

## **“PROFESSIONAL CONDUCT” MATTERS : DEALING WITH COMPLAINTS AND NOTIFICATION REQUIREMENTS UNDER THE LEGAL PROFESSION ACT 1987**

**Carol Webster**

This article is a revised version of a paper delivered during several continuing professional development Mini Conferences in May and June 2004. Relevant statistics have since been updated. The article considers three aspects of ‘professional conduct’:

- the procedures that apply to conduct complaints;
- matters to bear in mind in responding to conduct complaints; and
- the procedures that apply to notification matters: the disclosure/notification requirements introduced in April 2001 by the *Legal Profession Amendment (Notification) Regulation 2001*, requiring barristers to report to the Bar Council certain bankruptcy events and offences.

In respect of the first two issues particularly, the paper and this article draw heavily on an article by Jeremy Gormly SC, “Conduct of Complaints Against Barristers” which appeared in the Spring/Summer 1994 issue of *Bar News*. It was subsequently republished in the February 1998 edition of *Stop Press*.

### **COMPLAINTS PROCEDURE**

The *Legal Profession Act 1987* (“Act”) makes detailed provision for the handling of complaints: all complaints must be investigated or otherwise dealt with in accordance with the *Act*. The procedures under the *Act* mean that barristers are more likely to find themselves facing full, formal hearings to defend complaints than under the previous regime because of the “reasonable likelihood” test in sec 155 of the *Act*.

Under the *Act*, the Legal Services Commissioner<sup>1</sup> is the person to whom complaints about barristers are to be made. The *Act* requires the Commissioner to assist complainants to formulate their complaints.

Any complaint made directly to the Bar Association is forwarded on to the Commissioner. The Commissioner then determines whether to investigate or attempt to mediate the complaint himself or whether to refer the complaint to the Bar Council for investigation or mediation. A copy of any

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<sup>1</sup> The first Legal Services Commissioner, Mr Steve Mark, was appointed on 1 July 1994.

complaint made by the Bar Council itself (pursuant to sec 134(2) of *Act*) must be forwarded to the Commissioner under sec 135(3).

The Bar Council can and will act of its own accord if a professional conduct issue comes to its attention other than by the making of a complaint by a third party.

The *Act* does not require the Legal Services Commissioner to notify the Bar Council of all complaints against barristers made to the Commissioner and he does not in fact inform the Bar Council of all complaints against barristers he receives.

The Commissioner has power to take over the Bar Council's investigation if he considers it appropriate. There is an ongoing obligation on the Bar Council to keep the Commissioner informed about the progress of complaints referred to it for investigation.

The Commissioner also has a wider public role in promoting community education and enhancing professional ethics and standards, and the Bar Council plays its own part in this.

Complaints referred to the Bar Council for investigation are distributed by the Director, Professional Conduct (Anne Sinclair) to one of the four Professional Conduct Committees (PCCs) of the Bar Council.

#### Nature and source of complaints

In recent years the 'source' of complaints has been (in order, from Bar Association 2003/04 figures<sup>2</sup>):

- clients and former clients (44% of the complaints made in 2003/04)
- opposing clients (29% of all complaints)
- the Bar Council (9% of all complaints)

Looking at the *type* of complaints made over the last two financial years points to some common threads, in particular, failure to communicate:

<b>Complaint Type</b>	<b>2003/2004</b>	<b>2002/2003</b>
Acting contrary to/failure to carry out instructions	3	4
Acting without instructions	0	1
Breach of sec152 Legal Profession Act 1987	0	3
Breach of undertaking	0	1
Breach costs disclosure provisions Part 11 Legal Profession Act 1987	0	1
Breach of Bar Rule 35 (Clyne case)	3	0
Breach of Bar Rules 36 or 37	0	2
Breach of Bar Rule (Other)	3	2

<sup>2</sup> The Bar Council's annual reports set out the statistics as to frequency of complaints and the nature of them.

