degree of loyalty to the system of which they seek to become a part. This means that continued disregard for the institutions and processes of law may — even absent dishonesty — prevent an applicant from being considered a fit and proper person to be admitted to practice.

*Julius* suggests that political beliefs may be insufficient to evidence disregard for law.

***Re Julius* [1941] St R Qd 247:**Facts

- Julius is a member of the Communist party
- In response to his application for admission, it is argued that, as a Communist, he supports the violent overthrow of the government

Issue

- Is Julius a fit and proper person to be admitted to practice?

Reasoning

- Julius wasn't a full member of the Party; he merely distributed literature
- There is a qualitative difference between believing in some principles of a political movement and resolving to carry out revolution in order to effect them

Decision

- Julius is admitted to practice

However, where a continued disregard for law and legal institutions is manifested by an applicant's conduct over a sustained period, they may be refused admission (*Bacon*).

**Re Bacon [1981] 2 NSWLR 372:**Facts

- Wendy Bacon is a fervent activist
- As part of her campaign against the establishment, she protests, is frequently arrested, and is willing to disobey the law if her ideas about social justice demand it
- She admits that legal ideals are subordinate to her personal view
- On one occasion, she protested the censorship of a magazine by walking into Court wearing nothing but a profane costume
- On another occasion, she is alleged to have obtained bailment for a friend from an unscrupulous source, which was subsequently forfeited due to non-attendance
- To further her activities, Bacon applies to be admitted to practice

Issue

- Is Bacon a fit and proper person to be admitted to practice?

Decision

- Not admitted

Bacon is the archetypal moral activist, and it seems fairly clear that her activities would more appropriately take place outside the processes and institutions of law than within them. However, admission requirements penalise moral activism by prospective lawyers. It does so to an extent to which practising lawyers may not be subject. It is arguable that prospective lawyers who believe a law is unjust should express their disdain without jeopardising their future legal career.

As Bacon observes, ‘most of the freedoms we have today would not exist if people, often supported by progressive lawyers, had not confronted authority and broken unjust laws.’<sup>2</sup> To deny previous activists the ability to participate in shaping and reforming law from the inside seems somewhat unreasonable. Internalising some forms of moral activism may lead to more uncontroversial and responsive reform from within the legal system.

However, it is difficult to draw a line between healthy activism and unhealthy subversion or disregard for law. It may be that certain expressions of protest — such as membership of a political group or leaflet distribution (as in *Davis*) — are appropriate, while others — dressing up as a nun in court, actively seeking out arrest (as in *Bacon*) — are not. Less clear are the following examples:

- Protesting against public policy (eg, refugees and immigration); and
- Criticising apartheid.

To clearly articulate precise boundaries between acceptable and unacceptable forms of moral protest is a very difficult (and controversial) task. It is a question of degree.

It might also be argued that it is hypocritical for a practitioner to be highly critical of the law but to remain a practitioner (supposedly) committed to upholding its administration. Of course, one may also argue that some degree of criticism and reflection is essential: blind subservience is equally disastrous as activist dissent. However, if an individual is so critical of law that they cannot reasonably be expected to uphold its processes, it seems impossible that they are fit to be admitted. Perhaps this is the true rationale of present admission requirements.

<sup>2</sup> Wendy Bacon, ‘I Fought the Law...’ (The Age, 22 November 2003, Melbourne) <<http://www.smh.com.au/articles/2003/11/21/1069027327368.html>>.

### 3 COMPLAINTS AND DISCIPLINE PROCESSES

#### 3.1 Who Should Regulate Lawyers?

##### 3.1.1 Self-Regulation

Self-regulation invokes rules and processes determined and overseen by a professional legal association. That association is responsible to its members to advance the interests of the profession. The result is minimum public accountability and maximum professional independence.

Arguments in favour:

- Lawyers' special expertise
- Responsibility to maintain independence from government, against whom lawyers may be representing clients
  - The legal profession must often argue cases against the government
  - If the government had regulatory control over lawyers, it may undermine operational independence in these situations
  - Lawyers must be free to argue fearlessly and vigorously against the government on behalf of all members of the community
  - Some degree of independence from government executive is important; already close judicial and parliamentary regulation of lawyers
- Incentive to maintain reputation and privileges
- Ethical autonomy
  - Suits role morality of adversarial advocate and responsible lawyer

It has even been suggested that only lawyers truly understand what constitutes ethical conduct. (While it may be true that lawyers are best placed to evaluate the practical demands placed upon a legal ethic, it seems a somewhat spurious objection to independent regulation in light of popular belief about lawyers' morality.)

