LAW SOCIETY OF TASMANIA
CONTINUING PROFESSIONAL DEVELOPMENT

DEALING WITH CONDUCT COMPLAINTS: Part 1 THE DISCIPLINARY TRIBUNAL

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Introduction

1. It is an important feature of a profession that it regulates its own discipline without fear or favour. Under the *Legal Profession Act 2007* ("the Act") the Disciplinary Tribunal is charged with hearing and determining disciplinary matters in relation to legal practitioners. It is a statutory body, constrained by the scope and purpose of the Act and required to act in accordance with the law.

2. The Tribunal is one of three bodies capable of taking disciplinary action against a practitioner. The Legal Profession Board ("the Board"), which is charged (amongst other things) with investigatory powers also has limited disciplinary powers. The Act, s.510 also purports to preserve the inherent jurisdiction and powers of the Supreme Court with respect to the control and discipline of local lawyers. In fact, the "inherent jurisdiction" is supplied by the Charter of Justice.[1] But it is well recognised that professional bodies, such as the Board, may institute disciplinary proceedings in the Court against practitioners using this power,[2] or under the Act, s.486. Both involve the plenary power of the Court to control its own practitioners. The Tribunal, however as a statutory body, is bound by the Act.

3. The objects of this paper are to:

   (a) describe the legislative scheme applicable to conduct complaints, including the procedure in the Tribunal;

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1 *In re a Solicitor* [1978] Tas R 199 at 202

2 See for example, *A Solicitor v Law Society of New South Wales* (2004) 216 CLR 253 esp at [2] to [3]

(b) attempt to explain some of the principles relevant to the categorisation of professional conduct within the scheme; and

(c) make some practical observations relating to the preparation of matters for the Board and Tribunal.

Disciplinary Action

4. In *Dickens v The Law Society,*[3] Cosgrove J (referring to the powers of the Disciplinary Committee)[4] observed:

> "There is high authority for the proposition that the powers given to the Disciplinary Committee to discipline a practitioner are entirely protective in character and no element of punishment is involved.[5] But to say that is merely to say that the powers are to be exercised for the purpose of, and in a manner seen to be likely to achieve, the maintenance of that high standard of conduct within the profession which will continue its good reputation, and so protect, not only the future of the profession, but also protect its clients from harm. With this object in mind, the Committee is required to look to the future. Even if the practitioner's misconduct be relatively slight, he may yet be struck off, if his capacities and attitude have been revealed to be such that his continuance in practice constitutes a threat to the profession. On the other hand, conduct which is itself more grave in nature, may not warrant striking off, if it is seen as a temporary and explicable departure from the practitioner`s own high standards. The Committee's task is to uphold the dignity and standards of the profession. To enable them to do so, they have been given powers to fine, to order payment of costs, to suspend, and to strike off. The exercise of any of these powers inevitably involves a deprivation of one kind or another to the practitioner. But the deprivation is merely part of the exercise of the discipline of the profession. There is in it no retributive element, no intention to express outrage, as there sometimes is in sentences for crime. The order which the Committee is called upon to make is that order which, in its opinion, is necessary, and no more than is necessary, to maintain professional discipline and high standards of conduct. It is not entirely incorrect to describe such an order as punishment, and that term is often used.[6] But it is punishment of a special kind, for a special purpose." [7]

5. This is an accurate statement of the nature of disciplinary action. It demonstrates a number of important matters that lie behind professional conduct matters.

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3 [1981] TASSC 42

4 Established under the *Legal Profession Act 1959*

5 See *Ziems v Prothonotary of the Supreme Court of New South Wales [1957] HCA 46;* (1957) 97 CLR 279 at 286 per Dixon CJ; *Clyne v The New South Wales Bar Association [1960] HCA 40;* (1960-61) 104 CLR 186 at 201-2; *The New South Wales Bar Association v Evatt [1968] HCA 20;* (1968) 117 CLR 177 at 183-4; and *Ex Parte Attorney-General for the Commonwealth; Re a Barrister and Solicitor* (1972) 20 FLR 234 at 244.

6 see in *Re Daley [1907] HCA 32;* (1908) 5 CLR, 193; *Southern Law Society v Westbrook [1910] HCA 31;* (1910) 10 CLR, 609; *Mellifont v Queensland Law Society Inc* (1981) QSR 17 at 28 per Andrews J., and *In re Moseley* (1925) 25 SR(NSW) 174 at 178

7 [1981] TASSC 42 at 15-16

6. Foremost is that disciplinary proceedings are not punitive. They are not to be equated to criminal prosecutions. This is a mistake too often seen in practitioners who have limited experience in this jurisdiction and it may result in serious consequences for a practitioner about whom a complaint is made.

7. Secondly, what is in issue is the professional conduct of the practitioner, judged against the protection of the public and the high standards of the profession. The conduct does not need to be unlawful to attract a complaint, although that may be an important factor.[8] On the other hand, is would appear that not all cases of dishonesty by a practitioner will attract removal from the roll.[9]

8. Thirdly, the range of disciplinary action available to the Tribunal, or for that matter the Court, is exceptionally wide, guided only by the protection of the public and the maintenance of high standards in the profession. An example of the reference to relatively slight conduct is *Law Society (NSW) v Moulton*,[10] where a solicitor borrowed money from a client without disclosing his interest and ensuring the client had independent advice. The fact that the client suffered no loss was not a relevant factor.[11] It was the practitioner's ignorance of his obligations that moved the Court to striking him off.

The relationship between the Practitioner and Professional Bodies

9. An important element lying behind the investigation and prosecution of disciplinary proceedings is the relationship between the practitioner and the Court, the Tribunal, or the Board.[12]

10. That relationship imposes (amongst other things) a duty to disclose material which might be potentially relevant to the question of fitness to practise.[13] A

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8 As in cases of undue delay, or repeated negligence.