Breach of confidentiality	0	1
Conflict of interest	1	3
Conspiracy to pervert course of justice	1	2
Delay/failure to provide chamber work	2	3
Failure to adduce evidence available	1	0
Failure to advise properly or at all	4	1
Failure to appear	5	1
Failure to conduct a fair hearing	0	2
Failure to explain terms of settlement (properly or at all)	1	1
Other incompetence in legal practice	0	3
Misleading conduct/dishonesty	7	5
Other unethical conduct	12	3
Over zealous cross-examination (harranging a witness)	3	1
Overcharging and/or overservicing	3	4
Personal conduct	3	4
Practising without a practising certificate	0	5
Pressure to change plea/plead guilty	2	1
Rudeness/discourtesy	1	1
<b>Total</b>	<b>55</b>	<b>55</b>

Note that a failure to comply with provisions of the Bar Rules (whether or not the barrister is a member of the Bar Association) can amount to professional misconduct or unsatisfactory professional conduct: see sec 57D of the *Act*, which provides:

- (1) Barristers rules are binding on barristers, solicitors rules are binding on solicitors and joint rules are binding on both barristers and solicitors.
- (2) Any such rules are binding on legal practitioners acting as barristers or solicitors without a practising certificate as if those legal practitioners were barristers or solicitors.
- (3) Any such rules are binding on barristers or solicitors even though they are not members of the Bar Association or the Law Society.
- (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.

#### Professional Conduct Committees

Those committees consist of about fifteen barristers of varying seniority, about six of whom are Senior Counsel, including the Chair who is a member of the Bar Council. In 2004, every Bar Councillor, except the President and the Senior Vice President, is a member of a PCC. Each PCC also has two community members and a legal academic member. The community and academic members rank equally with the other members of the committee in the decision-making process. Academic and community members are now appointed for a term of two years. Community members are eligible for appointment for one further two year term, and at the discretion of the President, academic members may be appointed for further terms.

Each PCC meets regularly: in 2004, generally every three weeks. The PCCs investigate complaints, generally by obtaining information from the complainant, the barrister and any possible witnesses, who are usually instructing or opposing solicitors or other Counsel, perhaps interpreters and so on.

In a large number of complaints, the details provided by the complainant in the initial complaint are inadequate to enable either the PCC or the barrister to understand what is the conduct in respect of which the complaint is made. In such cases, further information in respect of the complaint will be sought before the barrister is asked to respond, although the barrister will in the interim have been advised that a complaint has been made.

Most professional indemnity policies require a barrister to notify his or her insurer on receipt of a complaint.

Gaps in the material available may be filled by obtaining transcripts, court or other relevant documents, or by requests for further information from the barrister or any other person.

It should be noted that under sec 152 of the *Act*, when investigating a complaint, the Bar Council has power to *require* a barrister or other legal practitioner to provide information and furnish documents necessary for the investigation of a conduct complaint.

Section 152 provides:

(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.

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(2) If a legal practitioner against whom a complaint is made claims a lien over documents relating to the matter the subject of the complaint, the Council or the Commissioner may require the legal practitioner to waive the lien if satisfied it is necessary for the orderly transaction of the client's business.

(3) A requirement under this section is to be notified in writing to the legal practitioner and is to specify a reasonable time for compliance.

(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.

A barrister or legal practitioner who fails to comply with a sec 152 notice, without reasonable cause, is guilty of professional misconduct under sec 152(4) of the *Act*. Barristers served with a notice pursuant

to sec 152 of the *Act* to provide information should respond promptly: failure to comply with a sec 152 notice without reasonable cause can lead to the Bar Council making a further complaint against the barrister, which may ultimately be referred to the Administrative Decisions Tribunal<sup>3</sup>, even if the original complaint investigated is dismissed or otherwise dealt with.

### PCC Reports

When sufficient material is available to form a preliminary view about the matter, one member of the Committee prepares a draft report for discussion by the Committee.

Before a report is finalised and a recommendation made to the Bar Council, the draft report which reflects the views of the Committee is sent to the barrister for comment if it is adverse to the barrister. The barrister is given an opportunity to make submissions as to whether the conduct could amount to unsatisfactory professional conduct or professional misconduct (as the case may be) and, if yes, what determination the Bar Council should make under sec 155 of the *Act*<sup>4</sup>.

The barrister's submissions are considered by the Committee. The Committee incorporates that consideration and any further discussion into one final report to the Bar Council reflecting all of material before the Committee. The report almost invariably includes a recommendation to the Bar Council as to the resolutions it could make to deal with the matter. Conduct matters are treated with priority by the Bar Council.

Conduct complaints are usually the subject of considerable analysis by both the relevant PCC and then by the Bar Council. There can be extensive debate in either or both of the PCC and the Bar Council where there is not a clear view as to the appropriate course of action. Most matters, however, involve a reasonably clear course of action.