Arguments against:

- The matters most frequently complained about are consumer issues, and the profession hasn't proven itself able to effectively identify and respond to these problems
  - Excessive costs
  - Delay
  - Lack of communication and candour
- Conflicts of interest may arise
  - Professionals regulating themselves
  - What is in the public's best interest is not always in the profession's best interest (eg, fee reductions or new compliance mechanisms)
  - Profession may unconsciously give excessive weight to its own interests
- Professionals might not be able to understand the substance of complaints made by lay people (consumers and observers)
- The profession only seems to take action in response to cases which threaten to undermine public confidence in lawyers (and would thus be detrimental to the industry)
  - But not system failures or abuses
- The profession may be too harsh on lawyers who do not conform to the prevailing values of the profession



- This is particularly undesirable where those values more closely represent the ethical standards of the community
- Professional associations arguably have too much power (certainly more than regulatory bodies) but, unlike regulatory bodies, are under no duty to exercise their power in the public interest
  - However, there is a certain incentive to continue meeting (at least tolerably) the public interest so that their privileged position is maintained

### 3.1.2 Independent Regulation

At the other end of the regulatory spectrum lies independent regulation by a Minister or government department. This represents the maximum level of public accountability, but entails the minimum degree of dependence for the profession.

Advantages:

- Avoids a conflict of interest between the interests of the profession and the public (or even the appearance of a conflict)
- Government is better equipped to identify and act in the public interest
- Independent regulation is better able to address systemic and policy issues of which the profession may either be unaware or unwilling to change
- Government regulators are directly accountable to the people (more democratic)
- The experience and expertise of lay people, especially consumers and industry leaders, is valuable for improving legal services
- Competition policy
- Ethics of responsiveness: independent regulation, democratically supported, fits better with moral activism and the ethics of care by enabling more direct and effective responses to changing community norms and conditions
- Members of the public are more likely to have confidence in lawyers if they know that their regulation is independently directed or overseen

As the New South Wales Law Reform Commission noted, it is 'a principle of fundamental importance' that the legal profession be responsive to changing community needs and norms. Because lawyers have a monopoly over the provision of litigation and other legal services, Parliament (who created and maintain the monopoly) have a responsibility to the public to ensure that they are able to obtain satisfactory service.<sup>3</sup>

Any system of legal regulation must balance the principles of independence and responsiveness.

Disadvantages:

- The Victorian Legal Ombudsman is acting like the police: receiving, investigating and prosecuting claims of malpractice
  - However, if only 'unsatisfactory conduct' is complained of, a practitioner can be reprimanded without a proper hearing
- Legal practitioners have a valuable role to play in regulating their profession
  - Independent regulators lack the knowledge and experience of practitioners
  - Regulation should be well informed, applicable and realistic to present conditions, and fair in light of professional exigencies

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<sup>3</sup> New South Wales Law Reform Commission, *First Report on the Legal Profession — General Regulation and Structure* (1982) para 3.8.

- Lawyers’ freedom to act for clients against the government or other powerful community interests might be ‘seriously eroded’ if they were controlled externally
  - However, the involvement of non-lawyers can actually increase lawyers’ independence (eg, by protecting practitioners from over-regulation or unfair reprimand by their colleagues)

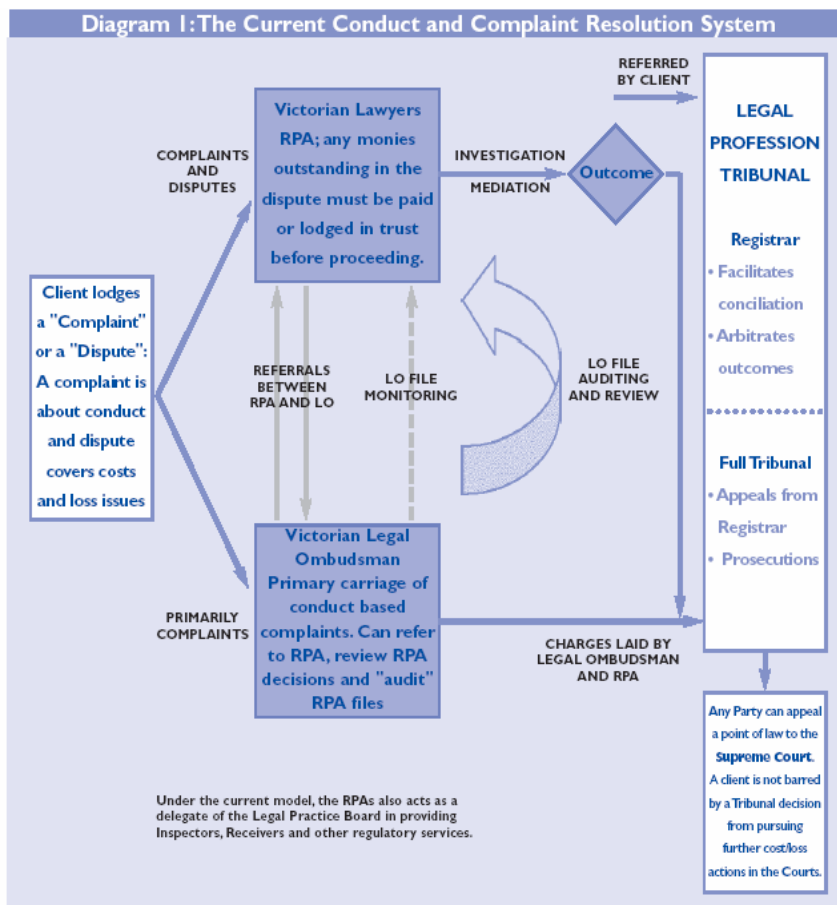
**3.1.3 Current Approach**

The current approach to legal regulation is set out in the *Legal Practice Act 1996* (Vic) pt V (*Legal Practice Act*). This Part establishes a regime of co-regulation (self-regulated professional associations accountable to an independent Ombudsman).

