

Legal Profession Act 2004

Complaints procedures and show cause requirements

By Carol Webster



This article¹ provides an overview of the provisions of the *Legal Profession Act 2004* (LPA 2004) dealing with complaints and what are now termed 'show cause events', updating an article published in the Summer 2004/2005 *Bar News*. That article and the CPD paper which preceded it dealt with three topics, only the first and third of which are considered in this article:

- the procedures that apply to conduct complaints;
- matters to bear in mind when responding to conduct complaints²; and
- the procedures that apply to notification matters – that is the disclosure/notification requirements introduced in April 2001 by the *Legal Profession Amendment (Notification) Regulation 2001*, requiring barristers to report certain bankruptcy events and offences to the Bar Council.

Implementing the National Legal Profession Model Provisions

The LPA 2004 wholly repeals the *Legal Profession Act 1987* (LPA 1987). It was passed in December 2004³ and before its commencement on 1 October 2005⁴ had been amended by three separate pieces of legislation.⁵

The LPA 2004 adopts National Legal Profession Model Provisions which are designed generally to achieve greater consistency and uniformity in the regulation of the legal profession on a national basis. The model provisions were developed through the Standing Committee of Attorneys-General. There were also some changes to provisions carried over from the LPA 1987 to address problems identified in the operation of some of the discipline and complaint related provisions.

Terminology changes

There are a significant number of defined terms (generally indicated *thus* in this article) in the LPA 2004. Some make substantial changes in the descriptions used in the current legislation. Note in particular:

- 'local lawyer' is a person who is admitted to the legal profession under the LPA 2004. An 'Australian lawyer' is admitted under the LPA 2004 or a 'corresponding law'. An 'interstate lawyer' is admitted under a corresponding law but not under the LPA 2004: s5. Separate reference to the position of 'local', 'interstate' and 'Australian' legal practitioners and lawyers is generally omitted in the balance of this article;
- 'admission to the legal profession' means admission by the Supreme Court under the LPA 2004 as a lawyer (or under

a 'corresponding law'), *not* the grant or issue of practising certificate: s4;

- reversing the present situation⁶, a 'local legal practitioner' is an Australian lawyer who holds a current 'local practising certificate' (a practising certificate granted under the LPA 2004): s6. After the commencement of the LPA 2004, barristers and solicitors enrolled as legal practitioners under the LPA 1987 are taken to have been admitted by the Supreme Court as lawyers under the LPA 2004 on the date of original admission: clause 6 of Schedule 9⁷;
- a 'barrister' is a local legal practitioner who holds a current local practising certificate to practise as a barrister; a 'solicitor' holds a current local practising certificate to practise as a solicitor and barrister: s4;
- 'law practice' means an Australian legal practitioner who is a sole practitioner (engages in legal practice on his or her own account) *or*: a law firm, a multi-disciplinary partnership, an incorporated legal practice or a community legal centre: s4. That is, references to a law practice *include* barristers.

The LPA 2004 frequently refers to 'the relevant council', being the Council of the Law Society in relation to solicitors or the Bar Council in relation to barristers. This article is only concerned with barristers and the Bar Council but the provisions discussed generally apply also to solicitors and the Council of the Law Society.

Complaints procedure

The LPA 2004, like the LPA 1987, makes detailed provision for the handling of complaints. In general terms, complaints – the subject of Part 10 of the LPA 1987 – are dealt with in Chapter 4 of the LPA 2004, ss494 to 609.

The Bar Council and the commissioner must make information about the operation of the complaints and discipline scheme established by Chapter 4 and procedures adopted in relation to it readily available to members of the public and to legal practitioners: s593(1) and (3) of the LPA 2004. The commissioner and Bar Council must provide assistance to members of the public in making complaints: s593(2).⁸

The procedures for making a complaint are largely unchanged. Complaints are to be made to the legal services commissioner: s505, unless the complaint is made by the commissioner or by the Bar Council.⁹ Any complaint made directly to the Bar Association, and a copy of a complaint made by the Bar Council, must be forwarded to the commissioner: s505(2) and (3). As was the case under the LPA 1987, there is no obligation under the LPA 2004 for the commissioner to advise the Bar Council of all complaints against barristers made to the commissioner.

The provisions about investigation of complaints are largely unchanged. The commissioner may investigate a complaint

himself under s526 or refer a complaint about a barrister to the Bar Council. Bar Council must, subject to s527, conduct an investigation into each complaint referred to it by the commissioner or made by it. The commissioner monitors investigations by the Bar Council into complaints: ss529, 530, 526 of the LPA 2004. A complainant may be required to give further information about the complaint and verify the complaint and any further information by statutory declaration: s507.