### **Mediation**

Since 1 July 1994 the Bar Council and the Commissioner have been able to refer complaints that are or involve consumer disputes to mediation. Participation is voluntary and anything said is confidential and cannot be used later. Mediations are a useful tool for resolving complaints which do not involve any real "conduct" issues but where clients have felt aggrieved, for example by lack of involvement in the settlement process. Written apologies by barristers are becoming more frequent, and appropriate.

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<sup>3</sup> A number of decisions of the Tribunal available on the Bar Association's website concern failure to respond to sec 152 notices, including *NSW Bar Association v Howen* [2003] NSWADT 117 and [2003] NSWADT 118

<sup>4</sup> Frequently referred to as "Murray compliance": *Murray v Legal Services Commissioner* (1999) 46 NSWLR 224

## Related litigation

Quite frequently, something that becomes the subject of a professional conduct complaint may also be the subject of either civil or criminal proceedings. When that occurs, the investigation process by the Bar Council may cease until completion of the related litigation<sup>5</sup>. While each case is looked at individually, the Bar Council endeavours to ensure that its investigation and the results of conduct proceedings are not misused by litigants as a method of obtaining evidence in unfair circumstances. As noted, a barrister has a professional obligation to make admissions and provide a full and frank response to any complaint, whereas in a criminal matter there is a right to silence.

## Options available to the Bar Council to deal with complaints

Having considered the matter, the Bar Council has a number of options available to it under sec 155 of the *Act*:

- to dismiss the complaint -- sometimes a barrister may also be counselled with respect to the conduct the subject of the complaint - sec 155(4);
- to find that it is satisfied that there is a reasonable likelihood that the barrister will be found guilty by the Administrative Decisions Tribunal (Legal Services Division) of unsatisfactory professional conduct, but that a reprimand is sufficient - sec 155(3)(a);
- to find that it is satisfied that there is a reasonable likelihood that the barrister will be found guilty by the Tribunal of unsatisfactory professional conduct, but that the complaint ought be dismissed as the Bar Council is satisfied that the barrister is generally competent and diligent and that no other material complaints have been made against the barrister - sec 155(3)(b); or
- to find that it is satisfied that there is a reasonable likelihood that the barrister will be found guilty of either unsatisfactory professional conduct or professional misconduct and refer the matter to the Tribunal for hearing - sec 155(2)

'Unsatisfactory professional conduct' and 'professional misconduct' are defined in sec 127 of the *Act* which is set out below.

The *Act* no longer requires that the practitioner to be reprimanded give consent. A practitioner who does not consent to a reprimand decision may appeal to the Tribunal against the decision: secs 155(6), 171N of the *Act*<sup>6</sup>. Reprimands are delivered orally in chambers by the President. In considering the

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<sup>5</sup> The principles relevant to whether or not an investigation should be delayed are discussed in *McMahon v Gould* (1982) 7 ACLR 202 at 206; *Halabi v Westpac Banking Corporation* (1989) 17 NSWLR 26; *Edelsten v Investigating Committee* (1987) 14 ALD 22; *Carson v LSC* [2000] NSWCA 308 3 November 2000 at [274], [275]; and relevant provisions of the *Act* include sec 155, 171P, 171R and 171Q.

<sup>6</sup> Following amendments made by the *Legal Profession Amendment Act 2004* which commenced on 15 August 2004.

exercise of its discretion under sec 155(3)(a) or (b), the Bar Council has regard to prior adverse findings against the barrister.

Complainants have a right to seek a review by the Commissioner of a decision by the Bar Council to reprimand or to dismiss the complaint. Where part of the complaint is dismissed and part is referred to the Tribunal for hearing and determination, the complainant also has a right of review in respect of that part which was dismissed.

### **Tribunal hearing**

Where a matter is too serious to be dealt with by way of a reprimand, the matter must be referred to the Administrative Decisions Tribunal (Legal Services Division). It hears matters of both unsatisfactory professional conduct and professional misconduct, defined in sec 127 of the *Act* as follows:

(1) For the purposes of [Part 10], *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
- (c) conduct that is declared to be professional misconduct by any provision of this *Act*, or
- (d) 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.

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(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.

### **Publication of Tribunal Decisions**

Hearings in relation to professional misconduct matters are held in public: sec 170 of the *Act*. Any decisions relating to unsatisfactory professional conduct (as opposed to professional misconduct) are heard in camera but are generally published on the making of an adverse finding against the barrister by the Tribunal.

Decisions of the Legal Services Division of the Tribunal are linked on the Professional Conduct page of the Bar Association's website

[http://www.nswbar.asn.au/Professional/ProfessionalConduct/content\\_pcd.php](http://www.nswbar.asn.au/Professional/ProfessionalConduct/content_pcd.php).