9 *Law Society v Ian Alfred Creese* (Disciplinary Decision 1/2009; *Legal Profession Board v Danaher* Disciplinary Tribunal decision 3/2009

10 (1981) 2 NSWLR 736

11 See also *Law Society v McDougall* (2007) 17 Tas R 1

12 See for example *A Solicitor v Council of the Law Society of New South Wales* (2004) 216 CLR 253.

13 *In re Davis* (1947) 75 CLR 409 at 426; *S v Legal Practice Board of West Australia* (2004) 29 WAR 173; *Re Del Castillo* (1998) 148 FLR 235

failure to be candid with a professional body may be relevant to the practitioner's fitness to practice.[14] A right of the practitioner to remain silent, even on the grounds of self-incrimination, is severely restricted. [15] A practitioner who is being investigated in relation to a complaint is not at liberty to withhold information relevant to the complaint from the Board, or the Tribunal. It is not a battle of tactics as it may be in a criminal prosecution.[16]

11. Moreover, a practitioner's conduct in relation to authorities not related to the profession may have a bearing on the Tribunal's view of their conduct. For example, a failure to report unlawful conduct to police at an early stage has been considered, in Tasmania, to be a relevant factor in categorising the nature of professional conduct.[17]

12. Finally, as will be seen, there are limits on the Board's duties of procedural fairness to the practitioner.

13. With these things in mind, a practitioner about whom a complaint is made, or who is asked to act for such a practitioner, should approach the disciplinary jurisdiction with significant trepidation.

Scope and Purpose of the Act

14. The Act, Chapter 4, is headed "Complaints and Discipline". It opens with s.417, which provides:

> **417. Purposes**
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> The purposes of this Chapter are as follows:
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> **(a)** to provide a nationally consistent scheme for the discipline of the legal profession in this jurisdiction, in the interests of the administration of justice and for the protection of consumers of the services of the legal profession and the public generally;

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14 ibid

15 *Martin v The Medical Complaints Tribunal* [2006] 15 Tas R 413; For a recent discussion of the authorities, see *Bar Association (NSW) v Power* (2008) 71 NSWLR at [13]&ff

16 *Re Veron; Ex Parte Law Society of New South Wales* [1966] 1 NSWR 566 at 515; *Scott v Law Society* [2009] TASSC 12 at [64] to [66].

17 *Legal Profession Board v Saric* (Disciplinary Tribunal decision No.5 of 2011)

(b) to promote and enforce the professional standards, competence and honesty of the legal profession;

(c) to provide a means of redress for complaints about lawyers.

15. For the present, the most important phrase in this definition is "the protection of consumers of the services of the legal profession and the public generally."

16. The powers and functions of the Tribunal (and the Board) under Chapter 4 extend to the conduct of Australian lawyers and former Australian lawyers as well as Australian legal practitioners and former Australian legal practitioners.[18] It captures any lawyer entitled to practise in Tasmania.[19] It has extra territorial application where the conduct has some connection with practice in Tasmania.[20] It also extends to the conduct of a local practitioner involving insolvency, serious offences and tax offences occurring outside Tasmania.[21]

Professional Misconduct and Unsatisfactory Professional Conduct

17. Section 418 provides, amongst other things, that "'conduct' means conduct whether consisting of an act or an omission…"

18. The Act recognises two categories of conduct; unsatisfactory professional conduct and professional misconduct.

19. Sections 420 to 422 provide:

> **420. Unsatisfactory professional conduct**
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> For the purposes of this Act –
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> **"unsatisfactory professional conduct"** includes conduct of an Australian legal practitioner 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 Australian legal practitioner.
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> **421. Professional misconduct**

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18 The Act, s.419. Under s.5, an "Australian lawyer" is a person who is admitted to the legal profession under this Act or a corresponding law"; and under s.6 an "Australian legal practitioner" is an Australian lawyer who holds a current local practising certificate or a current interstate practising certificate.

19 The Act, s.423

20 The Act s.424(2)

21 The Act, s.425

(1) For the purposes of this Act –

"professional misconduct" includes –

(a) unsatisfactory professional conduct of an Australian legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and

(b) conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.

(2) For finding that an Australian legal practitioner is not a fit and proper person to engage in legal practice as mentioned in subsection (1), regard may be had to the suitability matters that would be considered if the practitioner were an applicant for admission to the legal profession under this Act or for the grant or renewal of a local practising certificate.

422. Conduct capable of constituting unsatisfactory professional conduct or professional misconduct

(1) Without limiting section 420 or 421, the following conduct is capable of constituting unsatisfactory professional conduct or professional misconduct:

(a) conduct consisting of a contravention of this Act, the regulations or the legal profession rules;

(b) charging of excessive legal costs in connection with the practice of law;

(c) conduct in respect of which there is a conviction for –

(i) a serious offence; or

(ii) a tax offence; or

(iii) an offence involving dishonesty;

(d) conduct of an Australian legal practitioner as or in becoming an insolvent under administration;

(e) conduct of an Australian legal practitioner in becoming disqualified from managing or being involved in the management of any corporation under the *Corporations Act 2001* of the Commonwealth;

(f) conduct consisting of a failure to comply with the requirements of a notice under this Act or the regulations (other than an information notice);

(g) conduct of an Australian legal practitioner in failing to comply with an order of the Tribunal made under this Act or an order of a corresponding disciplinary body made under a corresponding law (including but not limited to a failure to pay wholly or partly a fine imposed under this Act or a corresponding law);

> **(h)** conduct of an Australian legal practitioner in failing to comply with a compensation order made under this Act or a corresponding law.
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> **(2)** Conduct of a person consisting of a contravention referred to in subsection (1)(a) is capable of constituting unsatisfactory professional conduct or professional misconduct whether or not the person is convicted of an offence in relation to the contravention.

20. The scope of these important provisions will be discussed further below.

Complaints

21. Under Chapter 4, a complaint about the conduct of an Australian legal practitioner can be made by anyone.[22] It is to be made in writing to the Board, which itself can make complaints.[23]

22. Sub-section 428(1) provides that a complaint may be made about conduct irrespective of when it is alleged to have occurred, but, under sub-ss.(2), unless the Board determines otherwise, a complaint cannot be dealt with, except to dismiss it if it is made more than 3 years after the alleged conduct. Factors affecting the Board's discretion include the delay and the reasons for it and the public interest. The Board's discretion is not open to challenge, or so says sub-s.(3).

