



The New South Wales Bar Association

Regulation of the Profession

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INTRODUCTION

- This paper will provide you with a general overview of the current regulation of the profession, the complaints investigation process, how to respond to complaints and some areas of practice, which statistical information indicates are problem areas.

Structure of paper

- (a) the fact of co-regulation and what it means to you;
- (b) point you to the relevant provisions of the *Legal Profession Act 1987* (the Act), the *Legal Profession Regulation 2002* (the Regulation) and the *New South Wales Barristers' Rules*;
- (c) outline the complaints investigation process;
- (d) advise you how to respond to a complaint if you are ever the subject of one;
- (e) advise you what to do if you are ever involved in disciplinary proceedings;
- (f) convey to you some of the statistical information the Bar Council (the Council) has collated and what it can teach us;
- (g) advise you how the Professional Conduct Department (the Department) and the Council can assist you.

Role of the Professional Conduct Department

- The Department facilitates the investigation and reporting to the Council of conduct complaints either referred to the Council by the LSC pursuant to sec 135 of the Act or initiated by the Council itself pursuant to sec 134 of the Act.
- The Department provides advice and policy support to the Council in respect of both the administration and carrying out of the Council functions under Parts 3 and 10 of the Act and the preparation of submissions to governments on the disciplinary regime of the profession.
- One of the key objectives of the Department is to promote a better understanding of good client service and communication on the part of the Association's members. Such an understanding is imperative if the Bar is to continue to flourish as a respected and efficient provider of legal service to the public.
- The Department also facilitates the provision of advice to members on ethical issues and responds, on a daily basis, to numerous inquiries from the public about the Bar and conduct of barristers.

CO-REGULATION

Why do we currently have a co-regulated profession?

- A gulf has formed between the legal profession and the society it serves. A better informed community is asking for accountability, transparency and sound professional standards. The role of the Council, the Professional Conduct Department, the LSC, the Attorney General and you is trying to bridge the gap (widened by perceived lapses in professional standards) through a redefinition of expectations of the community and redefinition of the legal practitioner's role.
- Co-regulation is a result of:
 - (a) the shift in society's, and that of independent regulators (such as the LSC), expectations of the profession; and
 - (b) our continued and strong desire to actively participate in shaping the future – your future – of the profession.

To do this requires an understanding of the principles and obligations associated with the profession. There are separate seminars which specifically address legal ethical principles associated with the legal profession. This paper, although addressing some of those principles, only does so to the extent necessary to explain the disciplinary regime governing legal practitioners.

- Over the years the status, autonomy and performance of the practise of law as a barrister has been challenged and questioned. Challenge like this is part of a continuous process in all professions. The effect of that process is a constant alteration and expansion of what is expected of a legal practitioner. The process has been described by Sylvia Cruess in an article in *The Lancet* in July 2000¹ as a social contract between society and law that hinges on professionalism.
- The 'express terms' of this social contract have, up until 1994 (with the introduction of the Act), been largely unwritten. However, societal expectations have changed and new demands are being made on all legal practitioners and particularly barristers – for example, those associated with direct briefs. All legal practitioners and especially barristers must adapt to this.
- A definition that is agreed upon and is reasonably explicit must now serve as the basis for the expectations of your clients (ie society). That contract is set out in Parts 3 and 10 of the Act. The Act, in its statutory definitions of unsatisfactory professional conduct and professional misconduct provides the

¹ Professionalism; an ideal to be sustained. R Cruess, S Cruess, S Johnston *The Lancet* Vol 356 Jul 98, 2000

'express terms' of the contract. The Act also incorporates what might be described as the 'implied terms'. These encapsulate court decisions which have addressed concepts of conduct. Section 171M retains the inherent jurisdiction of the Supreme Court in the disciplinary regime and sec 57D provides that the *New South Wales Barristers' Rules* are binding on barristers and that failure to comply with the Rules is capable of being professional misconduct or unsatisfactory professional conduct.

- We therefore now have a 'written contract'. It is a contract by which a barrister is bound and by which the public is entitled to have certain expectations fulfilled. The role of the Attorney General, the LSC and the Council is to enforce it.

What does co-regulation mean for you as practitioners and the Bar Council?

- **The Bar Council is not the principal regulator.** It is important to appreciate that the Council has a statutory obligation to investigate complaints made against barristers. This statutory role is monitored by both the LSC, who is an independent statutory overseer of the Council's statutory duties, and, ultimately the Attorney General. The Council is the instrument of a statutory regime but its effective and transparent participation in that regime is critical to the continuation of self regulation.
- Changes in the public's expectations combined with a failure, particularly over the last few years, of some barristers to act in accordance with their professional standing has brought barristers under close scrutiny by the government, the profession and the community.
- Currently, the Association and the LSC work co-operatively in the referral, investigation and review of disciplinary matters.
- Should the current co-regulatory system not satisfy either the consumers of legal services or the government, the alternative is a completely government regulated profession.
- It is therefore in the interest of barristers to work with the Department in the investigation of any complaint and to assist their colleagues in practising in such a way as to maintain the integrity of, and the public's respect in, the profession. The ways in which you can do this are discussed later in the paper.

WHAT ACTS, REGULATIONS AND RULES GOVERN YOUR CONDUCT?

Part 3 Division 1 of the *Legal Profession Act, 1987*

This Division of the Act relates to the requirement for the issue, suspension and cancellation of, and attachment of conditions to, practising certificates. The most significant sections and sub-sections are as follows:

25. Requirement for practising certificate

- (1) *A legal practitioner whose sole or principal place of legal practice is this State must not practise as a barrister or solicitor and barrister without being the holder of a current practising certificate.*
- (2) *A legal practitioner whose sole or principal place of legal practice is this State must not hold himself or herself out to be a barrister without being the holder of a current practising certificate as a barrister.*
- (4) *A legal practitioner or interstate legal practitioner who contravenes this section wilfully and without reasonable excuse is guilty of professional misconduct.*

30. Refusal of application for practising certificate as barrister or solicitor

- (1) *A Council must refuse to issue a practising certificate if the application for it:

 - (a) *is not accompanied by the appropriate fee (unless payment of the fee has been waived by the Council, or*
 - (b) *is not accompanied by, or does not contain, such information as may be prescribed by the regulations.**
- (2) *A Council may refuse to issue a practising certificate applied for by the holder of a suspended practising certificate.*
- (3) *A Council may refuse to issue a practising certificate if a finding of unsatisfactory professional conduct or professional misconduct has been made in respect of the applicant and:

 - (a) *a fine imposed because of the finding has not been paid, or*
 - (b) *costs awarded against the applicant because of the finding have been assessed but have not been paid or, if an arrangement for their payment has been made, the applicant is in default under the arrangement, or*
 - (c) *any costs of an inspection or investigation payable under section 55 by the applicant have not been paid, or*
 - (d) *any expenses of receivership payable under section 110 by the applicant have not been paid.**
- (4) *Other sections of this Act also provide for the refusal of applications for the issue of practising certificates.*
- (5) *Without limiting subsection (1)(b), information prescribed by the regulations may include details of, or details of the nature of, pre-admission events, whether occurring before or after the commencement of this subsection.*

48B. Unqualified person acting as barrister or solicitor and barrister

- (1) *A natural person must not act as a barrister or solicitor and barrister unless the person holds a current practising certificate.*
- Maximum penalty: 20 penalty units.*
- (2) *This section does not prevent a licensed conveyancer from carrying out conveyancing work in accordance with a licence in force under the Conveyancers Licensing Act 1995.*
- (3) *A person who contravenes this section is, whether or not prosecuted or convicted for the contravention, guilty of contempt of any court in relation to which the contravention takes place.*
- (4) *If a person contravenes this section:*
- (a) *no action lies for the recovery of costs in respect of anything done in the course of the contravention, and*
 - (b) *if any such costs have been paid, the amount paid may be recovered as a debt owed by the person to the other person who paid them.*
- (5) *(Repealed)*
- (6) *A person who is an interstate legal practitioner does not contravene this section if the person is the holder of a current interstate practising certificate issued by a regulatory authority of another State or a Territory.*