Complaints referred to the Bar Council for investigation are distributed by the director, professional conduct (Anne Sinclair) to one of the four Professional Conduct committees (PCCs) of the Bar Council. The PCCs are, in formal terms, delegates of the Bar Council¹⁰ for the purposes of investigating complaints and making a recommendation to the Bar Council as to the resolutions the Bar Council could make to deal with the matter.

As soon practicable after a complaint is made about a legal practitioner the practitioner must be given a copy of it and, unless the complaint is to be summarily dismissed under s511, the practitioner must be given written notice of the right to make submissions to the commissioner or the Bar Council, specifying the period within which the submissions are to be made: s508. Notice to the practitioner *may* be postponed if the commissioner considers that giving notice may prejudice the investigation of the complaint, a police investigation, place the complainant or another person at risk of intimidation or harassment, or prejudice pending court proceedings: s508(3) and (4). A complaint may be made and dealt with even though the Australian legal practitioner concerned is the subject of proposed or current criminal or civil proceedings relating to the subject matter of the complaint: s600.

Section 591 of the LPA 2004 is new. It provides that the rules of procedural fairness apply in relation to the investigation of complaints, and procedures of the commissioner and the Bar Council under Chapter 4. The Bar Council and the commissioner have a duty to deal with complaints and investigations 'as efficiently and expeditiously as is practicable': s592.

Sections 722 and 723 create offences of disclosing information obtained in the exercise of powers or functions under the LPA 2004 or the administration of the LPA 2004, other than as reasonably required to perform duties or exercise functions under the LPA 2004. The equivalent section of the LPA 1987 was s171P, which expressly referred to Part 10 and Division 1AA of Part 3.

Conduct that may be the subject of a complaint

Chapter 4 generally applies to the conduct of an Australian legal practitioner occurring in NSW: s501(1). Sections 499 and 500 extend the reach of Chapter 4 in specified circumstances.

Chapter 4 expressly applies to conduct of a local legal practitioner where there is a 'conviction' for a 'serious offence', a 'tax offence' or an offence involving dishonesty, conduct of the practitioner 'as or in becoming an 'insolvent under administration' and 'in becoming' disqualified from managing or being involved in the management of a corporation under the *Corporations Act 2001*: s502(1). Relevant definitions to be considered include:

- 'serious offence' – an indictable offence, whether or not it may be dealt with summarily: s4. There is no definition of 'indictable offence' in the LPA 2004. However, s21(1) of the *Interpretation Act 1987* (NSW) provides that indictable offence means an offence for which proceedings may be taken on indictment, whether or not proceedings for the offence may also be taken summarily.¹¹
- 'tax offence' – any offence under the *Taxation Administration Act 1953*, whether committed in or outside NSW (to the same effect as the definition in s3(1) of the LPA 1987): s4;
- 'conviction' – defined in s11(1) of the LPA 2004, to include a finding of guilt, or the acceptance of a guilty plea, *whether or not* a conviction is recorded. The reference to acceptance of a guilty plea is new. Subsections (2) and (3) deal with the quashing of a conviction;
- 'insolvent under administration' includes an undischarged bankrupt, a person who has executed a Part X *Bankruptcy Act 1966* deed of arrangement or whose creditors have accepted a composition: s4. Contrast the broader scope of 'show cause events' discussed below.

Summary dismissal

Section 511 of the LPA 2004 largely carries over the summary dismissal power under s139(1) of the LPA 1987. The commissioner or the Bar Council may dismiss a complaint if the complainant does not give further information as required or if the complaint is vexatious, misconceived, frivolous or lacking in substance (note the additional bases for summary dismissal in s511(1)).

Section 155A of the LPA 1987 allowed the commissioner or the Bar Council to dismiss a complaint before, during or after investigation if satisfied that it is in the public interest to do so. This is picked up in s511(1)(g) of the LPA 2004.

Obtaining information from legal practitioners

Section 152 of the LPA 1987 provided that the Bar Council or the commissioner could require a legal practitioner to provide information, produce documents or assist in, or co-operate with the investigation of a complaint. The section was not limited to the legal practitioner the subject of the complaint. Failure to comply with an s152 notice, without reasonable excuse, is professional misconduct.

This is dealt with differently in the LPA 2004. Section 660(1) of the LPA 2004, in Chapter 6, provides that for the purpose of carrying out a 'complaint investigation' in relation to an Australian lawyer, an 'investigator' may by notice served on the lawyer, require the lawyer to produce specified documents, provide information and assist in, or co-operate with the investigation of the complaint.

An 'investigator' may be appointed under s531 of the LPA 2004 to investigate a complaint as the agent of the commissioner or the Bar Council. The powers of investigators generally are dealt with in Chapter 6. Under s531A the commissioner or the Bar Council may appoint 'authorised persons' for the purposes of Part 4.4 who may exercise any or all of the functions of an investigator. The executive director, the director, professional conduct and each of the deputy directors have been appointed as 'authorised persons' by the Bar Council.