23. The Board has powers to request further information about the complaint and have it verified by statutory declaration.[24] It must notify the practitioner of a complaint, although it may withhold notice if, in its opinion, its investigation, or a police investigation, or court proceedings will be prejudiced, or the complainant will be intimidated or harassed.[25]

24. Section 431 provides that a practitioner about whom a complaint has been made may make submissions to the Board about the complaint. The Board must consider the submissions before deciding what action is to be taken. Even though the Board may be concerned at this point about whether the complaint

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22 The Act, ss.426, 427(1)

23 The Act, s.427. See this section for the requirements necessary to make a complaint. It is a good idea to have a look at the Board's website (www.lpbt.com.au) and obtain a complaint form.

24 The Act, s.429

25 The Act, s.430.

should be summarily dismissed,[26] it is important to remember the obligation of candour and the need for any information supplied to be accurate. A possible approach to this is discussed below.

25. Complainants may also withdraw their complaint. However, this cannot occur if the Board has instituted proceedings in the Tribunal.[27] The withdrawal of the complaint means that no further action can be taken on it, except the Board may make its own complaint about the conduct if it so chooses.[28]

Investigation

26. Part 4.4 provides for the investigation of complaints. The first thing to note is that Board's investigators are given extraordinary powers to investigate complaints.[29] A practitioner who fails to cooperate with an investigation does so at great peril. The obligation of candour is but one example.

27. The investigatory powers include, for example, the power to require the practitioner to produce documents, provide written information or otherwise assist in and cooperate with the investigation.[30] Section 573(3) provides,

> **"(3)** If, before complying with the requirement, the person objects to the investigator (sic) on the ground that compliance may tend to incriminate the person, the information is inadmissible in evidence in any proceeding against the person for an offence, other than –
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> **(a)** an offence against this Act; or
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> **(b)** any other offence relating to the keeping of trust accounts or the receipt of trust money; or
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> **(c)** an offence relating to the falsity of the answer."

28. A requirement by an investigator is not invalid on the ground that it may incriminate a person. It is arguable that these provisions will not prevent the Tribunal from compelling an answer that may tend to incriminate a practitioner. The Tribunal is not bound by the rules of evidence.[31] Failure to

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26 The Act, s.433
27 The Act, s.434
28 The Act, s.434(6) & (7)
29 The Act, s.443 and Chapter 6
30 The Act, s.572
31 *Legal Profession (Disciplinary Tribunal) Rules 2010,*("the Rules") r.12

obey a requirement of an investigator is an offence. Further, the Act, s.584 makes it an offence to obstruct an investigator, without lawful excuse. The commission of either offence is also capable of constituting unsatisfactory professional conduct, or professional misconduct.[32]

29. Under s.445, if the Board considers that any matter under investigation may amount to professional misconduct; it is to make an application to the Tribunal, or the Court. This provision is directory only,[33] but it is difficult to imagine how anything less than substantial compliance would be sufficient obedience by the Board.

30. During the investigation, the Board may also require the Law Society (as the prescribed authority) to suspend the practitioner's practising certificate if it thinks that the practitioner is likely to be found guilty of professional misconduct and it is in the public interest.[34] The practitioner has a right of appeal to the Court against the suspension.[35]

Board's Powers after investigation

31. Section 450 provides that after the investigation is completed the Board may hold a hearing itself, if it considers the matter relates to unsatisfactory professional conduct, or "a less serious complaint".[36] It may apply to the Tribunal if it considers the matter to amount to unsatisfactory professional conduct, or professional misconduct.[37] It may also apply to the Court in cases of professional misconduct.[38]

32. Under s. 451, the Board may dismiss the complaint after an investigation if it is satisfied that:

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32 The Act, ss.422(1)(h); 573(6)
33 *Acts Interpretation Act 1932*, s.10A(1)(b)
34 The Act, s.446(1) and (4)
35 The Act, s.446(5)
36 For hearings before the Board, see ss.453 and Schedule 1, s.454. Less serious complaints are dealt with in s.456. The Tribunal has jurisdiction to review decision of the Board in limited circumstances: s.458.
37 The application is made under s.464
38 The application is made under s.486

> **"(a)** there is no reasonable likelihood that the practitioner will be found guilty of either unsatisfactory professional conduct or professional misconduct; or
>
> **(b)** it is in the public interest to do so."

Sections 450 and 451 are enabling provisions. The Board cannot decline to act at all.

33. The Board is to ensure that the investigation is conducted as efficiently and expeditiously as possible.[39] It must also at the complainant's request provide the complainant with full details of the person conducting the investigation, the progress of the investigation, the documents being examined and copies of any documents relating to the investigation.[40] There does not seem to be a provision that allows the practitioner the same access to information. Arguments about lack of procedural fairness to the practitioner will not necessarily prevail.[41] It is not to the point that the complainant has a better right to information than hapless practitioner;[42] yet is not the one in jeopardy of being investigated and disciplined.[43]

34. In light of all this, it is perhaps heartening to know that:

> "…the rules of procedural fairness, *to the extent that they are not inconsistent with the provisions of this Act or the regulations*, apply in relation to the investigation of complaints and the Board's procedures under this Chapter.[44]

The Board is to ensure that the complainant and the practitioner are notified in writing of receipt of the complaint by the Board and a statement of reasons from the Board in respect of any action taken in relation to the complaint.[45]

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39 The Act, s.441. This is enshrined, repetitiously, as a duty under s.461

40 The Act, s.444

41 The Act, s.460 (referred to below)

42 The Act, s.444

43 See for example, *Annetts v McCann* (1990) 170 CLR 596 "…when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment" per Mason CJ, Deane and McHugh JJ at 598

44 The Act, s.460. Emphasis added.

45 The Act, s.461. This includes a dismissal of the complaint. The complainant has a *limited* right to have the Board's decision to dismiss reviewed. The extent of the limitation is beyond the scope of this paper.

This would seem to entail that before instituting proceedings the Board, having provided its reasons to the practitioner, should give the practitioner an opportunity to respond to the complaint.[46]

The Disciplinary Tribunal

35. A well-known cut price conveyancing practitioner[47] was once heard to remark to the effect that being struck off by the Disciplinary Tribunal involved a lesser penalty than being struck off by the Court. This was, of course, a complete misconception of the powers and functions of the Tribunal and its importance in the legal profession and perhaps an indication that, in that practitioner's case, striking off was warranted.