48C. Unqualified person making false representation to be a barrister or solicitor and barrister

- (1) *A natural person must not falsely pretend to be qualified to act as a barrister or solicitor and barrister.*
- (2) *A natural person who does not hold a current practising certificate must not:*
- (a) *take or use a name, title, addition or description implying that the person is qualified to act as a barrister or solicitor and barrister, or*
 - (b) *do anything, or permit anything to be done, that holds out, advertises or represents that the person is so qualified.*
- Maximum penalty: 20 penalty units.*

Part 3 Division 1AA of the Act and Legal Profession Regulation 2002

- Sub-Clauses 7(1)(g) and 7(1)(h) of the Regulation specify those matters which must be notified to the Council when an application for a practising certificate is made under section 30 of the Act. Those Regulations provide as follows:

7 Information in application: section 30

- (1) *An application by a legal practitioner for a practising certificate must be in a form that is approved by the appropriate Council, and signed by the practitioner, and must contain or be accompanied by the following:*
- (g) *if the practitioner has been found guilty of any offence (other than an excluded offence)—the nature of the offence,*
 - (h) *if the practitioner has committed an act of bankruptcy (within the meaning of section 3 (3) of the Act)—details of the act of bankruptcy*
- (2) *Subclause (1) (g):*
- (a) *applies to an offence whether or not committed in the course of practice as a legal practitioner, and*
 - (b) *applies to any finding of guilt of an offence whether or not the court proceeded to a conviction for the offence, and*
 - (c) *applies to an offence committed in New South Wales or to an offence committed outside New South Wales (so long as it would have been an offence, other than an excluded offence, if committed in New South Wales), and*
 - (d) *applies to a finding of guilt even if other persons are prohibited from disclosing the identity of the offender, and*
 - (e) *extends to an indictable offence committed before the commencement of this Regulation (and so extends whether the finding of guilt was made before or after that commencement), and*
 - (f) *extends to an offence (other than an indictable offence) committed after 8 March 1991, and*
 - (g) *does not apply to a finding of guilt previously disclosed in an application for a practising certificate or under clause 133.*
- (3) *Subclause (1) (h) does not require the disclosure of any information previously disclosed in an application for a practising certificate or under clause 134.*
- (4) *Subclause (1) (h) applies to acts of bankruptcy whether occurring before or after the commencement of this Regulation.*
- (5) *The appropriate Council may require the legal practitioner to furnish such further information as it considers relevant to its determination of the application within such time as it specifies.*
- (6) *In this clause, **offence** includes a tax offence.*

Please note that an 'act of bankruptcy' is defined in Section 3(3) of the Act as follows:

- (3) *For the purposes of this Act, a person is taken to have committed an **act of bankruptcy** if the person:*
- (a) *is bankrupt or the subject of a creditor's petition presented to the Court under section 43 of the [Bankruptcy Act 1966](#) of the Commonwealth, or*
 - (b) *has presented (as a debtor) a declaration to the Official Receiver under section 54A of the [Bankruptcy Act 1966](#) of the Commonwealth of his or her intention to present a debtor's petition or presented (as a debtor) such a petition under section 55 of that Act, or*
 - (c) *has applied to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounded with his or her creditors or made an assignment of his or her remuneration for their benefit.*

A tax offence is defined in Section 3 of the Act as:

tax offence means any offence under the [Taxation Administration Act 1953](#) of the Commonwealth

Clauses 133 & 134 of the *Legal Profession Regulation 2002*

- Clauses 133 & 134 impose on barristers the same obligations as those imposed on applicants for a practising certificate to notify the Council if found guilty of an offence or if an act of bankruptcy is committed. However, disclosure is not required if disclosure has previously been made in an application for a practising certificate.
- A barrister is defined in sec 3 of the Act as a legal practitioner who holds a current practising certificate as a barrister or an interstate practitioner who practises as a barrister in the State. Legal practitioner means a person enrolled in the Supreme Court as a legal practitioner: sec 3 of the Act.

133. Duty to report offences

- (1) *If a barrister or solicitor is found guilty of an offence (other than an excluded offence), the barrister or solicitor must:*
- (a) *notify the appropriate Council in writing of the finding and the nature of the offence, and*
 - (b) *furnish to the appropriate Council, within the time specified by the appropriate Council, such further information as it requires relating to the finding or the commission of the offence.*
- (2) *Subclause (1):*
- (a) *applies to an offence whether or not committed in the course of practice as a legal practitioner, and*
 - (b) *applies to a finding of guilt of an offence whether or not the court proceeded to a conviction for the offence, and*
 - (c) *applies to an offence committed in New South Wales or to an offence committed outside New South Wales (so long as it would have been an offence, other than an excluded offence, if committed in New South Wales), and*
 - (d) *applies to a finding of guilt even if other persons are prohibited from disclosing the identity of the offender, and*
 - (e) *extends to an indictable offence committed before the commencement of this Regulation (and so extends whether the finding of guilt was made before or after that commencement), and*
 - (f) *extends to an offence (other than an indictable offence) committed after 8 March 1991.*
- (3) *A notification under subclause (1) must be made within 7 days after the finding was made.*
- (4) *Subclause (1) does not require the disclosure of any information previously disclosed in an application for a practising certificate or under this clause.*
- (5) *In this clause, "offence" includes a tax offence.*

134. Duty to report bankruptcy

- (1) *A barrister or solicitor who commits an act of bankruptcy (within the meaning of section 3 (3) of the Act) must notify the appropriate Council in writing of the details of the act of bankruptcy.*
- (2) *A notification under subclause (1) must be made within 7 days after the act of bankruptcy was committed.*
- (3) *Subclause (1) does not require the disclosure of any information previously disclosed in an application for a practising certificate or under this clause.*

Offences

- Clauses 7(1) and 133 of the Regulation require disclosure of ‘an offence’ (*other than an excluded offence*). Excluded offences are defined as offences under the road transport legislation (formerly traffic offences) other than specified traffic offences such as negligent driving where the sentence imposed on the barrister is imprisonment or a fine of not less than \$200, or furious or reckless driving. Driving in excess of the prescribed alcohol concentration is also required to be disclosed.
- It is important to note that where a court finds an offence proved but does not formally record a conviction, for example under sec 19B of the Crimes Act in respect of tax offences, there is still an obligation to disclose. That is, it is a finding of guilt which attracts the requirement for disclosure.
- A legal practitioner or barrister is not obliged to notify:
 - (i) the issue of a penalty notice and payment of the ‘fine’ specified, without electing to contest the matter in court,
 - (ii) the issue of an infringement notice as an alternative to prosecution and payment of the penalty specified, and
 - (iii) the imposition by the ATO of an administrative penalty.
- However, matters which may not formally be required to be disclosed under clauses 7(1)(g) and 133 of the Regulation could still affect a legal practitioner or barrister's good fame and character and fitness to remain a legal practitioner, where the relevant conduct suggests an habitual or systematic disregard of legal and civic obligations.
- Clause 7(5) of the Regulation permits the Council to require any other information it considers is necessary to determine whether it should issue a practising certificate. The Council requires a legal practitioner when applying for a practising certificate or a barrister when applying for renewal of a practising certificate to disclose conduct which may affect good fame and character and fitness to remain legal practitioner. The Council has determined that the accumulation in the preceding 12 months of 15 or more penalty units, or fines or penalties totalling \$2,000 or more in respect of penalty or infringement notices or other forms of administrative penalty should be disclosed as a matter which could affect a legal practitioner or barrister's good fame and character and fitness to remain a legal practitioner. A note addressing this issue has recently been published in *Bar Brief* and is available on the Association's website.
- I cannot urge you enough to familiarise yourself with the Regulation. If, when having considered the Regulation you realise you should have notified the Council of a notifiable event, please do so immediately.

