

Do tell....

Notification requirements

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THERE ARE A VARIETY OF DIFFERENT OCCURRENCES IN A LEGAL PRACTITIONER'S PRACTICE, OR OCCASIONALLY THEIR PERSONAL LIFE, FOR WHICH THERE IS AN OBLIGATION TO NOTIFY THE SOCIETY. THESE OBLIGATIONS LARGELY ARISE UNDER PARTICULAR SECTIONS OF THE LEGAL PROFESSION ACT 2006 (LPA), ALTHOUGH THERE IS ONE NOTIFICATION OBLIGATION THAT COMES ABOUT AS A RESULT OF A CONDITION IMPOSED BY THE SOCIETY ON ALL PRACTISING CERTIFICATES ISSUED IN THE NORTHERN TERRITORY.

This article is aimed at reminding local practitioners about those statutory obligations and so it is restricted to a review of notification obligations for the holders of local practising certificates and practitioners who are already engaged in legal practice; disclosure obligations relating to admission as a lawyer or to first-time applications for a practising certificate are not considered, nor is the common law duty to be candid with the regulator.

There are two particular circumstances under the LPA where individual legal practitioners bear the responsibility to notify the Society of the occurrence of certain events. Practitioners need to be alert to these obligations as time limits apply for such notice to be given.

Professional or personal conduct?

There is a common misconception that a practitioner need only provide notice to the Society about

events directly associated with their practice. A conviction for drink driving is not something the Society needs to be told about, right? Surely it has nothing to do with competence as a practitioner. This presumption is incorrect and it is important for all practitioners to understand their obligation to give notice to the Society particularly about offences and convictions, regardless of whether or not the alleged offending behaviour occurred within their professional or their personal life. And just to clarify; practitioners do need to notify the Society about a "minor" matter such as a drink driving offence.

What is a serious offence?

Before moving on to consider the specific reporting obligations on practitioners it is helpful to first understand what constitutes a *serious offence* for the purposes of the LPA.

A *serious offence* (as defined in section 4 of the LPA) includes any

indictable offence, regardless of whether the offence can be dealt with summarily or not. Indictable offences under Northern Territory law, Commonwealth law or any other jurisdiction fall within this definition. An offence against a law in another jurisdiction, including a foreign country, which would be an indictable offence if committed in the Northern Territory or the Commonwealth, also comes within the definition of a serious offence.

The Northern Territory Criminal Code does not use or define the term "indictable offence", the *Justices Act* does use the term "indictable offence" but does not specifically define it. The Criminal Code does provide that an offence that is a *crime* can only be dealt with on indictment¹. For the purposes of the LPA therefore a *serious offence* would include any offence that is a *crime* within the Northern Territory. This would not be limited to offences under the Criminal Code (NT), but could include offences under other Acts that meet the definition of a *crime*. A *crime* is defined in the *Interpretation Act (NT) 1979*

as any offence carrying a term of imprisonment exceeding two years as a maximum penalty, unless the offence is expressly stated to be other than a *crime*². Thus even a matter finalised in the Magistrates Court can be a serious offence if it is an indictable offence dealt with summarily.

An offence that constitutes a *simple offence* or a *regulatory offence* under the Criminal Code would not fall within the definition of a *serious offence*. Generally speaking an offence under the Criminal Code would amount to a serious offence but an offence under the *Summary Offences Act* would not. Notably, a significant number of offences within the Criminal Code carry a maximum penalty of two years imprisonment, but are specifically designated as a *crime*. A practitioner should however; check the relevant legislation pertaining to the offence in question to ascertain for themselves, whether or not a particular offence is a *serious offence*.

Notification obligations around serious offences

There are three potential notifications requirements arising out of a practitioner being dealt with for a serious offence. Firstly there is an obligation arising under section 76(1)(b) of the LPA. This is a statutory condition imposed on all local practising certificates that requires the holder of a practising certificate to give to the Society written notice of being charged with a *serious offence*.

If later convicted of that serious offence, the practitioner must then give notice to the Society of the conviction as required by section 76(1)(a) of the LPA.

Lastly, a conviction for a serious offence constitutes a show cause event and the practitioner must provide notice to the Society

pursuant to section 62 of the LPA.

Notification obligations for conviction of any offence

An obligation to give notice to the Society also arises for conviction of any offence that would have to be disclosed under the admission rules. This reporting requirement arises under section 76(1)(a) of the LPA.

Conviction is defined in section 4 of the LPA to include a finding of guilt, regardless of whether or not a conviction is recorded.

Rule 18(2) of the Legal Profession Admission Rules requires the disclosure of an offence, other than an *excluded offence*. The relevant sub-paragraphs of the definition in Rule 17 of the *Legal Profession Admission Rules* provide that the following are considered *excluded offences*:

- (d) An offence under the Traffic Act other than an offence for which the maximum penalty is a term of imprisonment; or
- (e) An offence relating to the parking of a motor vehicle.