36. The Tribunal is established by the Act, s.610. It consists of 10 legal practitioners and 5 lay persons appointed by the judges. The legal practitioners are appointed from panel a panel of 15, or which 2 are nominated by the Tasmanian Bar Association, 2 by the Tasmanian Independent Bar and the balance by the Law Society. The judges also appoint the chair and the deputy chair.[48]

37. The introduction of lay persons was brought in by the Act. In light of the emphasis on the protection of the consumer and the definition of unprofessional conduct, it was no doubt thought desirable that ordinary members of the community should be represented on the Tribunal. It also follows the general trend to appoint lay members to professional bodies and tribunals.

38. Perhaps there is a fear by practitioners that lay members will not apprehend when a matter passes from mere negligence,[49] for example, into the realm of conduct caught by the Act. However, the Tribunal is constituted with a

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46 Murray v Legal Services Commissioner (1999) 46 NSWLR 224

47. Who shall remain nameless.

48 The Act, s.610(4) provides: "Schedule 6 has effect with respect to the membership of the Tribunal."

49 See the discussion in *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 at 200

majority of practitioners, who should be able to adequately safeguard issues of this kind.

39. The process of appointment of members, in which the judges are ultimately responsible, reflects the Court's supervisory jurisdiction of its practitioners and the requirement that it has confidence in those who dispense professional discipline.

40. The Tribunal has also made the *Legal Profession (Disciplinary Tribunal) Rules 2010* ("the Rules") under the Act s.615(5).

41. In addition to applications arising from complaints, applications under s.458 may be made to the Tribunal to have a matter determined by the Board, heard by the Tribunal. The Rules provide for a form.[50] It appears that the Tribunal's jurisdiction under this provision is limited to cases under:

    (a) ss.454 and 456 to determinations after a hearing; and

    (b) in the case of s.433 to a deemed determination before an investigation.

    It is not available in cases where the Tribunal has made a determination to dismiss a case without a hearing under s.451(a), for example. [51]

42. Any person, including the Board, may apply to the Tribunal for the hearing and determination of a complaint.[52] The application is to be in writing and should specify the particulars on which it is based.[53] The rules provide for a form.[54] It is to be lodged with the secretary to the Tribunal,[55] who is to serve copies on the parties and the Board, if it is not the applicant.[56] The Tribunal can require persons to give further information about the complaint, or verify

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50 The Rules, r.4 and Form 1.
51 *Brinkley v Zeeman* (Disciplinary Tribunal Decision delivered on 17 February 2011)
52 The Act, s.464(1). Only the Board may apply for a compensation order: sub-s.(2).
53 The Act, s.464(3)(a) & (b)
54 The Rules, r.4 and Form 2.
55 The Act, s.464(3)(c)
56 The Act, s.464(4)

the complaint by statutory declaration.[57] Note that these latter provisions relate to the complaint, not the application.

43. The Tribunal is entitled to regulate its own procedure and has wide powers to enable it to deal with an application.[58] These include powers:

    (a) to summons and to proceed in the absence of a party who has been summonsed. The Rules provide for the procedure to be followed by a party wishing to request a summons to issue; [59]

    (b) to take evidence on affidavit, or oath or affirmation,

    (c) to require the production of documents or other material,

    (d) require persons appearing before it to answer questions.

    (e) to require a person to assist with investigations.

44. The Tribunal has power to fine a person who neglect, or fails to do any of these things.[60] It also has power to fine a person who obstructs its proceedings. These fines are enforceable as an order under the *Supreme Court Civil Procedure Act 1932*.[61]

45. There are other procedural provisions, including a power of amendment.[62]

46. The Tribunal's power to conduct a hearing is found in s.466(7). Under that provision, it has powers to refer matters of unprofessional conduct or less serious matters back to the Board as well as to dismiss undeserving cases.

47. A hearing before the Tribunal is open to the public, unless the Tribunal orders otherwise.[63] A party to an application may be represented by a lawyer, and give or adduce evidence, examine witnesses and make submissions.[64]

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57 The Act, s.465
58 The Act, s.466
59 See also The Rules, r.7 and Form 5
60 The Act, s.466(3) s.467(7)
61 The Act, s.466(6), s.467(9) & (10)
62 The Act, s.466(2)
63 The Act, s.467(3)
64 The Act, s.467(5)

48. The Act, s.469 provides that proceedings are not to be terminated without leave of the Tribunal, on the ground that continuing them is not warranted in the public interest.

49. If the Tribunal is satisfied that the conduct is either unsatisfactory professional conduct, or professional misconduct, the Tribunal may make orders disciplining the practitioner.[65] The Tribunal may order that the name of a party is not to be published, or communicated to another person.[66] It is an offence to contravene an order of the Tribunal.[67] The contravention of an order by a practitioner, being a breach of the Act, would also expose the practitioner to further disciplinary proceedings. The relevant orders the Tribunal might make are set out below.

> **471. Orders of Tribunal requiring official implementation in this jurisdiction**
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> The Tribunal may make the following orders under this section:
>
> **(a)** an order recommending that the Supreme Court remove the name of the Australian legal practitioner from the local roll;
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> **(b)** an order that the practitioner's local practising certificate be suspended for a specified period or cancelled;
>
> **(c)** an order that a local practising certificate not be granted to the practitioner or renewed before the end of a specified period;
>
> **(d)** an order that –
>
> **(i)** specified conditions be imposed on the practitioner's practising certificate; and
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> **(ii)** conditions be imposed for a specified period; and
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> **(iii)** specifies the time (if any) after which the practitioner may apply to the Tribunal for the conditions to be amended or removed;
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> **(e)** an order reprimanding the practitioner.[68]
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> …
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> **473. Orders of Tribunal requiring compliance by practitioner**

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65 The Act, s.470(1)
66 The Act, s.470(2)
67 The Act, s.470(3)
68 As to the publication of an order for reprimand, see s.477

The Tribunal may make the following orders under this section:

(a) an order that the Australian legal practitioner pay a fine of a specified amount;[69]