Show Cause Statements

- If the disclosure relates to the commission of an act of bankruptcy or a finding of guilt of a tax offence or indictable offence, since you were admitted as a legal practitioner, a statement should also be made pursuant to sec 38FB of the Act as to why, despite the notification matter, you consider you are a fit and proper person to hold a practising certificate. If the disclosure is made late, you are also required to explain why you failed to notify the Council within the time prescribed by the Regulation. A failure to notify has ramifications under sec 38FD of the Act. These matters are dealt with later in this paper.

38FB. Requirements to show cause---bankruptcy, indictable offences, tax offences and failures to notify

- (1) *An applicant for a practising certificate who, since being admitted as a legal practitioner:*
 - (a) *has committed an act of bankruptcy, or*
 - (b) *has been found guilty of an indictable offence or a tax offence,*

must provide a written statement, in accordance with the regulations, showing why, despite the act of bankruptcy or finding of guilt and any circumstances surrounding the act or finding, the applicant considers that he or she is a fit and proper person to hold a practising certificate.
- (2) *An applicant for a practising certificate who has failed to notify a matter as required by the regulations (being a failure declared by the regulations to be professional misconduct) must provide a written statement, in accordance with the regulations, showing why, despite the failure to notify, the applicant considers that he or she is a fit and proper person to hold a practising certificate.*
- (3) *A barrister or solicitor who, since being admitted as a legal practitioner:*
 - (a) *has committed an act of bankruptcy, or*
 - (b) *has been found guilty of an indictable offence or a tax offence,*

must provide a written statement, in accordance with the regulations, showing why, despite the act of bankruptcy or finding of guilt and any circumstances surrounding the act or finding, the barrister or solicitor considers that he or she is a fit and proper person to hold a practising certificate.
- (4) *A barrister or solicitor who fails to notify a matter as required by the regulations (being a failure declared by the regulations to be professional misconduct) must provide a written statement, in accordance with the regulations, showing why, despite the failure to notify, the barrister or solicitor considers that he or she is a fit and proper person to hold a practising certificate.*
- (7) *This section:*
 - (a) *applies to an indictable offence or a tax offence whether or not committed in the course of practice as a barrister or solicitor, and*
 - (b) *applies to a finding of guilt of an indictable offence or a tax offence whether or not the court proceeded to a conviction for the offence, and*
 - (c) *applies to an indictable offence committed in New South Wales or to an offence committed outside New South Wales (so long as it would have been an indictable offence if committed in New South Wales), and*
 - (d) *applies to a tax offence committed in or outside New South Wales, and*
 - (e) *applies to a finding of guilt of an indictable offence or a tax offence even if other persons are prohibited from disclosing the identity of the offender, and*
 - (f) *extends to an indictable offence or a tax offence committed before the commencement of this section (and so extends whether the finding of guilt was made before or after that commencement).*

Clauses 135 – 137 of the Regulation

Clauses 135 and 136 provide the time within which statements pursuant to sec 38FB must be provided.

135. Show cause statements relating to bankruptcy and indictable and tax offences

- (1) *For the purposes of section 38FB (1) of the Act, the written statement required to be provided by an applicant for a practising certificate must be provided to the appropriate Council within 14 days after the application is made.*
- (2) *For the purposes of section 38FB (3) of the Act, the written statement required to be provided by a barrister or solicitor must be provided to the appropriate Council within 14 days after the appropriate date.*
- (3) *In this clause:*
"appropriate date" means:
 - (a) *for a statement that relates to an act of bankruptcy---the first date on which the act of bankruptcy was committed, or*
 - (b) *for a statement that relates to a finding of guilt---the date on which the finding of guilt was made.*

136. Show cause statements relating to failures to notify

- (1) *For the purposes of section 38FB (2) and (4) of the Act, the written statement required to be provided by an applicant for a practising certificate, or a barrister or solicitor, who has failed to notify a matter as required by this Regulation must be provided to the appropriate Council within 7 days after the appropriate date.*
- (2) *In this clause:*
"appropriate date" means:
 - (a) *if the applicant, barrister or solicitor notifies the matter after the period in which the notification was required to be made by this Regulation and the last day of that period occurs on or after the commencement of this Regulation---the date on which the notification was made, or*
 - (b) *if the Council has given notice in writing under section 38FC (2) to the applicant, barrister or solicitor in relation to the act of bankruptcy or finding of guilt that should have been notified---within 7 days after the date on which the Council's notice was given.*

Clause 137 of the Regulation

- Amendments made to the Regulation in April 2004 include an amendment to clause 137 which previously declared failure to notify the Council, without reasonable cause, of an act of bankruptcy or a finding of guilt of a tax offence or an indictable offence (required to be notified under clauses 7(g) & (h), 133 and 134 of the Regulation) to be professional misconduct.
- With the introduction of clause 137(2), failure to notify, without reasonable cause, information in relation to a finding of guilt of the commission of an offence not being an indictable or tax offence, as required by clauses 7(g) and 133, is capable of constituting professional misconduct or unsatisfactory professional conduct.

137. Failures to notify---professional misconduct

- (1) *Each of the following failures to notify is declared to be professional misconduct:*
- (a) *a failure to notify, without reasonable cause, information in relation to a finding of guilt of the commission of an indictable offence or a tax offence as required by clause 7 (1)(g),*
 - (b) *a failure to notify, without reasonable cause, information in relation to an act of bankruptcy as required by clause 7 (1)(h),*
 - (c) *a failure to notify, without reasonable cause, a finding of guilt of the commission of an indictable offence or a tax offence as required by clause 133 in the time and manner specified in that clause,*
 - (d) *a failure to notify, without reasonable cause, an act of bankruptcy as required by clause 134 in the time and manner specified in that clause.*
- (2) *The following are capable of constituting professional misconduct or unsatisfactory professional conduct:*
- (a) *a failure to notify, without reasonable cause, information in relation to a finding of guilt of the commission of an offence (not being an indictable offence or a tax offence) as required by clause 7(1)(g),*
 - (b) *a failure to notify, without reasonable cause, a finding of guilt of the commission of an offence (not being an indictable offence or a tax offence) as required by clause 133 in the time and manner specified in that clause.*

Note. *Clauses 7(1)(g) and 133 require the disclosure to the appropriate Council of all offences other than excluded offences.*

- In the financial year ending 30 June 2004 the Association was notified of 30 notifiable events, 13 of which were notification matters, that is, acts of bankruptcy, tax offences or indictable offences requiring determination under Part 3 Division 1AA of the Act.

Part 3 Division 1AA of the Act

The relevant provisions in the Act relating to the action the Council must or may take on becoming aware of the commission of an act of bankruptcy by, or the finding of guilt of an indictable offence or a tax offence against, an applicant for a practising certificate or a barrister are as follows:

38FC. Refusal, cancellation or suspension of practising certificates---bankruptcy, indictable offences and tax offences

- (1) A Council must refuse to issue, or must cancel or suspend, a practising certificate if:
- (a) the Council is aware that the applicant for or holder of the practising certificate has, since being admitted as a legal practitioner, committed an act of bankruptcy or been found guilty of an indictable offence or a tax offence, and
 - (b) the Council considers that the act of bankruptcy, indictable offence or tax offence was committed in circumstances that show that the applicant or holder is not a fit and proper person to hold a practising certificate.

38FD. Refusal, cancellation or suspension of practising certificates---failure to notify

- (1) A Council may refuse to issue, or may cancel or suspend, a practising certificate if the applicant or holder has failed to notify a matter (being a failure declared by the regulations to be professional misconduct) and the Council considers that the failure to notify occurred without reasonable cause.
- (2) If the Council acts under this section and, within 14 days after being notified of the action, the applicant or holder concerned requires the Council to state its reasons for the action, the Council must comply with the requirement without delay.

38FE. Refusal, cancellation or suspension of practising certificates---failure to show cause or furnish information

- (1) A Council may refuse to issue, or may cancel or suspend, a practising certificate if the applicant or holder:
- (a) is required by sec 38FB to provide a written statement in relation to a matter and has failed to provide a written statement in accordance with that section, or
 - (b) has provided a written statement in accordance with sec 38FB but, in the opinion of the Council to which the statement was provided, has failed to show in that statement that he or she is a fit and proper person to hold a practising certificate, or
 - (c) has failed to comply with a requirement under section 38FI or has wilfully contravened section 38FI (4).
- (2) If a Council acts under this section and, within 14 days after being notified of the action, the applicant or holder concerned requires the Council to state its reasons for the action, the Council must comply with the requirement without delay.