The reference to spent records or spent offences³ within the definition of *excluded offences*, has no bearing on the requirement under section 76(1)(a) to report a conviction, as to constitute a spent record or offence a period of between five and ten years after the conviction must elapse before it is considered "spent", or in the case of Commonwealth offences a pardon has been granted for a reason other than that the person was wrongly convicted of the offence.

Therefore it is important to note from this that convictions for drink driving and disqualified driving offences are amongst those that need to be notified to the Society under section 76.

Other circumstances constituting a show cause event

Conviction for a serious offence is not the only circumstance that creates an onus on practitioners to provide notice of a show cause event to the Society. Practitioners who hold a Northern Territory practising certificate must give notice to the Society of any show cause event⁴.

A show cause event is defined in section 4 of the LPA as the following:

- a) Becoming bankrupt or being served with Notice of a Creditor's petition presented to the Court under section 43 of the *Bankruptcy Act 1966 (Cth)*;
- b) Presenting, or intending to present, a debtor's petition under section 55 of the *Bankruptcy Act 1966 (Cth)*, or presenting as a debtor a declaration to the Official Receiver under section 54A of the *Bankruptcy Act 1966 (Cth)*;
- c) Applying to take the benefit of any law for the relief of bankrupt or insolvent person, compounding with creditors or assignment of remuneration for creditors benefit;
- d) Conviction for a *serious offence* or a *tax offence* (*emphasis added*).

The provisions of a), b) and c) are clear, it is however, d) that warrants elucidation. The definition of *serious offence* outlined above applies and a *tax offence* is any offence under the Taxation Administration Act 1953 (Cth).

It is irrelevant whether the *serious offence* or *tax offence* was committed whilst engaged in legal practice as an Australian legal practitioner. Conduct pertaining to a practitioner's private, or non-professional, life must be disclosed if it comes within the definition. Even if there is a prohibition on disclosing

the offender's identity, the Society must be notified of the offence by the practitioner. Similarly it doesn't matter whether the offence was committed within or outside the Northern Territory.

How and when is notice to be given?

The section of the LPA under which the notification is required determines the timeframe and type of information to be provided.

A section 76 Notice about being charged with a serious offence or convicted of any offence (including a conviction for a *serious offence* that has been previously notified when first charged with the offence) must be given to the Chief Executive Officer of the Society within seven days after the event⁵. There is a form available on the Law Society website to enable a practitioner to comply with this obligation.⁶

So what must a practitioner do if a show cause event occurs? There are two separate reporting duties. Firstly, within seven days of the show cause event happening notice must be given to the Society in the approved form. Again this form is available on the Law Society website⁷.

Secondly, after satisfying the initial notice requirement, the practitioner is under a further obligation to give to the Society a written statement providing an explanation as to why the practitioner is still a fit and proper person to hold a practising certificate despite the show cause event. The statement must be provided within twenty-eight days of the event happening.

A practitioner's failure to provide a notice of a show cause event, aside from any conduct or disciplinary implications arising, can create a basis for the Society to refuse to renew or to amend, suspend or cancel a practitioner's practising certificate.⁸

Change of practitioner's practice details

There is a further obligation that arises as a condition of all practising certificates issued in the Northern Territory. Under the LPA, the Society has the ability to impose conditions on local practising certificates it issues (section 70). The Council of Law Society Northern Territory resolved in 2011 to impose a condition on all practising certificate holders requiring them to notify the Society as soon as is reasonably practicable every time their practice details change. A check of a current practising certificate will reveal this condition listed on the back of the certificate.

Therefore, each time a practitioner ceases or commences employment it is incumbent on the practitioner to contact the Society to provide these details. There is no form required to notify the Society of these changes, but it would be prudent to provide this notification in writing and to also retain a copy to be able to demonstrate compliance if called upon. An email or facsimile to the Society is usually sufficient to satisfy a practitioner's obligations.

It is also helpful if practitioners contact the Society to advise of any change to their personal contact details. The Society sends out reminders via the regular *The Practitioner* e-news as well as by post about obligations that practitioners have such as lodgement of CPD declarations and renewal of practising certificates. Generally these go to the practitioner's work contact details, but if a practitioner has left their employment these reminders are sent to the practitioner's personal address, either email or postal. If the Society doesn't have current contact details then a practitioner may miss out on these important reminders.

Notices required from Principals

Aside from the individual notification requirements there are also notifications that principals of law firms must be aware of in the management of their practice.