(b) a compensation order under Part 4.9;

(c) an order that the practitioner waive the whole or part of any fees charged to a specified person in respect of specified work;

(d) an order that the practitioner repay the whole or part of any fees paid by a specified person in respect of specified work;

(e) an order that the practitioner waive any lien in respect of a specified document or documents;

(f) an order that the practitioner undertake and complete a specified course of further legal education;

(g) an order that the practitioner undertake a specified period of practice under specified supervision;

(h) an order that the practitioner do or refrain from doing something in connection with the practice of law;

(i) an order that the practitioner's practice, or the financial affairs of the practitioner's practice, be conducted for a specified period in a specified way or subject to specified conditions;

(j) an order that the practitioner's practice be subject to periodic inspection by a specified person for a specified period;

(k) an order that the practitioner undergo counselling or medical treatment or act in accordance with medical advice given to the practitioner;

(l) an order that the practitioner seek advice in relation to the management of the practitioner's practice from a specified person;

(m) an order that the practitioner cease to employ or engage a specified person or class of person;

(n) an order that the practitioner not apply for a local practising certificate before the end of a specified period;

(o) an order that the practitioner employ in the practice of the practitioner a person belonging to a specified class of persons;

(p) an order that the practitioner cease to accept instructions in relation to a specified class of work for a specified period;

(q) an order prohibiting the practitioner from acting as a practitioner, otherwise than in the course of employment by a practitioner holding an unrestricted practising certificate;

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69 As to the amount of the fine, see s.476

> **(r)** an order that the practitioner carry out for a specified person such work, either free of charge or for such fee, as the Tribunal may so specify.
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> **474. Ancillary or other orders of Tribunal**
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> The Tribunal may make ancillary or other orders, including an order for payment by the practitioner of expenses associated with orders under section 473, as assessed in accordance with the order or as agreed.
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> **475. Alternative finding of Tribunal**
>
> The Tribunal may find that a person is guilty of unsatisfactory professional conduct, even though the complaint or application to the Tribunal alleged professional misconduct, or may find that a person has engaged in professional misconduct, even though the complaint or application to the Tribunal alleged unsatisfactory professional conduct.
>
> **…**

50. The Tribunal has the power to make interim or interlocutory orders in the nature of its powers pending the final determination of a complaint.[70]

51. Consent orders can be made, but the Tribunal is not required to accept a consent application by the parties.[71]

52. An order of the Tribunal filed in the Supreme Court is enforceable under the provisions of the *Supreme Court Civil Procedure Act 1932*.[72]

53. The Tribunal has powers to award costs. In the absence of special circumstances, it must order the hapless practitioner found guilty of unsatisfactory professional conduct, or professional misconduct to pay costs.[73] It may require the practitioner to pay the costs, even if the practitioner is not found guilty of either professional misconduct or unsatisfactory professional conduct.[74] It may also make orders against the Board in exceptional circumstances, or the complainant where the complaint was frivolous or vexatious, or lacked substance.[75]

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70 The Act, s.478
71 The Act, s.479
72 The Act, s.480(7) & (8)
73 The Act, s.481(1)
74 The Act, s.481(2). The discretion may be exercised where the practitioner has failed to cooperate with the Board, or the Law Society, or where it is justified by other circumstances.
75 The Act, s.481(3) & (4)

54. Under Part 4.9, the Tribunal also has power to make a compensation order against a practitioner found guilty of unsatisfactory professional conduct, or professional misconduct, but only when the loss is occasioned by that conduct.[76] Note that an application for a compensation order must be made under s.464(2).[77]

55. There is a register of disciplinary action kept by the Board.[78]

56. Decisions of the Tribunal are subject to appeal to the Court.[79] However, this is probably not an appeal *de novo*.[80]

Procedural Directions

57. Under the Rules, the Tribunal is empowered to hold directions hearings and make procedural directions. Under r.6(5) the Tribunal may give directions and make order in respect of the following:

> **"(a)** the simplification of, or more adequate definition of, issues;
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> **(b)** the amendment of an application or any document connected to the application and the terms of such an amendment;
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> **(c)** admissions of fact and documents;
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> **(d)** discovery, listing, inspection and proof of documents;[81]
>
> **(e)** any matter which may reduce the costs of a witness attending a hearing;
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> **(f)** limiting the number of expert witnesses;
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> **(g)** the preparation and service of affidavits;
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> **(h)** a timetable for taking any step or complying with any order or direction in the proceeding;
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> **(i)** the determination of an issue of fact before any other issue;
>
> **(j)** the determination of a point of law before a hearing;
>
> **(k)** the preparation and settlement of issues;
>
> **(l)** the revocation or variation of a previous order made under this rule."

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76 The Act, ss.490, 491(1), 492(1), 493.

77 see also the Rules, r.4 and Form 3

78 Part 4.10

79 The Act, s.484

80 *A v Law Society* (2001) 10 Tas R 152, decided under the former Act.

81 Query whether in the absence of an express statutory power, the rule making power under s.615(5) is sufficient to allow the Tribunal to make rules as to discovery.

Evidence

58. The Tribunal is not bound by the rules of evidence and may inform itself as it sees fit of any matter relevant to determining the accepted standards of practice and behaviour within the legal profession.[82] This gives the Board an advantage in proceedings in the Tribunal that it would not obtain in the Court.

59. Evidence in Tribunal is, generally, by affidavit. There are procedural rules relating to affidavits. These concern form, swearing and lodgement. Notice to cross examine a deponent must also be given.[83]

Onus

60. The onus of proving unsatisfactory professional conduct or professional misconduct is on the applicant: *Southern Law Society v Westbrook*.[84] The standard that applies is "reasonable satisfaction", in the sense used in *Briginshaw v Briginshaw*[85].