Two forms of professional discipline exist:

- Failures of character; and
- Consumer complaints.

The following diagram illustrates the current processes and bodies:<sup>4</sup>



<sup>4</sup> Sallmann and Wright, *Regulation of the Victorian Legal Profession: Report of the Review of the Legal Practice Act 1996* (2001) 19.

## 1 Making a Complaint

Clients can complain to a Recognised Professional Authority ('RPA') (such as the Law Institute of Victoria or the Victorian Bar) or the Victorian Legal Ombudsman ('VLO'). There are thus multiple entry points for consumer complaints: see ss 137–144 of the *Legal Practice Act*.

Complaints are divided into:

- Those that raise an issue of misconduct or unsatisfactory conduct
  - These become disciplinary matters;
- Those that do not raise an issue of misconduct or unsatisfactory conduct
  - These are just disputes between the complainant and a lawyer.

One criticism that has been made of this system is that multiple entry points for complaints is confusing and inefficient (Sallmann and Wright).

## 2 Disciplinary Matters

Complaints that raise an issue of misconduct or unsatisfactory conduct are then investigated by the VLO or a RPA. The VLO can also review RPA investigations, which provides for some measure of independent accountability and acts as a check on self-regulation: ss 145–156.

The VLO or a RPA can prosecute charges of misconduct or unsatisfactory conduct in the Legal Profession Tribunal: ss 157–170. Appeals can be heard by a Full Tribunal and a Court of Appeal. The Supreme Court of Victoria also has an inherent jurisdiction to discipline lawyers as 'officers of the court', and can hear further appeals.

*Law Society of New South Wales v Foreman* provides an example of the operation and application of similar professional disciplinary processes and standards in New South Wales.

### ***Law Society of New South Wales v Foreman:***

#### Facts

- Foreman, a partner with Clayton Utz, acts in a divorce proceeding which accrues \$355 174.99 in costs
- In order to bill legal costs, a written disclosure of costs needs to be provided (otherwise a firm can only charge up to a certain threshold fee, which was around \$30 000)
- Foreman thought she gave the costs agreement to the client, but the client disputes that it was provided and now seeks to avoid paying the (substantial) fees since incurred
- Foreman forges a timesheet to reflect giving the sheet to the client so that she will be able to prove that the disclosure was made
- She also forges a second sheet before it goes to court as evidence in the costs proceeding
- A discrepancy between copies of the timesheet is later discovered and the forgeries are revealed

Issue

- Is Foreman guilty of professional misconduct?

Reasoning

- Mahoney JA:
  - Protection from future misconduct is not the only relevant concern when deciding whether remove a practitioner from the Roll
    - The Court may consider (relevant aspects of) the character of the practitioner
    - This is separate to and irrespective of their sincere belief that they will not offend again; their character may limit the Court's ability to rely upon that claim
    - The Court should consider whether the solicitor did not understand or was unwilling to accept their obligations
  - It is also relevant consider the effect of its order upon 'the understanding, in the profession and amongst the public, of the standard of behaviour required of solicitors'
    - The Court should articulate the standards and that they are high
    - Allowing a solicitor guilty of a serious infringement of those standards to continue practicing may have a detrimental effect upon the profession's image
  - Can the solicitor establish and maintain the kind of relationship which must exist between solicitors?
    - If solicitors are unable to rely on one another's words and promises, 'the administration of justice would be seriously impeded'
    - Thus, if a practitioner is 'guilty of such conduct that the solicitors with whom he must deal will have significant reservations as to his observance of his obligations and will lack respect for him, that is a matter which is to be taken into account'
  - Is the effect of what the practitioner has done to undermine the Court's confidence in all that they will now say and do?
  - Ms Foreman's default is 'of a most serious kind', that kind being 'of a most serious order'
    - Her argument in mitigation 'is not fully convincing'
    - The profession and wider public would not see anything less than striking off as appropriate to what she has done
    - She has breached the 'serious responsibility' she owes to the Court, the duty she owes to the rest of the profession, its suitors and to the whole of the profession
    - The imposition of a fine is not 'a proper measure of the seriousness of what was done'
  - Therefore, the Court cannot hold Ms Foreman as a person fit and proper to practice as a solicitor
- Kirby P:
  - Public interest in use of skills
    - The highly diligent qualities of this solicitor must be given considerable weight
    - It is in the public interest that such a conscientious legal practitioner should remain in practice
  - Improvement prospects
    - 'The public's interest also includes the economic interest which is involved in utilising, to the full, the skills of talented people who have undergone years of rigorous training but who, having misconducted

themselves, have had to be removed for a time from positions of responsibility and trust'