38FG. Commissioner may take action

- (1) *The Commissioner may, at any time, take over the determination of a matter under sec 38FC from a Council.*

38FH. Automatic suspension of practising certificate

- (2) *If the relevant period in relation to a matter to be determined under sec 38FC by a Council expires but no determination has been made under that section by the Council or the Commissioner, the practising certificate of the holder concerned is suspended until:*
- (a) the matter is determined by the Council or the Commissioner, or*
 - (b) the suspension is removed by the Supreme Court under subsection (4),*
- whichever occurs first.*

- The Council must investigate a notification matter and make a determination within three months, although the Council can request a further one month extension from the LSC.
- As previously stated, an applicant for a practising certificate or a barrister who, since being admitted as a legal practitioner, has committed an act of bankruptcy or been found guilty of an indictable offence or tax offence must provide a statement pursuant to sec 38FB of the Act showing why, despite the notification matter, the barrister considers he or she is still a fit and proper person to hold a practising certificate. If the statement is not provided with the notification then the Council must request the practitioner to provide that statement.
- The Council can also issue the practitioner with a sec 38FI Notice which, in essence, requires further particulars of the facts and circumstances surrounding the notification matter.
- On some occasions members have failed to co-operate with the Council in its investigation of their notification. This has included a failure to respond to statutory notices issued by the Council requiring information from the barrister as to the facts and circumstances surrounding the commission of the act of bankruptcy or the finding of guilt.
- Please be aware that if a barrister does not co-operate with the Council in its investigation of Division 1AA matters such that the Council has insufficient information on which to make a determination, and the relevant period expires, then an automatic statutory suspension of the barrister's practising certificate will arise (pending certain avenues for re-issue) and the LSC will then determine the matter – not the Council.

Attachment of conditions to practising certificates

- The Act empowers the Council to cancel, suspend, refuse to issue or attach conditions to practising certificates.
- Section 32 empowers the Council to attach conditions to a practising certificate. Thus far (excluding readers' conditional certificates) conditions relating to medical treatment and/or financial conditions have been attached to practising certificates. As at August 2004, 24 barristers were subject to conditions which require quarterly reports to Council from approved accountants (in whose hands they have placed control of their financial affairs) and/or from medical practitioners.
- The relevant sections of the Act relating to attachment of conditions are as follows:

32. Conditions may be imposed on practising certificates

- (1) *A practising certificate may be issued unconditionally or subject to conditions.*
- (2) *A Council may attach a condition to a practising certificate when it is issued or at any time after it is issued, and may at any time vary or revoke any such condition.*
- (3) *A condition cannot be attached to a practising certificate unless it is of a kind authorised by this Act to be attached.*
- (4) *(Repealed)*
- (5) *A legal practitioner who is the holder of a current practising certificate must not fail to comply with a condition to which the certificate is subject.*

33. Conditions on practising certificates generally

- (1) *Conditions of the following kinds can be attached to the practising certificate of a barrister or solicitor:*
 - (a) *a condition requiring the holder to undertake and complete one or more courses of continuing legal education,*
 - (b) *a condition requiring the holder to undertake additional academic or training courses,*
 - (c) *a condition, of a kind authorised by the regulations, limiting the practising rights of the holder as determined by the Bar Council or the Law Society Council,*
 - (d) *any other condition agreed to by the holder.*
- (2) *Other sections of this Act also provide for conditions that may be attached to practising certificates.*

34. Additional conditions on practising certificates of barristers

- (1) *Conditions of the following kinds can be attached to the practising certificate of a barrister:*
- (a) *a condition requiring the holder to undertake and complete to the satisfaction of the Bar Council a full-time component or other component of a reading program applicable to the holder and determined or approved by the Bar Council,*
 - (b) *a condition requiring the holder to sit for and pass any examination set by the Bar Council as part of a reading program,*
 - (c) *a condition requiring the holder to read with a barrister of a specified class or description chosen by the holder (including a barrister chosen from a list of at least 10 barristers kept by the Bar Council for the purpose) for a specified period and to comply with such requirements as will enable the barrister, at the end of the specified period, to certify to the Bar Council that the holder is fit to practise as a barrister without restriction.*
- (2) *A condition of a kind referred to in subsection (1) which is attached to the practising certificate of a barrister may limit the practising rights of the barrister until the condition is complied with.*
- (3) *The following conditions may also be attached to the practising certificate of a barrister:*
- (a) *a condition limiting the holder to practising as a barrister as the holder of a statutory office under the Crown (whether in right of New South Wales or in another right),*
 - (b) *a condition limiting the holder to practising as a barrister in any other office under a contract of service, or contract for services, with the Crown (whether in right of New South Wales or in another right),*
 - (c) *a condition limiting the holder to practising as parliamentary counsel under a contract of service, or contract for services, with the Crown (whether in right of New South Wales or in another right).*

Significant cases

Tax Offences

- Unfortunately, in the last few years, the conduct of some former barristers has led to public condemnation of the profession. In 2001, the decisions of **Cummins**² and **Somosi**³ in particular are relevant. Failure by a barrister to lodge tax returns for income derived from a system funded by the very payment of income tax was seen by the Court of Appeal as rank hypocrisy. Both Cummins' and Somosi's names were removed from the Roll of Legal Practitioners and the Court declared that each was guilty of professional misconduct.
- In 2003 the Court of Appeal delivered judgment in **Young**⁴ and **Stevens**⁵. In both cases, the barristers concerned had failed to lodge income tax returns for many years. The Council resolved that their practising certificates be cancelled and proceedings be commenced in the Court of Appeal seeking orders that their names be removed from the Roll of Legal Practitioners.

² New South Wales Bar Association v Cummins [2001] NSWCA 284

³ New South Wales Bar Association v Somosi [2001] NSWCA 285

⁴ New South Wales Bar Association v Young [2003] NSWCA 228

⁵ New South Wales Bar Association v Stevens [2003] NSW CA 261

- Young did not file income tax returns from 1980 to 1996 and did not pay any income tax from 1980 to 2000. The Court referred to a submission put on behalf of Young that he was not involved in any professional misconduct and to various other matters put in his favour, but found that those matters do not derogate from the fact that Young's failure to file income tax returns for years is incompatible with that degree of integrity which the public has the right to expect in a barrister. The Court declared that Young is not a fit and proper person to remain on the Roll of Legal Practitioners and ordered his name be removed from the Roll.
- In *Stevens*, the Court of Appeal made declarations and orders on 9 September 2003 that Stevens has been guilty of professional misconduct, that he is not a fit and proper person to remain on the Roll of Legal Practitioners and that his name be removed from the Roll.
- In resolving to cancel Stevens' practising certificate pursuant to sec 38FC and sec 38FD of the Act, the Council considered that the two tax offences of failing to lodge tax returns for 1999 and 2000 notified by Stevens were committed in circumstances that show he is not a fit and proper person to hold a practising certificate. In making its determination, the Council had regard to the fact that Stevens had failed to lodge returns and pay tax over 20 years between 1976 and 1996.
- Stevens appealed to the Supreme Court against the Council's decision to cancel his practising certificate. On 2 December 2002, Justice Greg James granted a stay of the cancellation of Stevens' practising certificate. On 24 April 2003, the Court of Appeal allowed an appeal by the Bar Council against the stay granted by Justice Greg James.⁶
- In the Court of Appeal⁷ it was argued on behalf of Stevens that the Council, in deciding to cancel his practising certificate, should have confined its consideration to the specific circumstances in which the two tax offences were committed. The Court referred to the determination the Council must make under sec 38FC(1)(b) as to fitness and propriety and noted this necessarily requires consideration of the 'full range of relevant circumstances'.