### Appeal and review

An order or decision of the Tribunal may be appealed to the Supreme Court: sec 171F of the *Act*<sup>7</sup>. The appeal is to be by way of rehearing, not a de novo hearing. Leave of the Supreme Court is required for an appeal in respect of an interlocutory decision, a decision made by consent and a decision as to costs.

### **Penalties**

The Tribunal may impose a wide range of penalties. Section 171C of the Act provides that if, after it has completed a hearing relating to a complaint against a barrister the Tribunal is satisfied that the barrister is guilty of professional misconduct or unsatisfactory professional conduct, the Tribunal may do any one or more of the following:

- (if guilty of professional misconduct) order that the name of the barrister be removed from the roll of legal practitioners: sec 171C(1)(a)
- order that the barrister's practising certificate be cancelled: sec 171C(1)(b)
- order that a practising certificate not be issued to the barrister until the end of the period specified in the order: sec 171C(1)(c)
- order that the barrister pay a fine specified in the order (not exceeding \$50,000 if guilty of professional misconduct; not exceeding \$5,000 if guilty of unsatisfactory professional conduct): sec 171C(1)(d)
- make an order publicly reprimanding the barrister or, if there are special circumstances, privately reprimand the barrister: sec 171C(1)(e)
- order that the barrister undertake and complete a course of further legal education specified in the order: sec 171C(1)(f)
- if applicable, make a compensation order: sec 171C(1)(h)
- order that the barrister pay the Informant Council's costs of the proceedings.

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<sup>7</sup> A further amendment made by the *Legal Profession Amendment Act 2004*. Previously appeals lay to an Appeal Panel.

## **RESPONDING TO A COMPLAINT**

Receiving notification from the Bar Association that a complaint has been made could never be pleasant. The experience of members of PCCs and the Bar Council has been that responses to complaints fall into two general categories. The first is a short uninformative, dismissive letter of denial as though the matter ought not be taken seriously (often expressed in intemperate language). The second is a lengthy response detailing a blow by blow history of the whole case but frequently failing to deal with the complaint in the process, which reflects the understandable distress of the barrister at being the subject of any complaint, whether justified or not.

Neither form of response is in the barrister's best interest given the nature of the *Act* and the duties it imposes on the Bar Council (and the Legal Services Commissioner) to investigate complaints.

The dismissive response usually results in a protracted investigation as the PCC struggles to obtain a full factual picture and a full response from the barrister, which deals with the precise complaint. Flippant or ill-considered comments in the first response become part of the investigation file. This may ultimately become evidence before the Tribunal. Further, it can prompt a second complaint by the complainant about the contents of the response.

The long and detailed response also prolongs investigation, but in a very different way: the barrister's response to a complaint will be sent to the complainant for comment. Although the barrister is informed by the Bar Association this will occur, it seems that not infrequently this is not always considered by a barrister when responding to a complaint.

Private or confidential correspondence cannot therefore be received in the course of investigation unless a real issue of legal professional privilege arises, or there is some other good reason of law.

In the nature of things, a long and detailed response from the barrister dealing with the whole history of the matter inevitably seems to provoke even longer comment from the complainant. Everything slows down as the issues are unravelled.

Responses to complaints often have to be written long after the brief was returned. Recollections of precisely what occurred will fade, particularly if the case was relatively small or insignificant (for the barrister in the course of practice, cf. the lay client).

Although the *Act* now sets a three year time limit for the making of complaints, under sec 137 of the *Act* the Commissioner may accept a complaint after that three year time has expired if he believes that it is just and fair to do so, or if it is in the public interest to investigate or if the complaint involves professional misconduct. The Bar Council may similarly determine to accept its own complaint made

after expiry of the three year time limit, after receiving submissions from the barrister as to whether it should do so.

An initial reply written without reference to the brief frequently contains unwitting inaccuracies which may be seized on by the complainant during the complaint process or emerge in a hearing before the Tribunal. A 21 day time limit for a reply is usually fixed but if additional time is needed to respond, a further short time will usually be granted. However, the Bar Council does expect barristers to give priority to responding to conduct complaints. The policy of the Bar Council is to require a barrister to personally sign any correspondence responding to enquiries from the Professional Conduct Department or to co-sign correspondence if the barrister retains a solicitor.