- The perceptions of the community and legal profession are 'unfathomable'
- A \$20 000 fine is inappropriate, but removal from the role is excessive
- Arguably, the most important issue raised by these facts is the cost of legal services: simply disbarring the solicitor would not protect the true standards of the legal profession and legitimate expectations of the community
  - The defence of enormous charges lay behind the practitioner's forgery; it is those charges which place 'the courts and their constitutional function beyond the reach of ordinary citizens'
  - The underlying issue thus relates to the cost of legal services and access to justice as a result
  - The greatest utility would be achieved by using Ms Foreman's skills in a community legal aid context

#### Decision

- Majority: Foreman is disbarred
  - Although she probably did give the costs agreement to the client, she also deliberately and fraudulently forged court documents
  - Foreman argued that she was under pressure from her firm to perform the alterations, but this is no excuse
- Kirby P:
  - her legal expertise could be better used in the community; she should be assigned to service in a community legal centre

### 3 Disputes

Complaints that do not raise an issue of misconduct or unsatisfactory conduct are treated as 'disputes': *Legal Practice Act* s 142. It is up to a RPA to attempt settlement of such disputes. The VLO has no role in dispute settlement.

If unsuccessful, the matter can be referred to conciliation and then to the Legal Profession Tribunal for decision: ss 122–136.

Naturally, where not protected by advocates' immunity, clients can sue their lawyers under a common law cause of action (eg, breach of contract, negligence, breach of fiduciary duty).

#### **3.1.4 Possible Reforms**

It is uncontroversial that a legal regulatory system should be fair, open, independent, effective, and efficient. However, there is significant disagreement about how best to achieve these goals. Whether they can be achieved by a self-regulatory, co-regulatory or independent system is 'an issue of considerable contention and complexity' (Sallmann and Wright).

The current system has been described as a kind of 'dysfunctional hybrid' of co-regulation and independence, producing an awkward tension and a great deal of inefficiency. The system of co-regulation is arguably an improvement on the self-regulatory model, but its structure makes for inevitable conflict and confusion. However, a more independent system could only work well if the Commission is able and willing to exert pressure on professional associations.

The current 'co-regulators' maintain a questionable working relationship; see, eg, *Power v Hamond* [2005] VSC 2:

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## 4

# Court curbs Victoria's 'zealous' legal regulator

**Katherine Towers**

Victoria's controversial legal ombudsman, Kate Hamond, has been ordered to stop investigating a high-ranking official of the state's Law Institute after a Supreme Court judge raised concerns about 'zealotry'.

Judge David Harper of the Victorian Supreme Court told Ms Hamond to cease investigating the head of the Law Institute's professional standards department, Kevin Power, over aspects of his practising certificate.

Mr Power and two members of his staff took Ms Hamond to the

Supreme Court to stop her investigating claims that Mr Power did not have a valid legal practising certificate and professional indemnity insurance while carrying out receiverships of defunct legal practices.

The incident is the latest in a hostile relationship between Ms Hamond and the LIV since the introduction of the legal ombudsman's office.

Justice Harper found no impropriety on behalf of Mr Power and said that if Ms Hamond did not stop her investigation into the practising certificate issue he was prepared to make the verbal order more official.

However, Justice Harper left

open the question of whether Ms Hamond could continue to investigate Mr Power over how he treated trust accounts when he carried out the receiverships of defunct practices.

**"Her attitude gave rise to a concern about zealotry."**

"The issue was not argued before me sufficiently to enable me to decide the point," he said.

*The Australian Financial Review* understands that Ms Hamond's

office is still investigating Mr Power over the trust account issue.

While Justice Harper found no bias in her investigation towards Mr Power, he did find that her attitude gave rise "to a concern about zealotry".

In a report tabled in the Victorian parliament in late 2003, it was revealed that Mr Power had practised law for six years without obtaining professional indemnity insurance, a mandatory requirement under the Legal Practice Act.

Mr Power had at the time been appointed receiver and manager of about 21 troubled legal practices.

Mr Power subsequently sought

and was granted a retrospective exemption from the statutory requirement to hold professional indemnity insurance.

Justice Harper criticised Mr Power's belief that he did not need to obtain a practising certificate as "too comfortably held" and he also found that he should have followed more strict procedures when dealing with trust accounts.

"The fact is that Mr Power held himself out, to the court and to others, as a current practitioner. He was unwise to have done so without being certain that he had met all the necessary conditions," Justice Harper said.