Other Offences

- In ***Prothonotary of the Supreme Court of New South Wales v P*** [2003] NSW CA 320, in a judgment delivered on 18 September 2003 the New South Wales Court of Appeal held, upon certain undertakings being provided by P, that there was no basis for the removal of P's name from the Roll of Legal Practitioners.
- In 2000/2001, P, a solicitor, was convicted and sentenced to 6 months imprisonment (only 3 months of which was to be served provided she entered into a recognizance to be of good behaviour for the further 3 months, which she did) for importing into Australia not less than a trafficable quantity of cocaine. The Prothonotary sought declarations that P was not a person of good fame and character and not a fit and proper person to remain on the Roll.

⁶ New South Wales Bar Association v Stevens [2003] NSW CA 95

⁷ New South Wales Bar Association v Stevens [2003] NSW CA 95

- In the judgment of Young JC in Equity, with which Meagher and Tobias JJA agreed, ten principles relevant to a determination of fitness established by the authorities are set out. Reference should be made to the judgment which appears on the Association's web site. The principles enunciated include that an order striking the name of a practitioner off the Roll should only be made when the probability is that the practitioner is permanently unfit to practise and the fact that a practitioner has a conviction for a serious offence is not necessarily reason for the making of an order striking that person off the Roll. Importantly, the question is one of present unfitness, not fitness at the time the crime was committed.
- In the judgment it is emphasised that "...the court must keep its eye firmly on the basic feature of the case, which is the protection of the community and the profession should this person continue to be on the Roll of Legal Practitioners." [para.16] The Court of Appeal took into account the solicitor's rehabilitation, the fact that she had been drug free for almost five years and found the facts of the case were such that the solicitor was not a risk to the public, particularly given the nature of the undertakings offered to ensure that she remained drug free. The Court of Appeal found there was no basis for removing P's name from the Roll in order to protect the public.
- On 4 February 2004 the High Court of Australia handed down its decision in **A Solicitor v The Council of The Law Society of New South Wales** [2204] HCA 1. This was an appeal by a solicitor against a decision of the Court of Appeal of New South Wales making declarations that he was guilty of professional misconduct in two respects, that he is not a fit and proper person to be a legal practitioner of the Supreme Court of New South Wales and ordering that his name be removed from the Roll of Legal Practitioners.
- The first finding of professional misconduct by the Court of Appeal related to convictions against the appellant in 1998 of four counts of aggravated indecent assault on a person under the age of 16 years contrary to sec 61M of the *Crimes Act 1900* (NSW), being acts committed in 1997 against the daughters of his now wife.
- The second finding of professional misconduct related to the appellant's failure to disclose to the Law Society of New South Wales that he had been convicted in November 2000 of further charges of aggravated indecent assault on a person under the age of 16 years, notwithstanding that the appellant was aware the Law Society at that time was actively considering whether disciplinary action should be taken against him in respect of the earlier convictions. These later convictions were subsequently quashed in April 2001. The essence of the second professional misconduct finding was the failure to disclose rather than the conduct giving rise to the convictions.
- The solicitor's failure to disclose was significant. The High Court found that the solicitor's duty of candour in his dealings with the Law Society was a professional duty and its breach was properly declared to be professional misconduct. The appeal against this declaration failed.
- It was common ground that the definition of professional misconduct in sec 127 of the Act (which specifically includes conduct occurring otherwise than in connection with the practice of law), did not directly bear on the proceedings because it was the inherent jurisdiction of the Supreme Court, not the special statutory scheme for dealing with complaints and discipline, that was invoked.

- The High Court found the acts of indecency committed in 1997 did not occur in the course of the appellant's profession and had no connection with such practice. They did not constitute professional misconduct, but rather personal misconduct relevant to a decision as to his fitness.
- It is clear from the judgment that the characterisation of the conduct as professional or personal misconduct is not determinative of the question of fitness (see para 21) and that it is necessary to consider the whole position.
- In considering the question whether the misconduct of the appellant demonstrated that he was not a fit and proper person to be a legal practitioner at the time of the Court of Appeal decision (that is, it is a question of *current* fitness), the High Court found the Court of Appeal appeared to have given insufficient weight to the isolated nature of the 1997 offences and the case made on behalf of the appellant as to his character and rehabilitation, the exceptional circumstances in which the 1997 offences were committed and the appellant's efforts to obtain professional advice and assistance.
- The appellant's breach of the duty of candour by not disclosing his November 2000 convictions to the Law Society was found by the court to have occurred in extraordinary circumstances. The High Court found that the combined effect of the 1997 convictions and the failure to disclose did not show that at the time of the decision of the Court of Appeal in March 2002, the appellant was unfit to practise.
- The declaration of professional misconduct in relation to the 1997 offences, the declaration that the appellant was not a fit and proper person and the order removing the appellant's name from the Roll were set aside.

Links to the decisions referred to above and other important decisions can be found on the Bar Association's website.

Part 10 of the *Legal Profession Act, 1987*

- Under Part 10 of the Act, the LSC has the power to request the Council to investigate a conduct complaint. The provisions of Part 10 provide the mechanics of the investigative process and the respective powers of the LSC and the Council in carrying out the investigation. The Council, as a practical matter, delegates its investigative powers to one of four investigating conduct committees. The Council is required to conduct its investigation expeditiously. If the Council has not been able to make a determination within six months of receiving the complaint, then the complainant can apply to have the matter reviewed by the LSC.
- It must be remembered that at all times the LSC monitors the Council's investigation of complaints (under sec 149 of the Act) and has the right to review any Council decision (under sec 59D(1)(g)). It is in a barrister's interests to assist the Council in the investigation of the complaint and, if a barrister is the subject of a complaint, he or she should familiarise themselves with the provisions of Part 10 of the Act.
- The key provisions relating to Part 10 of the Act and the investigation of a complaint are set out below:

127. Professional misconduct and unsatisfactory professional conduct

- (1) For the purposes of this Part, "**professional misconduct**" includes:
- (a) *unsatisfactory professional conduct, where the conduct is such that it involves a substantial or consistent failure to reach reasonable standards of competence and diligence, or*
 - (b) *conduct (whether consisting of an act or omission) occurring otherwise than in connection with the practice of law which, if established, would justify a finding that a legal practitioner is not of good fame and character or is not a fit and proper person to remain on the roll of legal practitioners, or*
 - (b1) *(Repealed)*
 - (ix) *conduct that is declared to be professional misconduct by any provision of this Act, or*
 - (x) *a contravention of a provision of this Act or the regulations, being a contravention that is declared by the regulations to be professional misconduct.*
- (2) For the purposes of this Part, "**unsatisfactory professional conduct**" includes *conduct (whether consisting of an act or omission) occurring in connection with the practice of law 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.*
- (3) *Maintenance or champerty by a legal practitioner (except in connection with a conditional costs agreement under Part 11) may constitute professional misconduct despite the Maintenance and Champerty Abolition Act 1993.*
- (4) For the avoidance of doubt, conduct:
- (a) *involving an act or acts of bankruptcy, or*
 - (b) *that gave rise to a finding of guilt of the commission of an indictable offence or a tax offence,*
- whether occurring before, on or after the commencement of this subsection, is professional misconduct if the conduct would justify a finding that the legal practitioner is not of good fame and character or is not a fit and proper person to remain on the roll of legal practitioners.*

134. Making of complaints

- (1) *A complaint may be made under this Part about the conduct of a legal practitioner.*
- (2) *A complaint may be made by:*
- (b) *a Council, or*
 - (c) *the Commissioner, or*
 - (d) *any other person.*
- (4) *A complaint may be made about conduct that is alleged to have occurred either within or outside this State.*

135. To whom complaint made

- (1) *A complaint is to be made to the Commissioner, unless it is made by the Commissioner or by a Council.*
- (2) *A complaint that is made to a Council instead of the Commissioner is to be forwarded immediately to the Commissioner by the Council.*

136. Requirements for making complaints

- (1) *A complaint must be in writing.*
- (2) *A complaint must:*
 - (a) *identify the complainant and the legal practitioner against whom the complaint is made, and*
 - (b) *describe the alleged conduct of the legal practitioner the subject of the complaint.*
- (3) *The Commissioner, or the Council to which a complaint is referred for investigation, may require the complainant to do either or both of the following:*
 - (a) *to give further information about the complaint,*
 - (b) *to verify the complaint, or any further information, by statutory declaration.*

