



# Who not to employ

**Kellie Grainger**

Manager Regulatory Services  
Law Society Northern Territory

Recruiting suitable staff is a challenge across many industries and businesses. Finding the candidate with the right skills, the requisite experience and the best fit for your particular business can be testing. In case that's not hard enough, law firms have added obligations by virtue of the *Legal Profession Act 2006* (LPA).

Practitioners would be aware that the LPA contains certain duties and obligations imposed on legal practitioner<sup>1</sup>, but the LPA also contains a restriction applying to other staff (support staff), called 'lay associates'<sup>2</sup> under the LPA.

Unless they first obtain the consent of the Society, a law firm cannot employ a person as support staff if they are a disqualified person or a person convicted of a serious offence.<sup>3</sup> A serious offence is defined as an indictable offence.<sup>4</sup>

Disqualified person includes:<sup>5</sup>

- a person whose name has been removed from the Roll,
- a person whose practising certificate has been cancelled,
- a person whose practising certificate is currently suspended,
- a person who has been refused renewal of their practising certificate and not subsequently been issued with a practising certificate; and
- a person preclude from being employed in or associated with a law firm or firms by certain orders of the Court.

If an employee is a legal practitioner, a principal has some reassurance by virtue of the LPA requirements applying to legal practitioners requiring them to give notice to the Society about certain matters or events. Legal practitioners have statutory and common law duties when they first apply for a practising certificate about disclosing to the Society any matter which may be relevant

to the determination of whether the person is a fit and proper person to hold a practising certificate. They also have ongoing obligations to make these disclosures at practising certificate renewal time and on the occurrence of certain events. Legal practitioners have an obligation to give notice to the Society (within specified timeframes) if they are charged with a serious offence or if they are convicted of an offence that would have to be disclosed at admission.<sup>6</sup> They are also required to give notice if a show cause event occurs.<sup>7</sup>

The regulatory notice provisions applying to legal practitioners oblige them to give notice to the Society but not to their employer. Principals may take some comfort that if a legal practitioner has obtained a practising certificate then any notifiable matters have been considered prior to the practising certificate being granted or renewed. Practitioners however don't always comply with the obligation to give notice in the specified timeframe and might only catch up on this at renewal time. This may have implications for the practitioner and mean the principal is otherwise unaware of a serious matter relating to their employee. Principals should consider including provisions in their employment agreement to place an obligation on an employed legal practitioner to disclose to the employer within a specified period any notifiable events, such as being charged with a serious offence, convictions, bankruptcy, suspension or cancellation of their practising certificate, etc. This would enable a principal to ensure appropriate supervision and support for the employed practitioner, especially for a junior practitioner, in complying with their regulatory obligations and also potentially serious personal circumstances that can impact on their work and relationships with fellow employees.

Before employing support staff, principals should consider obtaining information about whether or not a potential

employee has been convicted of an offence or otherwise meets the definition of a disqualified person. A record should be kept of that enquiry and evidence of the candidate's response.

Additionally staff induction procedures should ensure that any incoming staff member is alerted to their obligations, which will vary depending on the capacity in which they were employed.

Under the LPA it is an offence by the support staff member if they fail to disclose they are a disqualified person or have been convicted of a serious offence and take up employment with a law firm. This is punishable by a maximum penalty of 100 penalty units or six months imprisonment.<sup>8</sup> The principal of the law firm can suffer consequences as well. A principal may be exposed to possible disciplinary action if a law firm contravenes the requirement on it to obtain approval to employ a disqualified or convicted person due to a deeming provision in the LPA that non-compliance with the law firm's obligation can constitute unsatisfactory professional conduct or professional misconduct by a principal of the law firm.<sup>9</sup>

As is the case with employed practitioners, principals should consider having a formal written commitment from support staff employees to notify their employer about the matters required by Section 699 of the LPA. Thought should be given to what information the principal wants and when. Even though a support staff employee being charged with an offence is not a trigger under the LPA, a principal may benefit from knowing about the mere existence of the charge as it gives them the opportunity to consider any implications for the firm including planning for an employee who may be unavailable for some period following an adverse outcome to the criminal proceedings.

Firms with formally documented policies and procedures should review these to ensure that they properly capture the principals' responsibilities under the LPA.

Principals of all law firms are encouraged to take a moment to review their employment processes and communicate with the staff about the types of matters that can affect their employment. This might include thinking about:

What do your employees need to know? This will vary between legal practitioners and support staff.

- Do your recruitment and induction processes make it clear? These processes should also provide you with an evidentiary record of the actions you have taken to comply with your obligations as a principal.
- What does your employment agreement say?
- Are there processes in place to manage future reporting and the action required if a staff member does disclose a relevant matter?
- Do you have a system to ensure reminders are issued to staff from time-to-time about these obligations?
- Are all principals or directors of the law firm aware of these requirements?

<sup>1</sup> For an article dealing with the reporting obligations on legal practitioners see: Kellie Grainger, 'Do tell ... Notification Requirements' (2012) 3 Balance 14

<sup>2</sup> Section 7(2)(b)

<sup>3</sup> Section 699(1)

<sup>4,5</sup> Section 4

<sup>6</sup> Section 76

<sup>7</sup> Section 62, definition of 'show cause event' in section 4

<sup>8</sup> Section 699(6)

<sup>9</sup> Section 698