Sallmann and Wright propose the following criteria according to which the effectiveness of a regulatory model may be assessed:

- Openness and accountability
- Independence
- Flexibility
- Efficiency in handling consumer complaints
- Accessibility to the public and profession
- Use of modern technology and accounting practices
- Dispute resolution techniques
- Cost effectiveness

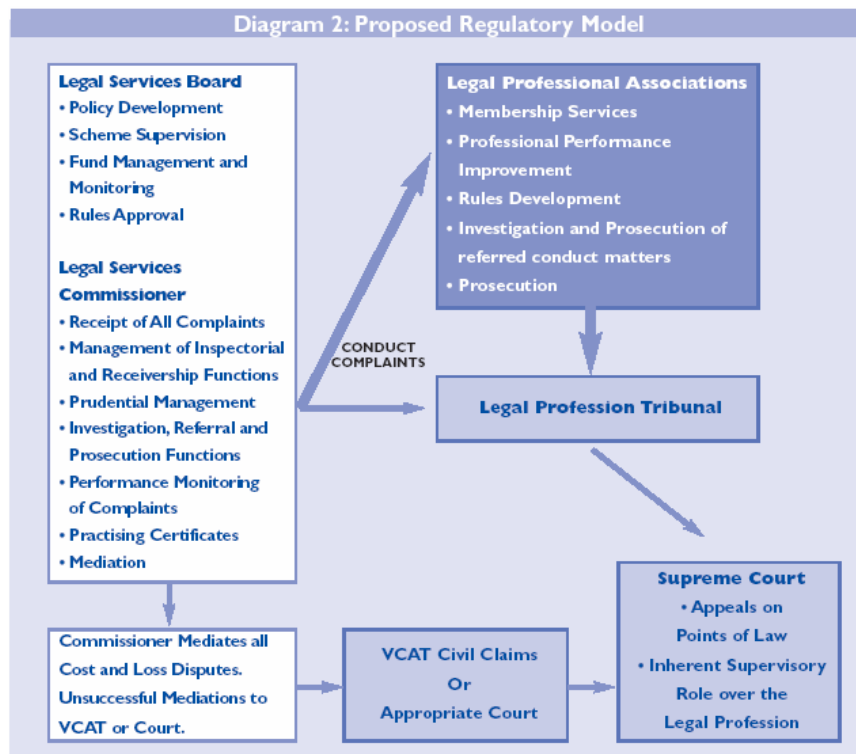
They propose a system whereby a legal services board, comprised of both lawyers and non-lawyers, would make policy, while a legal services commissioner would maintain operational responsibility for all the current functions of the LIV, Bar, LPB and Ombudsman. The Commissioner would receive all complaints, and either deal with them himself or be referred to the professional body for investigation.

See further:

- John Cain and Kate Hamond, 'Tending the bar' (The Age, 18 August 2002) <<http://www.theage.com.au/articles/2002/08/17/1029114031216.html>>.

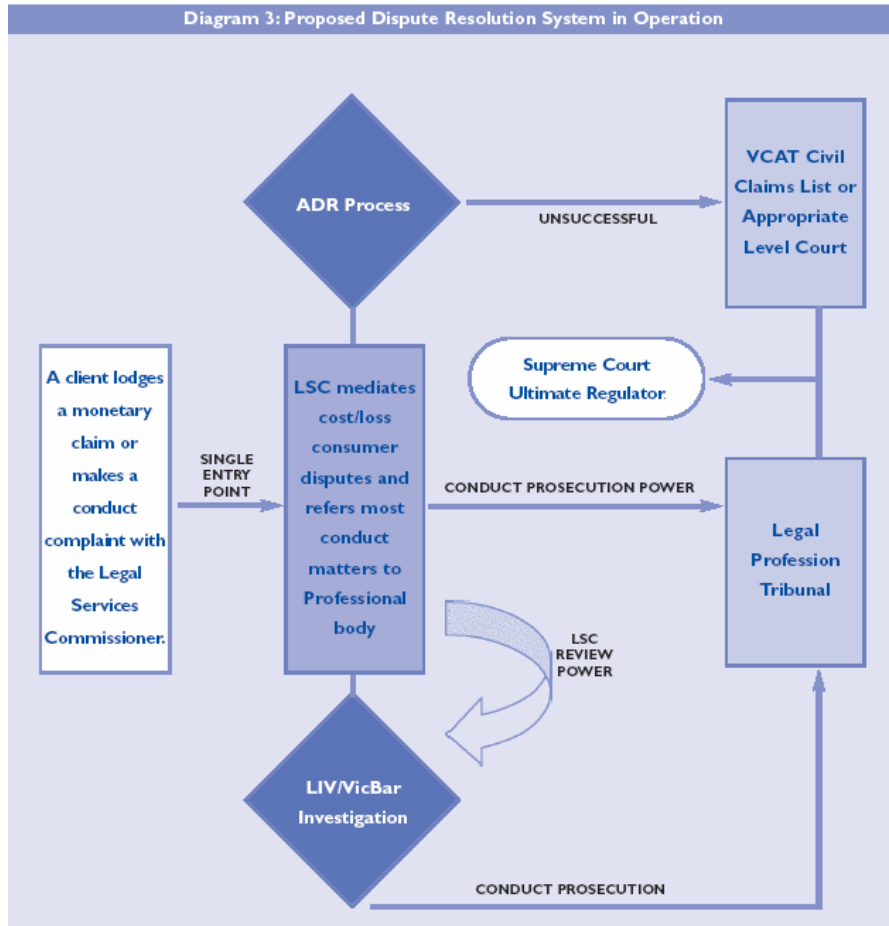
Note that as of 2005, new legislation is being introduced to regulate lawyers in Victoria: see *Legal Practice Act 2005* (Vic). A new legal services board is created, comprising both lawyers and non-lawyers, and is chaired by a lawyer. This is said to retain professional independence while ensuring that the regulatory body is accountable to the public.