137. Complaints made over 3 years after conduct concerned

- (1) *A complaint may be made about conduct of a legal practitioner irrespective of when the conduct is alleged to have occurred.*
- (2) *However, a complaint cannot be made more than 3 years after that conduct is alleged to have occurred unless a determination is made under this section that:*
 - (a) *it is just and fair to deal with the complaint having regard to the delay and the reasons for the delay, or*
 - (b) *the complaint involves an allegation of professional misconduct and it is in the public interest to deal with the complaint.*
- (3) *A determination under this section:*
 - (a) *in the case of a complaint made to or by the Commissioner – is to be made by the Commissioner, or*
 - (b) *in the case of a complaint made by a Council – is to be made by the Council.*
- (4) *A determination made under this section is final and cannot be challenged in any proceedings by the complainant or the legal practitioner concerned.*

149. Monitoring by Commissioner of conduct of investigation

- (1) *The Commissioner is to monitor investigations by a Council into complaints.*

150. Directions by Commissioner about conduct of investigation

- (1) *The Commissioner may give the Council directions on the handling of a complaint being investigated by the Council if the Commissioner considers that it is in the public interest to do so having regard to the seriousness of the complaint.*

152. Powers of Council or Commissioner when investigating complaint

- (1) *For the purpose of investigating a complaint, a Council or the Commissioner may, by notice in writing served on any legal practitioner, require the legal practitioner to do any one or more of the following:*
- (a) *to provide written information, by a date specified in the notice, and to verify the information by statutory declaration,*
 - (b) *to produce, at a time and place specified in the notice, any document (or a copy of any document) specified in the notice,*
 - (c) *to otherwise assist in, or cooperate with, the investigation of the complaint in a specified manner.*
- (3) *A notice is served under this section on a legal practitioner if:*
- (a) *it is served personally on the practitioner, or*
 - (b) *it is sent by post to the practitioner's place of practice, business or residence last notified by the practitioner to a Council.*
- (3A) *A notice under this section is to specify a reasonable time for compliance with the requirement.*
- (4) *A legal practitioner who, without reasonable excuse, fails to comply with such a requirement is guilty of professional misconduct.*
- (5) *A legal practitioner must not mislead or obstruct a Council or the Commissioner in the exercise of any function under this Division. The wilful contravention of this subsection is capable of being professional misconduct.*

Note. Documents has a wide meaning. The term is defined in the *Interpretation Act 1987* to mean any record of information. The term would include any file that was itself a record of information.

The New South Wales Barristers' Rules

As indicated previously, sec 57D of the Act incorporates the New South Wales Barristers' Rules. Section 57D(4) provides as follows:

57D. Rules binding

- (4) *Failure to comply with any such rules does not of itself amount to a breach of this Act. However, failure to comply is capable of being professional misconduct or unsatisfactory professional conduct.*

Inherent Jurisdiction of the Supreme Court

This jurisdiction is always retained. In some matters, such as *Cummins* and *Somosi*, the Council has commenced proceedings in the Supreme Court of New South Wales rather than going through a Part 10 investigation. The jurisdiction is retained pursuant to sec 171M of the Act which provides as follows:

171M. Jurisdiction of Supreme Court not affected

- (1) *The inherent power or jurisdiction of the Supreme Court with respect to the discipline of legal practitioners is not affected by anything in this Part or Part 2.*
- (2) *That inherent power or jurisdiction extends to interstate legal practitioners and locally registered foreign lawyers.*

THE COMPLAINTS INVESTIGATION PROCESS

- All complaints must be made in writing and sent to the LSC – even if they are received in the Department we must forward them to the LSC who then determines whether the matter should be investigated by him, the respective Council, be mediated or referred to an independent investigator (pursuant to sec 151 of the Act).
- Once the complaint is received by the Department then the Director, Professional Conduct allocates it to one of 4 Professional Conduct Committees (PCC's). Each PCC consists of a Senior Counsel who is Chair (and a member of the Council) and approximately 14 other barrister members ranging in seniority, some of whom are also members of the Council. Each PCC also has 2 lay members and a legal academic member who rank equally with other members of the PCC in the decision making process. Indeed the Chairs of each PCC are acutely aware of the valuable input of the non barrister members as they bring a true reflection of the community expectations to the PCC's deliberations.
- Each PCC meets every 3 weeks with one of the Deputy Directors of the Department who acts as the PCC secretary. The Deputy Director obtains further details of the complaint and obtains responses from the barrister. The Deputy Director also corresponds with third parties and may obtain copies of transcripts and/or court documents if necessary to fill in any gaps in the material. The Deputies also assist the PCC in ensuring that procedural requirements are met, such as compliance with the *Murray*⁸ case which requires any proposed adverse finding be sent to the barrister for comment prior to the matter going to the Council for consideration.

⁸ *Murray v Legal Services Commissioner & Anor* [1999] NSWCA 70

- When all of the material has been gathered a barrister member of the PCC prepares a report with recommendations to the Council – the report fully reflects the view of the PCC. The complaints are analysed considerably by the PCC and the Council. If there is no clear view then extensive debate follows until a final decision can be made.
- After the Council or Commissioner has completed an investigation into a complaint against a legal practitioner, the Council or Commissioner must deal with the complaint in accordance with section 155 of the Act.

Section 155 of the Act:

155 Decision after investigation of complaint

- (1) *After a Council or the Commissioner has completed an investigation into a complaint against a legal practitioner, the complaint is to be dealt with in accordance with this section.*
- (2) *The Council or the Commissioner must institute proceedings in the Tribunal with respect to the complaint against the legal practitioner if satisfied that there is a reasonable likelihood that the legal practitioner will be found guilty by the Tribunal of unsatisfactory professional conduct or professional misconduct.*
- (3) *However, if the Council or the Commissioner is satisfied that there is a reasonable likelihood that the legal practitioner will be found guilty by the Tribunal of unsatisfactory professional conduct (but not professional misconduct), the Council or the Commissioner may instead:*
 - (a) *reprimand the legal practitioner, or*
 - (b) *dismiss the complaint if satisfied that the legal practitioner is generally competent and diligent and that no other material complaints have been made against the legal practitioner.*
- (4) *The Council or the Commissioner is to dismiss the complaint against the legal practitioner if satisfied that there is no reasonable likelihood that the legal practitioner will be found guilty by the Tribunal of either unsatisfactory professional conduct or professional misconduct.*
- (5) *If a Council or the Commissioner decides to dismiss a complaint or to reprimand a legal practitioner under subsection (3) and the complainant requested a compensation order in connection with the complaint, the Council or the Commissioner may require the payment of compensation by the legal practitioner or the successful mediation of the consumer dispute before the decision takes effect.*
- (6) *If a Council or the Commissioner decides to reprimand a legal practitioner under this section and the practitioner does not consent to the reprimand, the practitioner may appeal to the Tribunal against the decision. Section 171N applies to an appeal under this subsection.*

- Changes to the Act which commenced on 15 August 2004 removed a previous provision requiring a barrister's consent to be reprimanded.
- Notably, the Council's determinations on complaints are rarely overturned on review by the LSC.

HOW TO RESPOND TO A COMPLAINT

- Members the subject of complaint are strongly urged to obtain independent advice before responding to any complaint or correspondence from the Department and the LSC.
- Advice may be available through a professional indemnity insurer's solicitors but, if not, then a silk (who is not a member of a PCC or Council) should be approached for advice. Most professional indemnity policies require a barrister to notify his or her insurer on receipt of a complaint.
- The policy of the Council is to require a barrister to personally sign any correspondence responding to enquiries from the Department. Extensions of time will be granted for replies to complaints if need is established.
- Responses to complaints should be made in a timely fashion and confined to the issues the subject of the complaint. Engaging in unjustified or intemperate attack upon the complainant, the process, the professional conduct committee or Council does not assist in having the matter dealt with expeditiously, and may ultimately lead to the making of further complaints about the content of the conduct of the barrister.
- Recommended reading for any barrister who receives a complaint against them is listed on the Bar Association's website and includes an article by Bob Stitt QC and Geoff Lindsay SC, *Disciplinary Proceedings Affecting Barristers*.