Some guidelines for responding to a complaint are as follows:

1. Consider whether your professional indemnity insurance policy requires you to put your insurer on notice of the complaint: most policies require notification on receipt of a complaint.
2. Few people - including barristers - are capable of being fully objective about a personal or professional complaint. Advice may be available through the professional indemnity insurer's solicitors. Alternatively, approach another barrister (preferably a silk who is not a member of a professional conduct committee or Council), or your own solicitor, with a copy of the complaint or other correspondence from the Professional Conduct Department and/or the Legal Services Commissioner, and the draft reply. Most people will resist doing this, but no matter how embarrassing, it invariably produces a better response (at the very least toning down intemperate language).
3. Responses are best if they are succinct, but they *must* deal with the factual circumstances of the complaint and provide a full answer.
4. Isolate and address the complaints that have been made rather than give a full history of the whole case. If the complainant has provided no background to the case, or taken things out of context, some background may be necessary for an understanding of the issues raised.
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 may *in itself* amount to a breach of proper standards of professional conduct. A solicitor's failure to disclose was significant in the recent High Court decision of *A Solicitor v Council of the Law Society of New South Wales* [2004] HCA 1 (2004) 78 ALJR 310.

## **NOTIFICATION PROVISIONS AND PART 3 DIVISION 1AA OF THE ACT**

The *Legal Profession Amendment (Notification) Regulation 2001* was gazetted on 9 March 2001 (“*Notification Regulation*”). It applied to both barristers and solicitors. The changes introduced by the *Notification Regulation* required legal practitioners to notify the relevant Council of certain bankruptcy events and offences.

Some four months later, the *Act* was amended by the *Legal Profession Amendment (Disciplinary Provisions) Act 2001*. At the same time, there was further amendment to the *Notification Regulation* by the *Legal Profession Amendment (Disciplinary Provisions) Regulation 2001*. The amendments commenced on 27 July 2001. The extent of the obligation to notify was extended in some respects, and the Councils were given further, “special”, powers to cancel or suspend practising certificates<sup>8</sup>. In Bar Brief N<sup>o</sup> 85, July 2002, the President outlined the changes that had been made.

Part 3 Division 1AA (secs 38FA-38FJ) of the *Act* is headed “Special powers in relation to practising certificates”.

The (new) *Legal Profession Regulation 2002* (“*2002 Regulation*”) which commenced on 1 September 2002 has substantially the same notification provisions as the *Notification Regulation*, albeit with significant renumbering. The continuing notification provisions are to be found in Part 13 of the *2002 Regulation*. Part 2 deals with issue of practising certificates.

The obligation to notify certain bankruptcy events and findings of guilt of certain offences is now to be found in clauses 7, 133 and 134 of the *2002 Regulation*. The *2002 Regulation* also sets out when a notification should be made, and what the disclosure statement should address. Part 3 of the *Act* attaches particular consequences to the commission of an ‘act of bankruptcy’ and being found guilty of an ‘indictable offence’ or a ‘tax offence’.

### **Obligation to notify offences and ‘acts of bankruptcy’**

#### **Applying for a practising certificate**

Clause 7 of the *2002 Regulation* specifies the matters required to be included in an application for a practising certificate. Particular attention should be paid to cll 7(1)(g) and (h). Clause 7(1)(g) requires the nature of any offence of which the practitioner has been found guilty (other than an ‘excluded offence’ but including a ‘tax offence’) to be included in the application; and cl 7(1)(h) requires details of an ‘act of bankruptcy’ committed by the practitioner to be included.

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<sup>8</sup> Inter alia by the insertion of sec 37 of the *Act*

It should be noted that clause 7(1)(g) applies to a finding of guilt of an offence whether or not the court proceeded to a conviction for the offence, and even if other persons are prohibited from disclosing the identity of the offender: cll 7(2)(b) and (d).

### Continuing obligation

Clause 133(1) of the 2002 *Regulation* provides that if a barrister is found guilty of any offence other than an ‘excluded offence’<sup>9</sup> (but including a ‘tax offence’), the barrister must notify the Bar Council in writing of the finding and the nature of the offence and furnish such further information as the Bar Council requires relating to the finding or commission of the offence.

Clause 133(2) is in like terms to cl 7(2) regarding the obligation to notify applying to a finding of guilt of an offence whether or not the court proceeded to a conviction for the offence.

Clause 134(1) of the 2002 *Regulation* provides that a barrister who commits an ‘act of bankruptcy’ (as defined in sec 3(3) of the *Act*) must notify the Bar Council in writing of the details of the act of bankruptcy.