The following diagram illustrates the proposed model of regulation:<sup>5</sup>



<sup>5</sup> Sallmann and Wright, *Regulation of the Victorian Legal Profession: Report of the Review of the Legal Practice Act 1996* (2001) 38.

The following diagram illustrates the operation of the proposed model in the context of consumer complaints:<sup>6</sup>



<sup>6</sup> Sallmann and Wright, *Regulation of the Victorian Legal Profession: Report of the Review of the Legal Practice Act 1996* (2001) 41.



## 4 STANDARDS AND SANCTIONS

### 4.1 Common Law Professional Misconduct

A distinction is drawn between professional and personal misconduct. Professional misconduct is an indiscretion which occurs in combination with legal practice. Personal misconduct has a broader meaning, but is said to impact in some way upon a lawyer's fitness to practice.

In *Allinson v General Medical Council* [1884] 1 QB 750, misconduct is defined as:

*Something which would reasonably be regarded as disgraceful or dishonourable by his professional brethren of good repute and competency.*

This definition is noticeably circular: what the legal profession terms 'misconduct' is constituted by what the profession deems to be 'misconduct'. As such, it is not especially helpful in determining the content and scope of common law misconduct.

*Clyne* suggests that misconduct is more a matter of 'does not' than 'must not' [???]. Breaches of 'elementary ethical standards' can occur to some degree, but where they impinge upon true practice constraints — ethical rules which all responsible counsel obey — they may constitute professional misconduct.

#### ***Clyne v New South Wales Bar Association (1960) 104 CLR 186:***

##### Issue

- Is Clyne a fit and proper person to be a member of the Bar of New South Wales?

##### Reasoning

- Clyne's conduct in the proceedings was in breach 'of a rule which all responsible counsel obey': the proceedings were frivolous and vexatious
- It seems like they were only initiated because of the opportunities they afforded for a public attack on the defendant without threat of a defamation suit
- It is extremely difficult to justify the verbal attack as relevant to the case
- 'It shows that tactics which ignore elementary ethical standards may be successful up to a point, and so reinforces our view that only disbarment can meet such a case as the present' (however, it is not a punitive order)
- A distinction is drawn between rules of etiquette and constraints upon legal practice
  - Etiquette is not a compulsory practice
  - Real constraints are those implicit in lawyers' ethics: 'ethical standards'

##### Decision

- '[The facts] speak for themselves': Clyne is not a fit and proper person to practice and should be disbarred

### 4.2 Common Law Personal Misconduct

Quite apart from professional misconduct, personal conduct may also be a ground for disbarring a practitioner, where such conduct evinces that the practitioner is not a fit and proper person to practice. However, personal conduct need not amount to professional misconduct to demonstrate unfitness.

The High Court of Australia, in *A Solicitor v Law Society of New South Wales*, recognised that personal conduct might give rise to misconduct requiring disbarment, a phrase described as encompassing ‘infamous conduct in any professional respect’.

***A Solicitor v Law Society of New South Wales* [2004] HCA 1 (Unreported, 4 February 2004, Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ):**

Facts

- In 1997, X had been practicing as a solicitor for 10 years and is involved in a relationship with B
- Due to several personal circumstances, X begins to suffer depression and exhaustion
- He pleads guilty and is subsequently convicted of indecently assaulting two of B’s daughters, and seeks psychiatric treatment
- A conviction of three months’ imprisonment is quashed and replaced by a three year good behaviour bond (on the basis of mitigating circumstances)
- In 1998, the Law Society takes steps to institute disciplinary proceedings based on the convictions; these are discontinued because of a procedural deficiency
- In 2000, a previous victim makes further allegations, which the appellant denies
- He is tried and convicted, sentenced to two years’ imprisonment, and subsequently acquitted on appeal; X still maintains that these allegations were false
- At the time the 1998 proceedings were discontinued, the further indecent assault charges were still pending; however, X writes to the Law Society asking them not to take further action
- X does not disclose the new charges, or his conviction and sentence
- In 2001, the Law Institute again institutes proceedings, this time adding the further charge of failing to disclose the 2000 offences
  - The Law Institute argues that the failure to disclose the proceedings is in breach of X’s duty of candour to his professional association
- At all times, X claims to recognise the seriousness and effect of his wrongdoing, and is said otherwise to be a very reputable person

Issue

- Is the solicitor’s personal misconduct of such a nature that it suggests he is not a fit and proper person to practice anymore?

