

Back to basics - the complaints process

It is very difficult to come to terms with the fact that we are now coming up to the first anniversary of the commencement of the *Legal Profession Act*. My, how time flies when you are having fun! It commenced on 31 March 2007, and I was employed as acting Professional Standards & Ethics Solicitor at the Society for a period of five weeks during March/April 2007 whilst my predecessor, Josephine Stone, was on leave.

At that time, we were all a little daunted (myself included) with respect to the commencement of the *Legal Profession Act*, as well as the ramifications for each of us which might flow as a consequence. The rationale behind the *Legal Profession Act* was that all jurisdictions Australia-wide would enact legislation which supported a National Model resulting in Australian legal practitioners having the benefit of a "travelling practising certificate". With this comes the added requirement that all jurisdictions have reciprocal legislation.

This creates various extended workloads and burdens on the Law Society, and it was obvious that the Law Society required additional administrative assistance to carry out the extra duties created by the passing of the *Legal Profession Act*.

Some of you may not be aware that Josephine Stone was the Law Society's first Professional Standards & Ethics Solicitor. Until Mrs Stone commenced with the Law Society in mid-2002, her role was generally carried out by the President, with the assistance of the Chief Executive Officer. When Mrs Stone commenced with the Law Society, the position was originally part-time, but I was

engaged permanently by the Society in July 2007 to share the role with Mrs Stone pending her departure at the end of 2007. At that time, there was some anticipation on the part of the Society that the position would become a full-time position.

Even in my time with the Law Society, the workload in the area of professional standards & ethics has increased, and does not seem to be abating.

There is no mystery about the role of the Society in dealing with complaints, although this may be contrary to the perceptions of some of the members of the Law Society, as well as members of the public.

Section three of the *Legal Profession Act* is an excellent statement of the main purposes of the Act, as follows:

- (a) to promote the administration of justice;
- (b) to provide for the protection of consumers of legal services and the public generally;
- (c) to regulate legal practice in this jurisdiction, including the legal practice of foreign law by foreign lawyers;
- (d) to facilitate the regulation of legal practice on a national basis.

It follows that part of the requirement for uniformity means that the manner of dealing with conduct issues must be uniform within the States and Territories. In this regard, in reality, there are no substantial changes in the manner in which the conduct issues are to be investigated, as opposed to the way they have been dealt with by this Society in the past.

The Professional Conduct Rules of the Law Society Northern Territory largely reflected Professional



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Conduct Rules of the Law Society of New South Wales. The Professional Conduct Rules are being reviewed in relation to all jurisdictions by the Law Council of Australia. Once again, this is so there is uniformity in the conduct of the profession on a national basis. It is not anticipated that this will result in any drastic changes in the Northern Territory.

In relation to conduct issues, the *Legal Profession Act* now defines, for the purposes of the Act, the key concepts of "unsatisfactory professional conduct" and "professional misconduct", which are distinct from each other: see sections 464 to 466. Absent from the repealed Act, was any definition for "unsatisfactory professional conduct".

It is important to note the differences between "unsatisfactory professional conduct" and "professional misconduct". The former can be said to apply to less serious conduct, and only applies in relation to conduct occurring in connection with the practice of law. Whilst the latter applies to conduct of a more

serious nature, and it also extends to conduct occurring outside of the practice of law. Needless to say, the potential penalties in relation to “professional misconduct” are greater.

The *Legal Profession Act* also defines the conduct which is “capable” of constituting “unsatisfactory professional conduct” and “professional misconduct”. However, the definition is not exclusive of the two concepts, but is rather inclusive of the two.

Under the repealed Act, procedures for dealing with conduct issues and complaints were previously largely governed by By Laws made under the Constitution of the Law Society. However, these are now, for the most part, incorporated into the *Legal Profession Act*. The Society will be working on introducing appropriate By Laws under the Constitution with respect to certain procedural issues which are not defined within the Act, or are absent from it.

Handling of complaints and disciplinary matters (conduct issues) are largely set out in Chapter four of the *Legal Profession Act*. Where breaches of conduct under the *Legal Profession Act* (and the Professional Conduct Rules) are made out, these attract penalties ranging from private reprimands, to public reprimands, to fines or to laying of charges (with the Disciplinary Tribunal). The general procedures for carrying out the investigations, lodging of Appeals and applications to the Disciplinary Tribunal, are set out in Chapter four.

In order for the Society to consider a complaint, the complaint must be made in writing. Therefore, whilst in practice the Society keeps a register of all enquiries, there can be no investigation without a formal written complaint. A complaint form is contained on our website. Complainants are encouraged to complete a complaint form, although it is not a specific requirement of the Act that the

written complaint is to be in our format. The rationale behind providing a form for complaints is so that complainants can focus on the nature of their complaint and provide other necessary details, eg. the naming of the practitioner rather than the firm, as complaints are investigated in relation to individuals and not firms. It also assists us in managing complainants expectations in relation to their desired outcomes, which are often outside of our powers.

At this stage, I would like to point out that it is not my intention to go into what the powers of the Society are in relation to dealing with complaints. I am going to give a “plug” to a CPD scheduled for 6 March 2008 on ‘The Law Society Disciplinary Powers & Your Obligations under the *Legal Profession Act*’.