The notification must be made within 7 days of the finding of guilt or act of bankruptcy: cl 133(3), 134(2). Information previously disclosed in an application for a practising certificate or under clauses 133 or 134 does not have to be disclosed again: cl 133(4), 134(3).

### Definitions

‘Excluded offence’ is defined in clause 3(1) of the *Regulation*. The effect of the definition is to impose a general obligation to notify a finding of guilt in respect of all offences other than offences under the road transport legislation (formerly, traffic offences) and parking offences, with specific exceptions for the following more serious driving matters, which are required to be notified:

- negligent driving where the barrister was sentenced to imprisonment or fined not less than \$200
- furious or reckless driving
- failing to provide particulars
- unlicensed driving
- driving a speed or in a manner dangerous to the public etc

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<sup>9</sup> The equivalent clause of the former *Regulation* was amended in 2001 to delete “any indictable offence” and substitute “any offence (other than an excluded offence)”.

Note particularly that offences of driving with more than the prescribed concentration of alcohol are not excluded and are required to be disclosed: cl 3(1)(a)(v) and (vii); as are other offences where the barrister is disqualified by court order from holding a licence: cl 3(1)(a)(ix).

‘Tax offence’ is defined in sec 3(1) of the *Act* - it means any offence under the *Taxation Administration Act 1953* (TAA).

### **Part 3 of the Legal Profession Act 1987: acts of bankruptcy, indictable offences or tax offences**

Section 38FB of the *Act*, in Part 3, requires that a legal practitioner applying for, or holder of, a practising certificate who has committed an ‘act of bankruptcy’ or has been found guilty of an ‘indictable offence’ or a ‘tax offence’ 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 legal practitioner or barrister considers that he or she is a fit and proper person to hold a practising certificate. Again, this is whether or not the court proceeded to conviction for the offence: sec 38FB(7)(b) and (e)<sup>10</sup>.

No fresh notification or determination is required where a written statement has previously been provided under sec 38FB or a determination made under sec 38FC<sup>11</sup>.

#### Definitions

Section 3(3) defines ‘act of bankruptcy’ for the purposes of the *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 sec 43 of the *Bankruptcy Act 1966* of the Commonwealth, or
- (b) has presented (as a debtor) a declaration to the Official Receiver under sec 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 sec 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.

The significance of the definition including compounding with creditors is that a person who compounds under secs 73 or 74 of the *Bankruptcy Act* and obtains the agreement of creditors to an annulment of his or her bankruptcy must still notify, because the ‘annulment’ does not affect the fact that the specified event occurred.

<sup>10</sup> In the same terms as cll 7(2)(b) and (d), and 133(2)(b) and (d) of the *Regulation*.

<sup>11</sup> See ss 38FB(5), 38FC(7) (and Schedule 8, which set out transitional provisions) and cll 133(4) and 134(3) of the 2002 *Regulation*

There is no definition of ‘indictable offence’ in the *Act*. However, sec 21(1) of the *Interpretation Act 1987* (NSW) - headed ‘Meaning of commonly used words and expressions’ - provides that ‘indictable offence’ means an offence for which proceedings may be taken on indictment, whether or not proceedings for the offence may also be taken otherwise than on indictment.

#### Time for notification and provision of written statements

Clause 135(2) provides that for the purposes of sec 38FB(3) a barrister must provide the written statement within 14 days of the “appropriate date”. “Appropriate date” here is defined by clause 135(3) as the (first) date on which the act of bankruptcy was committed or finding of guilt made. Clause 135(1) of the *2002 Regulation* provides that for the purposes of sec 38FB(1) an applicant for a practising certificate must provide the written statement required within 14 days after making an application for a practising certificate.

#### Refusing to issue, cancelling or suspending practising certificates

Sections 38FC, 38FD and 38FE provide powers for the Bar Council to refuse to issue, cancel or suspend a practising certificate.

Section 38FC(1) provides that a Council must refuse to issue, or must cancel or suspend a practising certificate if the Council is aware that since being admitted as a legal practitioner an applicant for, or holder of, a practising certificate has committed an act of bankruptcy or been found guilty of an indictable offence or a tax offence and the Council considers that act or offence was committed in circumstances that show that the applicant or holder is not a fit and proper person to hold practising certificate. Sub secs 38FC(3) and (4) deal with matters occurring very close to the date when practising certificates would ordinarily expire.