Reasoning

- An act might be such as to impinge upon the previously good character of a practitioner
- Here, the sexual abuse of the practitioner’s stepdaughters is not a sufficient basis on which to draw an inference of ‘unfitness’
  - The allegations were made on four occasions, which suggests that they were isolated
  - Subsequent psychological treatment is inconsistent with a finding of unfitness
  - The mother and father in law were in full support of X
- The analysis is highly dependent on the facts
- *However*, not telling the client about the practitioner’s past convictions *is* misconduct

Decision

- X shows ‘true contrition’ by admitting the wrongful nature of his conduct (pleading guilty), seeking psychological assistance, and never at any point seeking to deny the matters
  - He has further been forgiven by B and the children do not appear to have

- o suffered psychological harm
  - o The offences are isolated, even though there were four in total; there is a great likelihood that such behaviour would never occur again
- However, X's breach of his duty of candour should be treated 'very seriously'
  - o A finding of professional misconduct should be made
- Penalty:
  - o The Court of Appeal should have made an order for his suspension for 5 years
  - o Because X has been unable to practice since 1999, such a suspension would already have been served
  - o Costs for the appeal to the Court of Appeal were also awarded against X, so no further sanction is required
  - o X should not be struck off from the roll of practitioners

However, if the effect of allowing a practitioner to remain on the roll would undermine the public's confidence in the legal profession, disbarment is the appropriate consequence (*New South Wales Bar Association v Cummins*).

### ***New South Wales Bar Association v Cummins* [2001] NSWCA 284:**

#### Facts

- John Cummins has been a practicing barrister for many years, during 38 of which he failed to lodge any income taxation returns
- The Legal Services Commissioner seeks his removal from the Roll of Legal Practitioners as a person unfit for legal practice

#### Issue

- Is Cummins a fit and proper person for legal practice?

#### Reasoning

- The barrister's actions bring the entire legal profession into disrepute
- The public interest is best served by declaring him unfit for practice
- 'Conduct not occurring directly within the course of professional practice may amount to professional misconduct if the facts involved are sufficiently closely connected with actual practice, or where the conduct may manifest the presence or absence of qualities which are incompatible with, or essential for, the conduct of practice.'
- Spigelman CJ:
  - o Honesty and integrity are essential to the legal profession
  - o Relevant considerations:
    - Clients must feel secure in confiding their secrets and entrusting their most personal affairs to lawyers
    - Practitioners must be able to depend on their colleagues' word
    - The judiciary must have confidence in practitioners who appear before them
    - The public must have confidence in the legal profession and its administration of justice, which depends in part upon placing trust in the professionalism and integrity of its administrators
  - o If a barrister is an unsuitable person to enjoy and discharge their privileges and responsibilities, then he is not a fit and proper person to remain at the Bar

Decision

- The failure to lodge any taxation returns for so long is ‘an inexcusable pattern of illegal conduct in complete defiance of his civic responsibilities’
- Cummins took full advantage of the services made available by taxation (most notably the judicial system), but left the financial burden ‘to his fellow citizens’
- ‘He engaged in the rank hypocrisy of advocating that other people should perform their legal obligations, while systematically refusing to perform his own’
- Considerations:
  - Cummins did not admit his wrongdoing
  - He completely disregarded his civic obligations
  - His actions were such as to bring the profession into disrepute
- Therefore, Cummins is not a fit and proper person to remain on the Roll and should be struck off therefrom

**4.3 Legal Practice Act 1996 (Vic)**

The ongoing regulation of lawyers’ conduct focuses primarily on maintaining standards of character, not competence.<sup>7</sup> However, legislative regulation of professional conduct increasingly aims to resolve consumer service complaints. For example, ss 64(a), 64(b) and 137(a) address delay or discourtesy, lack of communication, and incompetence or overcharging, respectively.

Section 137 of the *Legal Practice Act 1996 (Vic)* defines two kinds of professional misconduct. The first kind, ‘misconduct’, relates to serious breaches of the Act.

**Section 137 — What are misconduct and unsatisfactory conduct?:**

In this Part —

“**misconduct**” means —

- (a) misconduct by a legal practitioner or firm in the course of engaging in legal practice, including —
  - **wilful or reckless contravention of this Act**, the regulations or practice rules that apply to the practitioner or firm or any other Act that relates to legal practice;
  - wilful or reckless failure to comply with a condition or restriction to which a practising certificate held by the legal practitioner is subject;
  - wilful or reckless **failure to comply** with an undertaking given to a court or tribunal or the Legal Ombudsman, the Board or an RPA;
  - **unsatisfactory conduct that amounts to a substantial or consistent failure to reach reasonable standards of competence and diligence;**
  - the charging of **grossly excessive legal costs**; or
- (b) conduct by a legal practitioner or firm that is unconnected with legal practice but that would justify a finding that the practitioner or firm is not of good character or is otherwise unsuited to engage in legal practice;

<sup>7</sup> Christine Parker, ‘Regulation of the Ethics of Australian Legal Practice’ (2002) 25 *University of New South Wales Law Journal* 676, 681.

The second kind, ‘unsatisfactory conduct’, relates to a failure to meet customer service standards. It goes beyond the common law definition in that these standards are not simply what the profession expects, but also what the wider public expects. It is thus significantly broader than common law misconduct.

**Section 137 — What are misconduct and unsatisfactory conduct?:**

...“unsatisfactory conduct” means —

- (a) ...conduct by a legal practitioner or firm in the course of engaging in legal practice that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner or firm; or
- (ab) conduct by a legal practitioner or firm in the course of engaging in legal practice that would be regarded by a legal practitioner or firm in good standing as being unacceptable, including —
  - (i) conduct unbecoming a legal practitioner or firm;
  - (ii) unprofessional conduct; or...