Some sensible guidelines for responding to a complaint are as follows:-

1. *Isolate and address the complaint rather than give a full history of the whole case. If the complainant has provided no background to the case some background may be necessary to an understanding of the issues raised.*
2. *Responses are best if they are succinct but must deal with the factual circumstances of the complaint and provide a full answer.*
3. *Few persons, including barristers, are capable of being fully objective about a personal or professional complaint. It is best to approach another barrister, preferably someone senior, or your solicitor, with the complaint and your draft reply. Most people resist doing this, but no matter how embarrassing, it invariably produces a better response.*
4. *Consider whether your Professional Indemnity Insurance policy requires you to put your insurer on notice of the complaint.*
5. *Although the process required by the Act is prosecutorial in nature, conduct proceedings are not criminal proceedings. Failure to provide a prompt, full and frank response can itself be a breach of standards of professional conduct. A barrister who fails, without reasonable excuse, to comply with a notice issued under sec 152 of the Act is guilty of professional misconduct: sec 152(4) of the Act.*

HOW TO CONDUCT YOURSELF IN DISCIPLINARY PROCEEDINGS

- Although disciplinary proceedings profoundly affect those the subject of them, and may involve the imposition of a fine, such proceedings are ultimately designed to be protective of the public rather than to punish particular practitioners. This reflects the philosophy behind the co-regulatory scheme which was referred to at the start of this paper. Orders for removal of a person's name from the Roll of Legal Practitioners, or for the suspension, cancellation of practising certificates are protective. The imposition of a fine is a means by which the Tribunal indicates the seriousness of the conduct in question.
- It is important to remember that all disciplinary action must ultimately be founded on public interest considerations, a primary concern of which is protection of the public.
- The High Court has clearly stated that a legal practitioner, the subject of disciplinary proceedings, has a professional obligation to assist the Court in the hearing of the proceedings.
- This duty of frankness and honesty on the part of a barrister under investigation extends to the investigative steps immediately anterior to the consideration of a case by the court or Tribunal appointed for that purpose.⁹
- Indeed, section 152 of the Act specifically reinforces the duty of a practitioner to assist the investigation of a complaint when formally called upon to do so. Many matters which began as complaints which may have ultimately been dismissed have ended up in the Tribunal because of a failure to assist the Council and in particular to comply with a sec 152 notice requiring information.
- Set out below is a very useful extract from the article of Stitt QC and Lindsay SC to which I have referred.

⁹ NSW Bar Association v Thomas [No 2] (1989) 18 NSWLR at 193 at 206.

Because of the public interest character of disciplinary proceedings, and the existence of a duty of candour which has an ethical (if not an unqualified legal) foundation and may involve serious professional or forensic consequences if it is breached, the astute conduct of the defence of a practitioner against allegations of misconduct will ordinarily:

- (a) *come to terms (quickly and without fuss) with the gravamen of the allegations against the practitioner, whether or not that case is clearly particularised as such in the process issued against the practitioner;*
- (b) *with a degree of humility, make all admissions of misconduct which can fairly be admitted;*
- (c) *without seeking to excuse misconduct, offer a concise explanation of how or why the practitioner fell into error;*
- (d) *offer (hopefully substantial) assurances about present, proper understanding of professional obligations and future conduct;*
- (e) *provide a reasonable (but not exaggerated) number of fully informed character references; and*
- (f) *keep the proceedings as short as they decently can be kept.*¹⁰

- Important decisions can be obtained via the Association's web site through a hotlink to the judgments under the heading 'Professional Conduct Department'. Decisions of the Legal Services Division of the Administrative Decisions Tribunal are also hotlinked. Any decisions relating to unsatisfactory professional conduct (as opposed to professional misconduct) are heard by the Tribunal in camera. If an adverse finding is made, these are generally published. Hearings in relation to professional misconduct matters are held in public. Copies of relevant decisions can be obtained via the Association's web site.
- Some members of the Bar have expressed reservations about the listing on the web site of recent decisions, cancellations and suspensions of practising certificates. Pursuant to amendments to the Act which came into force on 4 October 2002, under sec 171LB, the Council must publicise disciplinary action taken against a barrister including the name and other identifying details of the person against whom the disciplinary action was taken. Under sec 171LC of the Act, the Legal Services Commissioner must keep a register of disciplinary action taken against barristers which is to be made available for public inspection on the internet. The Commissioner is required to identify the name of the person against whom disciplinary action was taken and to provide particulars of the action taken. Disciplinary action includes any decision to suspend, cancel or refuse to issue a practising certificate and any orders of the Administrative Decisions Tribunal following a finding of unprofessional conduct or professional misconduct.

¹⁰ *Disciplinary Proceedings Affecting Barristers* by Bob Stitt QC and Geoff Lindsay SC

A Recent Important Decision

On 19 August 2003 the Tribunal delivered its judgment in ***NSW Bar Association v Amor-Smith***. The Tribunal found the barrister guilty of professional misconduct for gross overcharging and ordered his name be removed from the Roll of Legal Practitioners. The Tribunal made no adverse finding in respect of another count of failing to provide a statement regarding billing arrangements and an estimate of likely costs as required by the Act.

The barrister had rendered five tax invoices to the clients. Only the fourth and fifth memoranda were the subject of complaint, the clients having paid the first three memoranda of fees totalling \$91,470. In respect of the fourth and fifth memoranda, the costs assessor determined an amount of \$32,500 to be 'fair and reasonable', just over one-fifth of the amount actually charged of \$151,441.05. The barrister did not seek to challenge the costs assessor's determination.

The judgment contains a useful examination of the authorities on overcharging. The Tribunal found that gross overcharging can amount to professional misconduct and that the question of whether the clients should be characterised as 'vulnerable' is an important factor. In this case, despite the clients making the barrister aware of their very real concern regarding costs and the stress they were suffering, the barrister went ahead with a number of time consuming tasks, levied an excessive charge per hour for photocopying and overcharged in that he undertook unnecessary work and spent unreasonably long periods of time in undertaking work. He failed to ensure that the amount of work he did was kept within reasonable limits or that the clients were advised of the number of hours being spent on their claim, in order that they could take whatever steps remained feasible to control their liability for costs.

The facts that impelled the Tribunal to conclude the barrister is not fit to remain in legal practice included that he was aware that he may in due course have to accept a lesser figure than the amount charged in the fourth and fifth memoranda of costs, the amount charged was substantial when the clients, even if successful, were unlikely to obtain a sufficient amount in the litigation to make such an outlay worthwhile, the barrister demanded full payment over a period of nearly 3 months in a distinctly aggressive manner and threatened to cease acting in circumstances where he knew that these demands substantially increased the pressure to which the client were already subject. The Tribunal found the overcharging amounted to '*exploitation of the weaknesses of lay clients in a distinctly vulnerable position.*'

On the question of penalty, the barrister, who had not renewed his practising certificate since its expiry on 30 June 2003, proffered to the Tribunal an undertaking that he would never again seek to obtain a practising certificate. He submitted that this together with an order that he be reprimanded would constitute sufficient protection of the professional and public interest in the integrity of the legal profession. The Tribunal rejected this argument finding that even if acceptance of the undertaking sufficiently protects the public from the possibility of further misconduct on the part of the barrister, if the barrister is not a fit and proper person to remain a member of the profession, it will not adequately protect the reputation of and maintain public confidence in the profession.