Dealing with Conduct Complaints

61. A good start in dealing with a complaint is to remember that all conduct whether professional misconduct, or unsatisfactory conduct, is capable of attracting the ultimate sanction: striking off.[86] The Tribunal's task is to characterise the conduct and determine its seriousness. Speaking of the provisions of the former *Legal Profession Act 1993*, in *A Legal Practitioner v The Law Society*,[87] Underwood J (as he then was) said:

> "16 … It is necessary to take a commonsense approach to a complaint that there has been conduct by a practitioner that resulted in serious neglect and/or undue delay. The conduct must be evaluated to determine its degree of seriousness. Such an evaluation should proceed upon the basis articulated by Crawford J in *Law Society v Turner*:[88]

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82 The Rules, r.12

83 The Rules, rr.8-11

84 (1910) 10 CLR 609 at 626 and 627

85 (1938) 60 CLR 336 and see Dal Pont, GE, *Lawyers Professional Responsibility* 2nd Ed LBC, 2001, p579-80

86 The Act, ss.470 and 471

87 [2005] TASSC 28. The forms of conduct under the former scheme were "professional misconduct" and "unprofessional conduct."

88 (2001) 11 Tas R 1 at par51

> "In a general sense, professional misconduct should be regarded in this State as a more grave form of misconduct than unprofessional conduct. There may well be an overlap and the same conduct might in some cases amount to both of those things."

17 As his honour said in the same case, the statutory definitions of professional misconduct and unprofessional conduct are inclusionary and therefore the common law definitions of professional misconduct and unprofessional conduct apply in addition to the statutory definitions. In *In re R, A Practitioner of the Supreme Court*,[89] the Full Court of South Australia,[90] said that unprofessional conduct included "conduct which may reasonably be held to violate, or to fall short of, to a substantial degree, the standard of professional conduct observed or approved of by members of the profession of good repute and competency", while professional misconduct is something that has been done by the practitioner "which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency".

18 Neglect and delay can be of short duration, but with resultant serious adverse consequences. It may be of short duration but with no, or few, adverse serious consequences. It may be isolated conduct and out of character, or it may form part of a general pattern of neglect and delay. It may relate to a substantial matter or a minor matter. It may or may not have taken place as a result of unusual circumstances in which the practitioner found himself or herself. The permutations are virtually endless. The Tribunal's task is to evaluate the serious neglect and/or delay to determine whether it is professional misconduct or unprofessional conduct. Such evaluation must be qualitative and quantitative and like all evaluations, must have a standard or standards against which the qualitative and quantitative measurements are made. That standard can only be that set by the common law, namely, the conduct observed or approved of by members of the legal profession of good repute and competency. The statutory definition makes all serious neglect or undue delay unprofessional conduct, but it will only become the more serious professional misconduct if it is so bad that practitioners of good repute and competency would reasonably consider that it had reached the stage where it could be described as disgraceful or dishonourable. I can see no other reasonable basis for construing the two definitions of serious neglect or undue delay.

62. The structure under the Act has changed since his Honour's remarks, however, there is no reason to think the approach he suggested, or the Tribunal's task has substantially altered.

63. While the scheme of the Act points to particular conduct capable of satisfying the primary definitions in ss.420 and 421, it is important to note:

(a) the primary definitions in s.420 and s.421 are inclusionary, so that, as Crawford J found in *Law Society v Turner*, common law conceptions also apply to a practitioner's conduct;[91]

(b) both definitions apply to conduct in connection with the practice of the law;

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89 [1927] SASR 58

90 [1927] SASR 58 at 61

91 (2001) 11 Tas R 1

(c) only professional misconduct expressly includes conduct "otherwise than in connection with the law";

(d) the plenary nature of the definitions in ss.420 and 421 is emphasised by opening words of s.422(1), "[w]ithout limiting etc";

64. It can immediately be seen that the field of conduct that might be caught is considerable. In *Adamson v The Pharmacy Board (No2),*[92] Evans J said:

> 7 It has long been accepted in relation to legislation governing the discipline of members of a profession that, save as otherwise provided, the kinds of misconduct that justify action by a disciplinary tribunal include criminal conduct, professional misconduct and unprofessional conduct…[93] Whilst categories of conduct such as those mentioned are often referred to, it is not necessary that the conduct in question falls within any particular category. In *The Matter of S76 Legal Practitioners Act 1959 and in the Matter of Four Legal Practitioners*, Green CJ said:[94]
>
> > "I reject the submission that my only function is to determine whether or not the respondents have been guilty of professional misconduct. My function is to consider the allegations and the evidence and make whatever findings about the respondents' conduct which might be appropriate."
> >
> > However, I am not satisfied that it is appropriate or necessary to characterise the respondents' conduct by the use of some phrase such as 'unprofessional conduct'. I do not think it necessary to attempt to characterise of categorise their conduct more precisely than I have in the above findings."
>
> 8 In the course of his reasons for judgment, Green CJ found that some respondents breached their duty as a solicitor and in the light of those findings, he invited the applicant to move that some admonitory, disciplinary or punitive steps should be taken. The course taken by Green CJ was upheld in *The Law Society of Tasmania v J B Walker, D B Walker and J R Hurburgh*. Cox J (as he then was) said:[95]
>
> > "I agree that having failed to be persuaded that there was any professional misconduct his Honour was not required to characterise the failings he found by any other epithet."
>
> 9 Accordingly, whilst it was not necessary that the complaint specify how the Tribunal might categorise the appellant's conduct, there was nothing improper about the complaint containing that indication.
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> 10 The distinction drawn in par10 of the complaint between "professional misconduct" and "conduct which fails to meet the standards which are expected of a Pharmacist who practices in this State", on its face, reflects the traditional distinction made in disciplinary proceedings between "professional misconduct" and "unprofessional conduct". Besides the inclusive meanings detailed in s43(2), professional misconduct is behaviour on the part of a member of a

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92 [2004] TASSC 82 at [7] to [10]

93 *In the Matter of the Law Society Act 1962 and in the Matter of a Legal Practitioner* A105/1982 Cox J (as he then was) at 8 and 9, and *Ex parte the Attorney-General for the Commonwealth: re; a Barrister and Solicitor* (1972) 20 FLR 234 at 241.