Practitioners starting⁹ or ceasing¹⁰ practice as an incorporated legal practice (ILP) must give notice to the Society. A failure to notify the Society of an ILP starting to engage in legal practice can have dire financial consequences; the firm is precluded from recovering any fees until such time as the Society is notified.¹¹

Notice must be given to the Society upon a legal practitioner member of a multi-disciplinary partnership (MDP) starting to provide legal services in this jurisdiction.¹²

If a practitioner, either as principal or employee, becomes aware that for any reason they are not covered by professional indemnity insurance and fails to give written notice to the Society as soon as possible this is an offence.¹³

Practitioners who engage in regulated mortgage practice have an obligation to give notice to the Society nominating their practice.¹⁴

Community Legal Centres also have a notification obligation to advise the Society in writing of the name of, and any change to, the supervising legal practitioner it employs or engages¹⁵.

Trust Accounts

Principals operating trust accounts have certain annual notification obligations; lodgement of their Part A declaration, their Part B declaration and the approved signatories to the Trust Account.

There is still an obligation principals need to be alert to even if their law practice does not operate a trust account. Pursuant to regulation 71 of the *Legal Profession Regulations*

2007, the Society gives notice each year requiring all law practices in the Northern Territory to provide a statement (a Part A declaration) specifying whether or not the law practice has received or held trust monies during the year, and if so, details as to what type of trust money (general, controlled, transit or money subject to a power) has been held.

There are forms available on the Society's website for each of these trust account notification requirements. The forms are completed online and then submitted electronically to the Society.¹⁶

Irregularities on Trust Accounts

In addition to the routine reporting requirements for principals operating a trust account there is a requirement to notify the Society promptly of any irregularity detected on the trust account.¹⁷

The obligation to report irregularities on trust accounts is not however restricted to the principals of the law practice. Any Australian legal practitioner who believes on reasonable grounds that there is an irregularity in relation to the receipt, recording or disbursement of trust monies, must give written notice to the Society as soon as possible after forming the belief, regardless of the fact that they are not an associate (as defined in section 7 of the LPA) of the law practice.¹⁸

Again there is a form available on the Society's website for either principals or other practitioners to provide notice about trust account irregularities.

So what happens next?

Notification of these various matters will not as a general rule lead to any dire consequence for a legal practitioner's practising certificate or career. The purpose of the notification system is to enable the

Society to properly regulate the profession.

A failure to notify often only exacerbates the consequences that flow from the notifiable event. It demonstrates a lack of candour which is a critical element to the conduct of the profession. A notable feature of some of the reported disciplinary decisions is that, the practitioner's lack of full disclosure or in some cases attempts to minimise or disguise the true nature of the conduct results in a much more serious penalty being imposed than the conduct the subject of the notification.

Failure to provide any of the notifications outlined above constitutes an offence under the LPA. Aside from the potential for prosecution, practitioners ought to be aware that by virtue of section 466(1)(a) a contravention of the LPA is capable of constituting unsatisfactory professional conduct or professional misconduct.

Any notice received by the Society, whether it's a section 76 Notice or a notice of a show cause event is first referred to the Ethics Committee for consideration. The Ethics Committee, however, has an advisory role only and is not the ultimate decision maker. The Ethics Committee's recommendations may result in the matter being referred to the Society's Chief Executive Officer to formally determine that no further action needs to be taken in respect of the notification, or it may result in the matter being referred to the Society's Council for further determination of any action to be taken, particularly in respect of the practitioner's practising certificate. A similar process applies to any conduct or disciplinary complaint that may be brought against a practitioner who fails to comply with their notification responsibilities under the LPA.

It's all up to you

These notification obligations are the personal responsibility

of the legal practitioner, and it is incumbent on all legal practitioners to be aware of their obligations and ensure they comply.

It is better for a practitioner to be upfront and contact the Society if concerned that there has been an event about which the Society should be notified. Ignoring it or putting off telling the Society does not improve the situation, and will generally result in worse consequences. For example, a matter that might have merely been noted by the Society with no further action may result in a conduct complaint as a result of the lack of compliance with the notification requirements or a lack of candour in the manner of notification.¹⁹ ●

Endnotes

1. Section 3(2) Criminal Code of the Northern Territory of Australia (Schedule 1 to the Criminal Code Act)
2. Section 38E
3. Sub-paragraphs (a), (b) and (c) of the definition of excluded offence in Rule 17 of the Legal Profession Admission Rules
4. Section 62 of the LPA
5. Section 76 (2) & (3) of the LPA
6. The "Notice by a local practising certificate holder of a conviction" form can be located under the "For the Profession" tab Admission/Practising Certificates Practising Certificates Additional Practising Certificate documents
7. The "Notification of a Show Cause Event" form can be located under the "For the Profession" tab Admission/Practising Certificates Practising Certificates Additional Practising Certificate documents
8. Section 63(1)(a)
9. Section 122
10. Section 124
11. Section 122(5)
12. Section 153
13. Section 380
14. Section 442 & 443
15. Section 230
16. These forms can be accessed under the "Notifications" tab in the Trust Account section of the Society's website.
17. Section 256(1)
18. Section 256(2)