Under sec 38FE a Council may refuse to issue or may cancel or suspend a practising certificate if the applicant or holder has:

- failed to provide a sec 38FB statement when required to do so under the section; or
- failed in the sec 38FB statement to show that he or she is a fit and proper person<sup>12</sup>.

Further, sec 37(1)(a) of the *Act* provides that a Council may refuse to issue, may cancel or may suspend a practising certificate if the applicant or holder is required by the Council to explain specified conduct (whether or not related to practice as a barrister or solicitor) that the Council considers may indicate that the applicant or holder is not a fit and proper person to hold a practising certificate and fails, within the period specified by the Council, to give an explanation satisfactory to the Council.

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<sup>12</sup> The interrelationship between secs 38FC and 38FE was discussed in *Murphy v The Bar Association of New South Wales* [2002] NSWCA 138 (2002) 55 NSWLR 23

## **Failure to notify**

A failure to notify can have quite serious consequences. Sections 38FB(2) and (4) provide that an applicant for a practising certificate or a barrister who fails to notify a matter as required by the regulations, where the failure is one declared by the regulations to be professional misconduct, must provide a written statement, in accordance with regulations, showing why despite the failure to notify the applicant or barrister is a fit and proper person to hold a practising certificate.

Under clause 136 of the *2002 Regulation*, the statements required under secs 38FB(2) and (4) with respect to a failure to notify a matter as required by the Regulation must be provided within 7 days of the appropriate date - being either the date of the actual notification or the date of the sec 38FC notice given by the Council.

If a Council becomes aware that an applicant for or holder of a 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, under sec 38FC(2) the Council must, within 14 days, give notice in writing to the applicant or holder dealing with 4 matters:

- if the Council has not received a statement under sec 38FB in relation to the incident, require the applicant or holder to make a statement in accordance with sec 38FB;
- inform the applicant or holder that a determination in relation to the matter is required to be made under sec 38FC;
- inform the applicant or holder of the ‘relevant period’ in relation to the determination of the matter and that the applicant or holder will be notified of any extension of the relevant period; and
- inform the applicant or holder of the effect of the automatic suspension provisions in sec 38FH in the event of the matter not being determined by the Council or the Commissioner within the relevant period.

‘Relevant period’ is defined in sec 38FA - three months commencing when (a) the notification is given, or (b) where no notification has been received by the time a sec 38FC(2) notice is sent, the date of issue of the notice under sec 38FC(2). It may be extended by the Commissioner under sec 38FA(2) but such extension is limited to a further month.

Under sec 38FD a Council may refuse to issue, 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 the failure occurred without reasonable cause.

Failures to notify declared to be professional misconduct

Clause 137(1) of the 2002 Regulation declares that failure to notify, without reasonable cause, information in relation to:

- (a) a finding of guilt of the commission of an indictable offence or a tax offence as required by cl 7(1)(g);
- (b) an act of bankruptcy as required by cl 7(1)(h);
- (c) a finding of guilt of the commission of an indictable offence or a tax offence as required by cl 133 in the time and manner specified in that clause; or
- (d) an act of bankruptcy as required by cl 134 in the time and manner specified in that clause,

is professional misconduct.

A sub cl (2) was added on 2 April 2004, to provide that a failure to notify, without reasonable cause, information in relation to:

- (a) a finding of guilt of the commission of an offence (not being an indictable offence or a tax offence) as required by cl 7(1)(g); or
- (b) a finding of guilt of the commission of an offence (not being an indictable offence or a tax offence) as required by cl 133 in the time and manner specified in that clause.

is capable of constituting professional misconduct or unsatisfactory professional conduct:

**Notices requiring production of documents or information**

Section 38FI is analogous to sec 152 in Part 10 of the *Act*. The section gives power to a Council or the Commissioner to require a barrister to provide information, produce documents or otherwise assist in or co-operate with the investigation of a matter under Part 3 Division 1AA.

**Part 10 complaints**

If conduct issues arise in the course of investigation of a Part 3 notification matter, the Bar Council can make (and has in the past made) a Part 10 conduct complaint against the barrister. The Part 10 complaint is then in turn investigated by a PCC in the manner which has been described above.

## **ISSUES TO NOTE**

Some matters should be noted:

### **Time limits**

The time limits imposed by the *Act* for the Bar Council to make a determination with respect to a matter notified under Part 3 of the *Act* are very restrictive (see sec 38FC of the *Act* and the definition of ‘relevant period’), and there is only a limited ability for the Bar Council to seek an extension, of a further month, from the Legal Services Commissioner: sec 38FA(2).