94 [1987]TASSC 2 at 37

95 [1988] TASSC 56 at 31

> profession that would reasonably be regarded as disgraceful or dishonest by members of that profession of good repute and competency.[96]

65. The disciplinary powers spoken of by Evans J were under a different legislative scheme. Under the Act, the condition precedent for the Tribunal to exercise its disciplinary powers is that it is "satisfied that the conduct falls within either professional misconduct, or unsatisfactory professional conduct."[97] That is distinct from the power of the Court exercising its jurisdiction implied from the Charter of Justice, which the Court in *Four Legal Practitioners* and *Walker* was dealing with, or in respect of applications to the Court under s.486.[98] However, the last point made by Evans J is important, in that the traditional categories are also reflected in the primary definitions.[99]

66. The categorisation of the conduct complained of is a matter for the Tribunal. The dividing line can be unclear and the scheme of the Act does not necessarily assist in cases at the margin. Where it relates to conduct committed in a professional sense, it can fall within either of the categories. Under s.421, conduct otherwise than in connection with the practice of the law (non-practice conduct) is also expressly made professional misconduct. In this latter category, the cases require great care.

67. Under s.422, unsatisfactory professional conduct can include a number of things, not necessarily in connection with practise. It is arguable, despite the distinction that is drawn in the primary definitions, that unsatisfactory professional conduct can include non-practice conduct. The better view is that it probably does not include non-practice conduct. This would tend to treat

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96 *In re a Solicitor* [1912] 1 KB 302 at 311, 312; *Grahame v Attorney-General of Fiji* [1936] 2 All ER 992 at 1002; *Myers v Elman* [1940] AC 282 at 288, 289; *Re Thom; ex parte the Prothonotary* (1963) 80 WN (NSW) 968 at 969; *Re Veron; ex parte Law Society of New South Wales* (1966) 84 WN (Pt1) (NSW) 136 at 143; *In re Three Solicitors* [1949] VLR 72 at 73; *Re a Solicitor* [1960] VR 617 at 620; *Law Society of Tasmania v Turner and Kench* (2001) 11 Tas R 1 [44].

97 The Act, s.470

98 The Act, s.510; *A Solicitor v Council of the Law Society of New South Wales* (2004) 216 CLR 253 at [2] & [3]

99 This was also recognised by Crawford J (as he then was) in *Law Society v Turner & Kench* (2001) 11 Tas R at [44]

the provisions more harmoniously.[100] The result is that non-practice conduct serious enough to attract disciplinary action is necessarily "professional misconduct", an epithet that may involve serious consequences for a practitioner.[101] This means that, before a practitioner should be found guilty for non-practice conduct, the circumstances must be very serious.

68. In *A Solicitor v Council of the Law Society of New South Wales*,[102] the High Court said:

> *"The decision in Ziems' case*
>
> **[16]** Where a practitioner appeals to this Court from an order of the Supreme Court removing him or her from the roll of practitioners, two potentially countervailing considerations arise. They were referred to by Fullagar J in *Ziems v Prothonotary of the Supreme Court (NSW)*[103] , who said:
>
> > "[T]he appellant challenges what is not merely an exercise of discretion by the Supreme Court, but an exercise of discretion in a matter which is in a special sense the province of the Supreme Court as the highest court of New South Wales. It relates to the right of a man to practise in that court and in other courts of New South Wales over which that court exercises a supervisory jurisdiction in certain ways. On the other hand, the possibly disastrous consequences of disbarment to the individual concerned [are such that] a court to which an appeal comes as of right is bound to examine the whole position with meticulous care."
>
> **...**
>
> **[18]** The case of *Ziems* provides an example of the need to examine "the whole position". There, a barrister had been convicted of manslaughter, and sentenced to imprisonment for two years. The Supreme Court concluded that the conviction and sentence constituted grounds in themselves for disbarring the appellant. This Court declined to adopt that view, and considered the facts and circumstances of the case. It was a case where the particularity with which the facts were approached was important to a conclusion as to the barrister's fitness. He had been found guilty of unlawful homicide (in the form of manslaughter) and sentenced to imprisonment. Even when his offence was described with a little more detail, his position was not improved. He had been responsible for the death of a person while driving under the influence of alcohol. Yet, when the circumstances of the case were exposed, the picture changed materially. The appellant, while drinking at a hotel, had been attacked and beaten. He was seriously injured. A sergeant of police advised him to go quickly to hospital. The appellant asked the sergeant to drive him, but the sergeant went away leaving the appellant without assistance. The appellant then set out to drive himself to hospital, and, in the course of the journey, was involved in a fatal collision. The appellant was still in prison when his case was before this Court. The order of the Supreme Court disbarring the appellant was set aside, and an order was made that he be suspended from practice during the remainder of his term of imprisonment.
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> **[19]** In *Ziems*, the conduct of the practitioner which resulted in his conviction and prison sentence had nothing to do with his practice as a barrister. Fullagar J said:[104]

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100 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69] & [70].

101 See Cox J in *Law Society v Walker* [1988] TASSC 58 "the consequences [of such a finding] must be very grave indeed."

102 (2001) 216 CLR 253

103 (1957) 97 CLR 279 at 287 - 288

104 ibid, 290

> "Personal misconduct, as distinct from professional misconduct, may no doubt be a ground for disbarring, because it may show that the person guilty of it is not a fit and proper person to practise as a barrister ... But the whole approach of a court to a case of personal misconduct must surely be very different from its approach to a case of professional misconduct. Generally speaking, the latter must have a much more direct bearing on the question of a man's fitness to practise than the former."

[20] The present case was conducted on the basis that the definition of "professional misconduct" in s 127 of the Act did not apply, because the proceedings were brought in the inherent, not the statutory, jurisdiction. The dividing line between personal misconduct and professional misconduct is often unclear. Professional misconduct does not simply mean misconduct by a professional person. At the same time, even though conduct is not engaged in directly in the course of professional practice, it may be so connected to such practice as to amount to professional misconduct. Furthermore, even where it does not involve professional misconduct, a person's behaviour may demonstrate qualities of a kind that require a conclusion that a person is not a fit and proper person to practise. And there may be an additional dimension to be considered. It was explained by Kitto J in *Ziems*:[105]

> "It is not difficult to see in some forms of conduct, or in convictions of some kinds of offences, instant demonstration of unfitness for the Bar. Conduct may show a defect of character incompatible with membership of a self-respecting profession; or, short of that, it may show unfitness to be joined with the Bench and the Bar in the daily co-operation which the satisfactory working of the courts demands. A conviction may of its own force carry such a stigma that judges and members of the profession may be expected to find it too much for their self-respect to share with the person convicted the kind and degree of association which membership of the Bar entails. But it will be generally agreed that there are many kinds of conduct deserving of disapproval, and many kinds of convictions of breaches of the law, which do not spell unfitness for the Bar; and to draw the dividing line is by no means always an easy task."

