The role of the Supreme Court in relation to discipline of legal practitioners

The Hon Justice D Mildren, RFD

On 1 July 2007 the *Legal Profession Act 2006* came into force. The Act contains 762 sections and occupies 399 pages of printed text. It is the longest Act ever passed by the Legislative Assembly of the Northern Territory, although by Commonwealth standards it is a mere bagatelle. At least it comes in only one volume.

The Act repealed and replaced the Legal Practitioners Ordinance 1974 which, when it was initially passed, contained only 141 sections and occupied a mere 56 pages of text. Prior to that there were no statutory provisions, apart from a few Ordinances dealing with trust accounts and the requirement to have them audited, which regulated the legal profession in the Northern Territory . Matters such as the admission and discipline of legal practitioners rested solely in the Courts inherent jurisdiction.

Only the State and Territory Supreme Courts and the High Court of Australia has inherent jurisdiction to admit and discipline legal practitioners and it is well established in the authorities that the Court's inherent jurisdiction includes both barristers as well as solicitors.

Usually the Court's powers are exercised upon the motion of the profession's governing body, but in the Northern Territory there was no Law Society until 1969, and so before then, applications to the Court to discipline legal practitioners were usually made on the motion of the Attorney-General, or if not by him by some other person. It is clear that any person is entitled to move the Court for the purpose of requiring the Court to exercise its inherent jurisdiction. Even if there is provision for reference of a complaint to a statutory committee, this does not prevent the Court from dealing with a matter on motion to the Court .

The *Legal Profession Act* specifically preserves the inherent jurisdiction of the Court in relation to the control and discipline of legal practitioners: see s 554. So far as the jurisdiction to admit practitioners is concerned, the *Legal Profession Act* does not take away the power of the Court to control the admission of practitioners. The provisions of Part 2.2 which deal with the admission to the legal profession are facultative, and do not prevent the Court from refusing to admit a practitioner even if the practitioner has formally complied with the conditions of eligibility for admission set up by the Act.

Indeed, there is some authority that the Court's inherent jurisdiction may be exercised on the Court's own motion. An interesting example of that occurred in the case of In re Bateman in the Supreme Court of the Northern Territory in 1926. In those days there was no Law Society, and the profession was very small. Bateman arrived in Darwin on 14 July 1926, bringing with him a certificate dated 22 June 1926 signed by the Prothonotary, and sealed with the seal of the Supreme Court of Victoria. The certificate indicated that he had been admitted in Victoria as a barrister and solicitor on 3 December 1894, had never been suspended or struck off in Victoria and had never been the subject of any complaint to the Court. Upon that certificate he was conditionally admitted as a practitioner on 19 July 1926. He was struck off on the Court's own motion on 4 October 1926, having been on the roll for only 67 days. This must be some kind of record. In that particular case it was alleged

Justice Mildren RFD

that Bateman had filed a false affidavit of service in relation to certain notices in bankruptcy proceedings. The matter had been brought to the attention of the Judge by a number of statutory declarations posted to the Judge anonymously. As no one moved to have Mr Bateman disciplined, the Judge himself drafted the necessary papers for Bateman to be summonsed before him and caused them to be served.

A similar type of case occurred in New South Wales in 1949 in the matter of In re Davis . In that case Davis had been admitted as a barrister, but had failed to disclose to the Court at the time of his admission that he had been tried and convicted in 1935 on a charge of burglary. The Court acted on the report of the Prothonotary who was not a party to the proceedings. Counsel appeared for the Bar Association as amicus curiae. The Full Court made an order that the barrister be disbarred and his name removed from the roll.

In modern times, disciplinary powers have been given to regulatory bodies, although, as a general rule the regulatory bodies have not

Continued page 36

had the power to strike off a practitioner whose name is on the roll. The striking off power still remains with the Court but, in any event, the Court may decide that the case does not warrant such an order and could make any other order that it sees fit such as limiting a person's right to practice on conditions, suspension from practice, a fine or an admonition or a combination of each.

Even if a practitioner has been acquitted by a disciplinary tribunal, it has been held that this does not operate as an issue estoppel or res judicata, and does not preclude the Court from finding a practitioner guilty of misconduct and dealing with him accordingly.

In Weaver v The Law Society of NSW, the High Court of Australia heard an appeal from the NSW Court of Appeal which had struck off a solicitor after the solicitor had been found not guilty by the statutory committee established under s 76 of the Legal Practitioners Act 1898 (NSW). The gravamen of the charge brought before the Court was that the practitioner had given false evidence before the statutory committee. The principle judgment was delivered by Justice Mason who said :

"Disciplinary proceedings under the *Legal Practitioners Act* and in the exercise of the Supreme Court's inherent jurisdiction are not criminal proceedings, they are proceedings sui generis. When the Court is called upon to examine the conduct of solicitors as officers of the Court, it is as much concerned to protect the public from misconduct on the part of solicitors as it is to ensure that issues already determined are not unnecessarily re-litigated. The Court cannot disable itself from hearing and determining the very serious complaint against a solicitor who has given false evidence merely because the complaint may or would involve the re-litigation on allegations of earlier misconduct of which the solicitor has previously been found not guilty."