Section 38FH effects an automatic suspension of a practising certificate where the Bar Council has been unable to determine a matter within the “relevant period” as defined.

Accordingly, particular attention must be paid both to events which must be notified, and then to the information to be provided.

Because of the time limits and the effect of sec 38FH, it is in a barrister’s own interests to provide a full sec 38FB statement with as much information as possible regarding the circumstances of the relevant matter when making a notification, and thereafter promptly to respond to any requests for further information, particularly any notice served under sec 38FI of the *Act* (which is to the same effect as sec 152 in relation to conduct complaints). The same comments made about responding to conduct complaints under Part 10 of the *Act* above apply to the content of “show cause” statements required in relation to notification or disclosure matters.

Equally, given the duty to co-operate in relation to ‘conduct’ matters, taking an overly technical view of what is or is not required to be notified, and not making a notification where there may be some doubt could well lead to further explanations being required. Again, it is in a barrister’s best interest to seek advice as to whether notification or disclosure may be required in respect of any offence, particularly where there may be some doubt as to whether and what sort of notification or disclosure is required.

### **Risk management strategies to consider: tax matters**

- with a view to avoiding the possibility of having to notify a tax offence or act of bankruptcy involving the ATO:

- proper record keeping;
- employing an accountant or financial adviser;

- getting financial records to your accountant or financial adviser on time to enable prompt completion of tax returns (and being aware of when tax returns are due);
- making provision for payment of income tax and GST, by setting money aside - which may be by banking a percentage of gross receipts into a separate account;
- ensuring that any change of address (personal or business) is notified to your accountant or tax agent, or direct to the ATO, as appropriate;
- ensuring that your accountant or tax agent brings any notice served by the ATO to your attention by more than one means - preferably including some form of personal contact with you;
- giving priority to complying with any notice to file returns (and if necessary, seeking an extension of time before rather than after the due date).

### **Penalty Notices and similar infringement notices**

A legal practitioner or barrister is not obliged, pursuant to cll 7(1)(g) or 133 of the *2002 Regulation*, to notify:

- the issue of a penalty notice, and payment of the ‘fine’ specified without electing to contest the matter in court; or
- the issue of an infringement notice as an alternative to prosecution, and payment of the penalty specified amount.

Similarly, the imposition by the ATO of an administrative penalty need not be notified pursuant to cll 7(1)(g) or 133 of the *2002 Regulation*, nor is the Bar Council required to make a determination in respect of such a penalty pursuant to sec 38FC of the *Act*.

Equally, no question of potential professional misconduct or unsatisfactory professional conduct pursuant to cl 137(2) of the *2002 Regulation* arises.

However, the Bar Council has recently published<sup>13</sup> a statement noting that matters which may not formally be required to be disclosed under cll 7(1)(g) and 133 of the *2002 Regulation* could still affect a legal practitioner or barrister's good fame and character and fitness to remain legal practitioner, where the relevant conduct suggests an habitual or systematic disregard of legal and civic obligations.

The Bar Council has stated that it:

... expects that a legal practitioner or barrister would disclose conduct which may affect good fame and character and fitness to remain legal practitioner, but for the avoidance of any doubt,

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<sup>13</sup> Bar Brief - edition No 116, p 8

advises 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.

### **PERSONAL MISCONDUCT AS 'PROFESSIONAL MISCONDUCT'**

Some of the more recent (and high-profile) decisions have concerned questions of personal conduct, and whether and when that will amount to "professional misconduct". It is not the purpose of this article to discuss these issues in any great detail, but as a matter of reference, the following decisions might be noted:

- *A Solicitor v Council of the Law Society of New South Wales* [2004] HCA 1 (2004) 78 ALJR 310
- *Prothonotary of the Supreme Court of NSW v P* [2003] NSWCA 320
- *New South Wales Bar Association v Hamman* [1999] NSWCA 404
- *Bryson v New South Wales Bar Association* (LSD) [2003] NSWADTAP 29 (dismissing an appeal from *New South Wales Bar Association v Bryson* [2003] NSWADT 19)

#### Part 3 matters:

- *New South Wales Bar Association v Cummins* [2001] NSWCA 284 (2001) 52 NSWLR 279
- *NSW Bar Association v Somosi* [2001] NSWCA 285
- *Murphy v The Bar Association of New South Wales* [2002] NSWCA 138 (2002) 55 NSWLR 23 (the appeal of the Association from the decision of McClellan J in *Murphy v The Bar Association of New South Wales* [2001] NSWSC 1191)