[21] Professional misconduct may not necessarily require a conclusion of unfitness to practise, and removal from the roll. In that regard, it is to be remembered that fitness is to be decided at the time of the hearing.

…"

69. In a recent case of "non-practice conduct", involving an assault on the member of the public the Tribunal was called on to identify the dividing line.[106] Having identified cases of dishonesty unconnected with practice as capable of being professional misconduct,[107] the Tribunal then said:

> "However, it is also plain that convictions for conduct other than dishonesty may well fall within the purview of professional misconduct where the offending is so serious as to demonstrate a fundamental lack of respect for the law, absence of self-control or which affect the standing and reputation of the profession.
>
> There may be many offences which legal practitioners might commit, which obviously do not make them unfit to practice. Many offences can be committed by reason of inadvertence or neglect. The seriousness or otherwise of the offence itself must be considered. Many sorts of offending do not show a fundamental lack of respect for the law or an absence of self control.

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105 ibid, at 98

106 *Legal Profession Board v Saric* (Disciplinary Tribunal Determination No 5 of 2011)

107 It referred to the recent case of *Legal Profession Board v Mathews* [2010] TASSC 60

> However, at base, legal practitioners as officers of the Court must necessarily demonstrate a fundamental respect for the law both in their practice and outside it. To show that fundamental respect they need not be paragons."

The practitioner's conduct in disciplinary proceedings

70. The conduct in question in the proceedings may not necessarily require a conclusion of unfitness to practise, and removal from the roll. In that regard, fitness is to be decided at the time of the hearing.[108]

71. Thus it will be relevant, for example, if the conduct occurred at a much earlier time and the practitioner has not shown any propensity for misconduct since. On the other hand conduct subsequent to the complaint may also be relevant in an adverse way. This will be so, even if the conduct occurs at the hearing.[109]

72. In this area, as was the case in *Scott v Law Society*,[110] the temptation to equate the proceedings with a plea of guilty in a criminal prosecution is to be avoided. The practitioner should not attempt to avoid the witness box by agreeing the facts and then seeking to deliver what amounts to a plea in mitigation. The practitioner's conduct in doing so will be a relevant issue for the Tribunal to consider, particularly if criticism is made by the prosecuting authority. The duty of the practitioner is to be candid with the Tribunal, whether or not it is thought that it may result in a risk of disbarment.

Preparation

73. Confronted with the provisions of the Act and Rules, even in a case of a relatively minor transgression that would not attract much more than an admonition, the practitioner faces severe consequences for not addressing the process correctly. A stark example is the failure to respond to an investigator under s.573, which exposes the practitioner immediately to prosecution for an

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108 *A Solicitor v Council of the Law Society of New South Wales* (2001) 216 CLR 253 at [21]

109 *Howes v The Law Society* [1998] TASSC 112, esp Slicer J; *Scott v Law Society* [2009] TASSC 12 esp at [52] to [66].

110 [2009] TASSC 12

offence and, potentially, further proceedings for misconduct.[111] The situation is magnified by of the obligation of candour.

74. Therefore, responses to requirements by the Board, or its investigator, must be prepared with the utmost care and attention. The temptation to pick up a dictaphone and dash out a quick response to a "please explain" letter should be resisted at all costs. The complaint should be treated with priority. The file and any other relevant material should be obtained and carefully examined. The response should be prepared consistently with the practitioner's memory of the events, assisted by that material. The facts should be stated with precision and without emotion, or fear or favour. Too often practitioners take offence at complaints and respond in high dudgeon. Arguments advanced in this way can be counterproductive.[112] Complaints are an occupational hazard and may be better treated in a measured and professional way.

75. It is desirable in every case for the response in draft to be referred to another practitioner, who has full knowledge of the nature of the complaint and access to any relevant documents. The earlier in the process that this occurs, the better. Depending on the seriousness of the matter a brief should be prepared for counsel to settle the response. Following this approach may save the practitioner from serious adverse consequences as the matter proceeds.

76. If the matter proceeds beyond to Board to the Tribunal, affidavits will need to be prepared. This possibility should be recognised at the outset and every document that is prepared for the Board should take account of the wider audience, including the Tribunal. It is highly desirable that the facts recited in each document are consistent with each other and the objective material available. All this takes meticulous care and time and will require the focussed attention of the practitioner about who the complaint is made as well as those advising and representing the practitioner.

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111 The Act, s.422(1)(a); see for example, *Legal Profession Board v Guest* (Disciplinary Tribunal decision 4 of 2010.)

112 "The lady doth protest too much, methinks", Hamlet, Act 3 scene 2, 230

77. In view of the requirement of candour, the practitioner must expect to be cross examined in proceedings before the Tribunal.[113]

Conclusions

78. Legal practitioners are subject to different and more onerous standards of conduct than ordinary members of the public. They are officers of the Court and have a part to play, no matter how small, in one of the arms of government, the discharge of the law. They have responsibilities to members of the public, including those based on their functions as fiduciaries.

79. When a practitioner is called to account for departing from these high standards, the disciplinary jurisdiction is not to be entered lightly. That applies not only to practitioners who are the subject of a complaint, but also to those who are required to practise in the jurisdiction. Great care is required in the preparation both of complaints, and the responses to them. In relation to the latter in particular it is prudent to remember the old adage that a legal practitioner who attempts to defend himself or herself has a fool for a client.

80. The practitioner's conduct in the proceedings will be relevant to the ultimate action taken against them if they are found guilty. A practitioner the subject of a complaint in the Tribunal should not attempt to play a tactical battle, akin to a criminal prosecution, or seek to avoid being cross examined. Consistency is required for the preparation of all material to be submitted to the Board, or the Tribunal, but candour is the watchword.

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113 *Re Veron: Ex parte Law Society of New South Wales* [1966] 1 NSWR 566 at 515