The Society can also commence an investigation of its own motion, in relation to any conduct issues which come to its attention. There have been occasions where we have had matters referred to us by the judiciary. At other times, things have come to our attention when dealing with a formal complaint when other issues (not the subject of the complaint) have come to our attention, and we can continue to deal with a complaint even though the complainant may have withdrawn the complaint. There have also been occasions when our attention has been drawn to some conduct issues through the media, or upon reading published judgments.

Once a complaint is received, it must be dealt with, and a copy of the complaint provided to the practitioner as soon as practicable after receipt, unless the Society has dismissed or intends to dismiss the complaint. The time for responding to a complaint is provided under Professional Conduct Rule 32.2, which states:

A practitioner should respond within a reasonable time, and in any event

within 14 days (or such extended time as the Law Society may allow) to any requirement of the Society for comments or information in relation to the practitioner’s conduct or professional behaviour. In doing so, the practitioner should furnish in writing a full and accurate account of his or her conduct in relation to the matter.

Notwithstanding that PCR 32.2 provides for a response within 14 days, it had become a standard practice to allow 21 days for a response. There are presently 48 current complaint files, with 10 complaints having been received from 1 December 2007 to the end of January 2008.

The Society will now effectively not be offering anything more than the 14 days provided for in PCR 32.2 for a response to the complaint. Of course, PCR 32.2 does allow for a request for an extension of time to be made in writing, and these requests will be considered on a case-by-case basis.

In the event that there are severe breaches of the time frames, then consideration will be given to imposing a fine and/or that the matter being considered without the benefit of a reply from the practitioner, which could attract further penalty.

Whilst the Society acknowledges the pressures of practice which exist for our members, the *Legal Profession Act* does require that we deal with complaints expeditiously, and it is for this reason there will be a stricter approach applied to the response from practitioners.

Again, there is additional power to the Society not previously held in relation to practitioners’ continuing failures to respond to the Society, and this will be covered at the CPD scheduled on 6 March 2008.

Any response received from a practitioner in relation to a complaint is forwarded to the complainant.

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Mandatory CPD year finishes on 31 March 2008

Practitioners are no doubt considering how to accumulate the 12 points required under the NT scheme as part of the renewal requirements for the 2008-2009 practicing certificate year.

The CPD Committee is running an active CPD programme ahead of the 31 March 2008 deadline, with registration forms for several CPDs included with the weekly *Practitioner* e-newsletter.

Queries on CPD issues should be directed to Christine Heatherington-Tait on 89815104.

CPD Calendar

Friday 29 February, 1.30pm-4.45pm

Disclosure, Negotiation & Employment

AMPLA/ACLA/LSNT Crowne Plaza, Darwin. Two (2) CPD points.

Thursday 6 March, 5.30pm-6.30pm

Law Society disciplinary powers & your obligations under the LPA 2006

Presenter: Jacqueline Presbury, Law Society Professional Standards Solicitor.

Projection Plus, Lindsay St, Darwin
Video conferenced to Katherine & Alice Springs. One (1) CPD point.

Monday 31 March, 5.30pm-6.30pm

Save the Date - Topic to be confirmed

Presenter: Prof. Louise Newman, Chair of Perinatal & Infant Psychiatry, University of Newcastle. Video conferenced to Katherine & Alice Springs. One (1) CPD point. Further details soon.

Wednesday 11 June, 1730- 1830

Risk Management – AML/CTF

Presenter: Paddy Oliver LL.B. MBA, Director, Legal Risk, SSAMM Management Consulting. Centrepoint Business Centre. One (1) CPD Point.

Professional Standards & Ethics:

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practitioner in relation to a complaint is forwarded to the complainant. Often, further input may be required from both the complainant and then the practitioner. Where the complaint is not dismissed, recommendations will be considered by the Ethics Committee which currently meets once per month.

These recommendations of the Ethics Committee then go before the Council of the Law Society and can either be accepted by Council or Council can make a determination differing from the recommendations of the Ethics Committee.

A copy of the recommendations are also provided to the complainant and the practitioner, with an invitation to make any submissions on penalty they deem appropriate. This will also be provided to the Council which they will consider in conjunction with the recommendations.

Again the processes of dismissing a complaint will be explained in further detail in the CPD on 6 March

2008, as well as the responsibilities of the Society, and its powers, in addition to your obligations and your rights.

I would like to emphasize that the purpose of the *Legal Profession Act* is not to make life more difficult for practitioners, but to support a national model for uniform practice in Australia.

The introduction of the *Legal Profession Act* involved a great deal of the Society's resources in its formulation and the lead up to its enactment, as well as additional work being required on an ongoing basis with its enactment. This has resulted in the expansion of the staff requirements of the Secretariat, a part of which was to make the position of the Professional Standards & Ethics Solicitor a full-time appointment, and the appointment of a Trust Account Investigator, Shamus Morton on a part-time basis. His role will also potentially have some impact on conduct issues.

The additional requirements of the *Legal Profession Act* does no doubt require greater accountability, but this can have positive consequences in terms of public perception, which is always an important consideration for the profession as a whole.

In closing, I extend my apologies if any of the information contained within this article is fairly basic. However, I went through previous issues of *Balance* back to about 2003 and could not see that there had been any information offered to our members in terms of the manner in which complaints are dealt with by the Society. Given that we have entered into a new era with the commencement of the *Legal Profession Act*, I considered that it might be appropriate to go through the basics of the complaints process. Of course if any of you have any questions in relation to the complaints process, please do not hesitate to contact me at the Law Society.