In the Northern Territory, the Court's inherent jurisdiction to discipline practitioners is now required, as a general rule, to be dealt with by the Full Court. Section 22(1)(b) of the *Supreme Court Act* provides that if the Rules so provide, the Full Court must exercise the inherent jurisdiction of the Court to hear and determine a proceeding relating to the discipline of the lawyer. Section 22 does provide for the power of the Full Court to refer a disputed question of fact to a single Judge, but it is the Full Court under s 22(3) which is required to make its own findings.

So far as an appeal is concerned from the Legal Practitioners Disciplinary Tribunal, that is also required to be heard under s 22(1)(a) by the Full Court. Section 22(4) makes it clear that an appeal to the Full Court is by way of rehearing and that the Court has power to draw its own inferences from evidence taken from the Tribunal.

These powers are all predicated upon "if the Rules so provide".

Rule 95.01 of the Supreme Court Rules provides that the Full Court will, as a general rule, exercise the jurisdiction of the Court to hear and determine a proceeding in the inherent jurisdiction of the Court relating to the discipline of a lawyer. However, Rule 95.01(2)(b) enables the Full Court, despite the general rule, to order that a particular matter be heard and determined by a single Judge. If a matter is dealt with by a single Judge the practitioner has a right of appeal under s 22(6) of the *Supreme Court Act* to the Full Court.

In addition the Court has power to make an order for costs against a legal practitioner under Order 63 Rule 21(1) of the Supreme Court Rules, including the costs of another party to the proceedings. Although the Rules provide for the mechanism and circumstances under which such an order may be made, it is clear that the Court is exercising, again, its inherent jurisdiction. Orders under that Rule have not been infrequently made by superior courts. Even the Federal Court has exercised similar jurisdiction, although it has no jurisdiction to discipline members of the profession: see White Industries (Qld) Pty Ltd v Flower & Hart. According to Dawson J in Knight v F P Special Assets Ltd, the jurisdiction is a summary jurisdiction to punish misconduct which rests upon the duty of the Court to supervise the conduct of its solicitors, but other authorities suggest that the primary object of the jurisdiction is not punitive or disciplinary but compensatory; that is to say to reimburse a party costs which the party has incurred because of the default of the solicitor. A number of other authorities suggest that it is summary, disciplinary and compensatory. It is to be noted that the power of the Court to make such an order under Rule 63.21(2)(a) includes a power to make a costs order by reason of the failure of a solicitor to attend in person or by a proper representative or to file a document which ought to be filed in a proceeding as a result of which the trial of the proceeding could not be conveniently heard or proceeded with, or if the trial is adjourned without useful progress being made. There are instances of orders of that kind being made on the Judge's own motion, but of course the solicitor must be given a proper opportunity to be heard.

Although Order 63.21 refers to a solicitor for a party, the inherent power of the Court to make a costs order against any person whether or not a party would enable the Court to make a similar costs order against a barrister. The jurisdiction to make such an order is not confined to civil proceedings and superior courts have been held

Continued page 37

The role of the Supreme Court in relation to discipline of legal practitioners...cont.

in the United Kingdom to have an inherent jurisdiction to order costs against practitioners in criminal proceedings as well.

The Supreme Court also has inherent jurisdiction to deal with any person including a practitioner who is guilty of contempt of court.

The question arises under what circumstances the Court might be asked to exercise its inherent jurisdiction and under what circumstances it is appropriate for the Court to refer the matter to the regulatory body. Obviously if an application is made by motion to the Court, that is to say the Full Court, for the discipline of a practitioner it is the Full Court's duty to deal with it even if the matter has not been referred to the disciplinary body. The Court maintains a discretion to adjourn the proceedings pending a complaint being laid before the relevant regulatory body . Whether the Court would exercise its discretion to so adjourn a particular case would no doubt depend upon the circumstances. There would be little point in adjourning a matter where the facts were not in dispute. By way of example, I do not think it would be necessary for the Law Society to make a complaint to a regulatory body in circumstances where a practitioner had been found guilty of a serious criminal offence of such a nature as to make the practitioner a person who is no longer a fit and proper person to remain on the roll.

However, in most cases concerning complaints against practitioners which come to the attention of the Court or a Judge of the Court, the Court is not in a position to make firm findings of fact without conducting a hearing, and I would expect that the Judge or the Court, if it consisted of more than one Judge, would generally refer such matters to the Law Society in the first instance.

A question could arise as to the power of a single Judge to fine or admonish a practitioner in the exercise of the Court's inherent jurisdiction for admitted professional misconduct. In those circumstances, it would appear that although the behaviour warranting such a course might be blatant and obvious and perhaps not in dispute, a single Judge may no longer have jurisdiction to deal with such a matter. The choice would then be for the Judge to either refer the matter to the Law Society, or to the Chief Justice with a view to the Full Court exercising its inherent jurisdiction ex mero motu. I do not imagine that the Court would act on its own motion except perhaps in very obvious cases or in circumstances where the Court for some good reason no longer had any faith in the Law Society or the disciplinary committee, a situation which has so far not occurred and I hope never will.

Administrator receives Australia Day Honour

Former NT Solicitor-General and current Administrator of the Northern Territory, His Honour Tom Pauling QC, was named an Officer of the Order of Australia on the Queen's Birthday Honours List recently.

According to the 'It's an Honour' website, His Honour received his AO for, "service to the Northern Territory through significant contributions to the law, particularly relating to constitutional matters, to the development of legal organisations and the promotion of professional standards, and

His Honour Mr Tom Pauling QC OAM

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