STATISTICAL INFORMATION THAT CAN HELP YOU

- Part of the annexures to this paper include some statistical information for the year ended 30 June 2004. This information is also set out in the Department's report in the Annual Report of The New South Wales Bar Association which was published recently.
- In the financial year to 30 June 2004, a total of 32 notifications were made. 13 notifications related to indictable offences, tax offences and acts of bankruptcy requiring the Council to make a determination under Part 3 Div 1AA of the Act.
- 55 new conduct complaints were referred to the professional conduct committees for investigation from 1 July 2003 to 30 June 2004. During the year, the committees investigated and reported to the Council in respect of 12 of the new conduct complaints, in addition to a further 48 complaints carried forward from the previous year. Of the total of 60 complaints dealt with by the Council during the year, 40 complaints were dismissed pursuant to sec 155(4) of the Act on the basis that there was no reasonable likelihood that the Administrative Decisions Tribunal would make a finding of unsatisfactory professional conduct or professional misconduct.

The educative value of the PCC's work.

- Some aspects of a barrister's practice have been identified via the complaints investigation process as recurring problem areas. They include:

Direct access matters

- New South Wales Barristers' Rules 74, 75, 76, 77 and 80 are particularly relevant in direct access brief matters.
- The absence of a solicitor to file and serve documents necessitates more vigilance on the part of the barrister to ensure that the client or some other person files and serves court documents. The New South Wales Barristers' Rules are on the Association's web site.
- Direct access matters demand direct, effective and timely communication with clients about the nature of the work the barrister is able to perform, and what work might be better performed by a solicitor in light of the client's expectations. Barristers undertaking direct access work need to confirm in writing all telephone conversations with the client and all matters which are discussed in conference. Discussions with opponents should also be communicated to the client. Communication (whether oral or written) needs to be clear and expressed in plain language to avoid the possibility of misunderstandings arising.

Fees Disclosure Requirements

- Related to Rule 80 are *the fee disclosure requirements* for barristers. Sections 176 and 175 of the Act proscribe the different disclosures required to be made to an instructing solicitor and those required for direct briefs respectively.

Practising without a practising certificate

- Sections 25, 48B and 48C of the Act provide that barristers must not practise as or hold themselves out as a barrister without being the holder of a current practising certificate. The word 'practise' includes any of the activities referred to in New South Wales Barristers' Rule 74. The meaning of 'practise' is not limited to advocacy and includes negotiation, representing a client in a mediation, giving legal advice (chamber work), advising on documents, acting as a referee/arbitrator/mediator and carrying out work properly incidental to the type of work referred to above.
- Nearly every instance of practising without a practising certificate arose because a barrister either made a late application for renewal of a practising certificate or overlooked renewing his or her practising certificate.

Communication with clients

- As always, clear communication and provision of quality service in all matters (whether instructed by a solicitor or acting directly) is likely to lead to fewer misunderstandings and, ultimately, to fewer complaints.
- Some areas of particular concern include:
 - (i) failure to ensure terms of settlement accurately reflect the agreement reached between parties,
 - (ii) failure to ensure that the effect of the terms of settlement is properly explained to clients,
 - (iii) pressure on clients to settle, and
 - (iv) failure to follow instructions.

Courtesy

- Barristers should remain courteous at all times in their dealings with others including clients, other barristers, solicitors, mediators, arbitrators and judicial officers.

HOW CAN THE ASSOCIATION HELP YOU IN AVOIDING AND DEALING WITH COMPLAINTS

Assistance to members seeking guidance on ethical issues

- The Council neither provides 'ethical rulings' nor advice to members. Rather, it assists members seeking guidance on ethical matters by referring the inquiring member to a silk on one of the professional conduct committees. Discussion and advice is available from senior counsel to assist members in reaching a conclusion. Ultimately however, the decision and responsibility must be that of the individual barrister. The Department's staff is able to provide the names and telephone numbers of senior members of committees who are able to give guidance on ethical issues.

Responding to a complaint

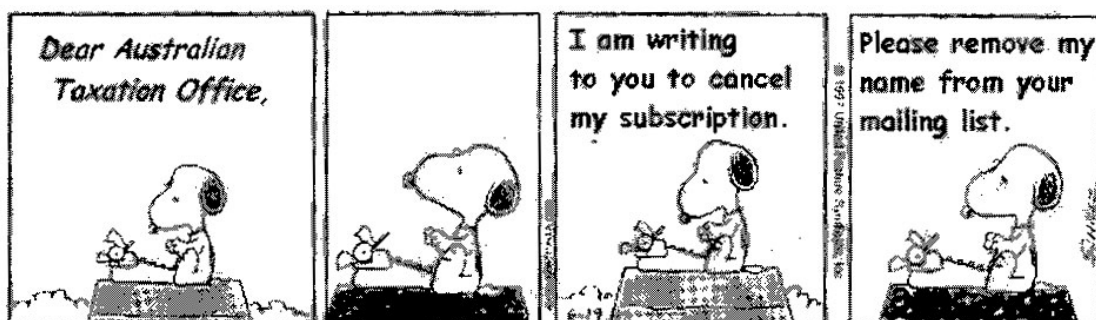
- If you are ever the subject of a complaint, please refer to the article by Bob Stitt QC & Geoff Lindsay SC and approach a senior member on your floor for advice and assistance prior to responding to any complaint.

Bar Care

- Members should also be aware that, at times, and often no fault of their own, the stress and pressure of practising at the Bar can be overwhelming and have unexpected negative effects both personally and professionally. If practitioners find themselves in difficulty, they are encouraged to seek assistance through the Bar Care program which is offered on a private and confidential basis.

A TIP

In conclusion - one important tip – never ever think it appropriate to write a letter in the following form!!



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ANNEXURES

BARRISTERS' WORK

74. *A barrister must confine the barrister's professional work to:*
- (a) *appearing as an advocate;*
 - (b) *preparing to appear as an advocate;*
 - (c) *negotiating for the client with the opponent to compromise the case;*
 - (d) *representing the client in a mediation;*
 - (e) *giving legal advice;*
 - (f) *advising on documents to be used in the client's affairs;*
 - (g) *acting as a referee, arbitrator or mediator; and*
 - (h) *carrying out work properly incidental to the kinds of work referred to in (a)-(g).*

[Amended Gazette No. 66 of 20 June 1997 p 4550]

75. *A barrister must not, in the barrister's professional work:*
- (a) *commence proceedings or file process in any court on behalf of the client in the barrister's name;*
 - (b) *serve any process of any court;*
 - (c) *make any demand, by letter or otherwise, on behalf of the client in the barrister's name, except for the purposes of work under Rule 74(c) and (d);*
and
 - (d) *conduct correspondence on behalf of the client in the barrister's name or deal on behalf of the client with any other person, unless:*
 - (i) *the correspondence is to seek information from a potential witness;*
or
 - (ii) *the dealing is a conference with a potential witness; or*
 - (iii) *it is for the purposes of work under Rule 74.*
76. *A barrister must take reasonable steps to avoid the possibility of the barrister becoming a witness in the case as a result of any correspondence conducted by the barrister or of any dealing by the barrister with persons other than the client.*
77. *A barrister must not, in the barrister's professional work, hold, invest or disburse any funds for any other person.*

Disclosure to direct access client

80. *A barrister who proposes to accept instructions directly from a person who is not a solicitor or a professional acting as such must inform the prospective client in writing of:*
- (a) *the effect of Rules 74 and 75;*
 - (b) *the fact that circumstances may require the client to retain an instructing solicitor at short notice, and possibly during the case;*
 - (c) *any other disadvantage which the barrister believes on reasonable grounds may, as a real possibility, be suffered by the client if the client does not retain an instructing solicitor; and*
 - (d) *the relative capacity of the barrister in performing barristers' work to supply the requested facilities or services to the client compared to the capacity of the barrister together with an instructing solicitor to supply them; and*
 - (e) *a fair description of the advocacy experience of the barrister.*

CONFIDENTIALITY & CONFLICTS

103. *A barrister must not disclose (except as compelled by law) or use in any way in the course of practice confidential information obtained by the barrister concerning any person unless or until:*
- (a) the information has been published;*
 - (b) the information is later obtained by the barrister from another person who is not bound by the confidentiality owed by the barrister to the first person and who does not give the information confidentially to the barrister; or*
 - (c) the person has consented to the barrister disclosing or using the information generally or on specific terms.*