Section 64 is a guide to interpreting the statute; it sets out values according to which the professional misconduct provisions should be construed.

**Section 64 — General principles of professional conduct:**

The general principles of professional conduct, to be reflected in the practice rules, are that a legal practitioner or firm, in the course of engaging in legal practice, should —

- (a) in the service of a client, act —
  - (i) honestly and fairly in the client’s best interests; and
  - (ii) so as not to engage in, or assist, conduct that is calculated to defat the ends of justice or is otherwise in breach of the law; and
  - (iii) with all due skill and diligence; and
  - (iv) with reasonable promptness; and
- (b) report regularly to a client on the progress of the matter ...; and
- (c) maintain a client’s confidences; and
- (d) avoid conflicts of interest —
  - (i) between the practitioner or firm and a client; and
  - (ii) between two or more clients; and
- (e) refrain from charging excessive legal costs; and

- (f) act with honesty and candour in all dealings with courts and tribunals ...; and ...
- (h) act with honesty, fairness and courtesy in all dealings with other practitioners and firms in a manner conducive to advancing the public interest; and
- (i) conduct all dealings with other members of the community ... with honesty, fairness and courtesy and in a manner conducive to advancing the public interest.

#### 4.4 Practice Rules

Recognised Practitioner Associations, such as the Law Institute of Victoria and Victorian Bar, are authorised to create and amend practice rules to be adhered to by their members (*Legal Practice Act* s 72).

Under s 137 of the Act, breach of practice rules can amount to misconduct or unsatisfactory conduct. However, the practice rules ('PCPR') do not exhaustively define misconduct and unsatisfactory conduct. In this way, common law misconduct can amount to a breach of s 137 without there being any relevant PCPR violation.

Section 64 of the Act also requires that the practice rules embody general standards of professional conduct.

#### 4.5 Application of Standards

When applying legislative disciplinary standards to fact situations, the following procedure should be used:

- 1 Has a breach of s 137 occurred?
  - Misconduct?
  - Unsatisfactory conduct?
- 2 Use the PCPR rules to assist in determining whether such a breach has occurred;
- 3 The PCPR rules should be interpreted and applied in the context of the general values set out in s 64 of the Act;
- 4 Even if there is no breach of the PCPR, there may still be breach of s 137: look at common law misconduct, definitions and s 64.

#### 4.6 Sanctions

Sanctions available for breach of the professional conduct rules are set out in ss 159 and 160 of the *Legal Practice Act*. They include:

- Disbarment (expulsion from the profession)
  - This sanction is only available for 'misconduct', and not 'unsatisfactory conduct'
  - To be disbarred, a practitioner must not be a 'fit and proper' person to practice
  - It is not a punitive enquiry; the aim is to protect the public's confidence in and the reputation of the legal institution
- Practice under supervision

- Courses or re-education
- Fines
- Criminal prosecution
  - This is the punitive component, if needed, and may involve an application of the criminal law
  - For example, where a lawyer is caught defalcating trust funds, they are likely to be disbarred (not being a fit and proper person to practice) and jailed (for the theft of the trust monies)

At common law, the range of sanctions is narrower:

- Disbarment
  - This is again a decision based on character (not a 'fit and proper person')
  - Candour is significant (*A Solicitor v Law Society of New South Wales*)
  - Sanctions are not punitive (again, for the protection of the public)

*Foreman* provides an example of the application of sanctions. There is some disagreement between Kirby P and Mahoney JA about the appropriate penalty; the majority favours striking the practitioner off the Roll of Legal Practitioners, while Kirby P proposes a more creative sanction (work in a community legal centre).

### **Foreman:**

#### Reasoning

- Mahoney JA:
  - Question: is the court any longer justified in holding out this person as fit and proper to be entrusted with the responsibilities of a lawyer?
  - This involves delving into the practitioner's character
  - Relevant factors:
    - Likelihood of attrition? (Low)
    - Rehabilitated? (Yes)
    - Remorseful? (Yes)
    - What message would be sent to the public? (Dishonesty)
    - What message would be sent to the profession? (Deterrence)
    - Could other lawyers feel they could trust this lawyer? (No)
  - The enquiry is not punitive; what should be considered is the effect of any proposed order upon the profession's image in the eyes of the public, its members and the judiciary

#### Decision

- Majority: she is not a fit and proper person and should be disbarred

This approach may be contrasted with *A Solicitor*, in which the High Court of Australia noted that the practitioner had already been punished by the criminal legal system. This occurred in a slightly different context (in that the Court was deciding after the criminal trial had concluded). The Court emphasises that the enquiry takes place in the present tense: look at the practitioner *now* (at the time of decision), not at the time of the trial. The Court concludes that the solicitor had been rehabilitated since committing the offence, and that a suspension was more appropriate than expulsion from the profession. That suspension having already in effect been served, no further sanction was ordered.