Section 660(2) allows also an investigator to require 'any associate or former associate of the lawyer or any person (including for example an ADI, auditor or liquidator, but not including the lawyer) who has or has had control of documents relating to the affairs of the lawyer' to give the investigator access to the documents or information relating to the lawyer's affairs reasonably required by the investigator. 'Affairs' of a law practice, 'accountant', and 'ADI' are defined in s4. The new concept of law practice has already been noted. The 'affairs' of a law practice are broadly defined. 'Associate' is defined in broad terms by s7. The terms of the definitions are not set out here but should be carefully considered. They appear to reflect a desire by the drafters to deal uniformly with barristers and solicitors and to cover the various ways in which solicitors can practice, including incorporated legal practices and multi-disciplinary partnerships.

It is an offence to fail to comply with a requirement under s660(1) or (2): s660(3).¹² Obstructing or misleading an investigator exercising a power under the LPA 2004, without reasonable excuse, is an offence: s674.¹³ It is professional misconduct for an Australian legal practitioner to fail to comply with any requirement made by an investigator in the exercise of powers conferred by Chapter 6 s671(1). It is also professional misconduct for an Australian lawyer whether or not the subject of the investigation concerned, to mislead an investigator or the Bar Council in the exercise of any power or function under Chapter 6, or to fail, without reasonable excuse, to comply with a requirement under s660: s676.

Mediation

As under the LPA 1987, the commissioner or the Bar Council may suggest to the complainant and the Australian legal practitioner concerned that complaints that are or involve 'consumer disputes' are referred to mediation. A consumer dispute is a dispute about conduct of a practitioner that does

not involve an issue of 'unsatisfactory professional conduct' or 'professional misconduct': s514. A complaint that involves both a consumer dispute and an issue of unsatisfactory professional conduct or professional misconduct may be mediated so far as the consumer dispute is concerned *and* investigated under Chapter 4 so far as it involves an issue of unsatisfactory professional conduct or professional misconduct: s516.

The commissioner now has the power to *require* the complainant and Australian legal practitioner to mediate a consumer dispute under s517 of the LPA 2004. Failure by a practitioner to comply with the terms of a mediation notice given by the commissioner is capable of being unsatisfactory professional conduct or professional misconduct: s517(3).

Options available to Bar Council to deal with complaints

This topic is dealt with in several sections of Part 4.5 of the LPA 2004. The relevant section of the LPA 1987 was s155.

Section 538 of the LPA 2004 is new. It permits the commissioner or the Bar Council to commence proceedings in the tribunal in relation to a complaint without commencing or completing an investigation, where the commissioner or council is 'satisfied that, having regard to the nature of the subject matter of the complaint and the reasonable likelihood that the tribunal will find that the practitioner has engaged in unsatisfactory professional conduct or professional misconduct, action should be taken under the section'. There is no further guidance in the section as to when the section would apply. Section 538(3) requires the commissioner's concurrence for the Bar Council to commence proceedings pursuant to the section.

Section 538 aside, after investigating a complaint the commissioner or the Bar Council must determine whether he or it is 'satisfied that there is a reasonable likelihood that the practitioner will be *found by the tribunal to have engaged in unsatisfactory professional conduct or professional misconduct*'. If not so satisfied, under s539(1)(a) the commissioner or the Bar Council may dismiss the complaint in whole or in part. The test under s155 of the LPA 1987 was phrased 'satisfied that there is a reasonable likelihood that the legal practitioner will be *found guilty by the tribunal of unsatisfactory professional conduct or professional misconduct*.'

The commissioner or the Bar Council may dismiss a complaint under s539(1)(b) if satisfied that it is in the public interest to do so. A compensation order may also be made under Part 4.9: s539(2). Under s540, if the commissioner or council is satisfied that:

- there is a reasonable likelihood that the practitioner would be found by the tribunal to have engaged in unsatisfactory professional conduct (but *not* professional misconduct);
- the practitioner is generally competent and diligent; and

- 'having regard to all of the circumstances of the case (including the seriousness of the conduct concerned) and to whether any other substantiated complaints have been against the practitioner', that taking action under s540 'is justified'

the commissioner or council may do any or all of the following under s540(2):

- caution the practitioner;
- reprimand the practitioner;
- make a compensation order under Part 4.9 if the complainant had requested one.

The taking of action under s540(2) is an end to the matter: s540(4).

This does not precisely repeat s155(3) of the LPA 1987. The options under s155(3) were reprimand the legal practitioner *or*, if satisfied that the practitioner is generally competent and diligent and that no other material complaints have been made against the practitioner, dismiss the complaint.

The power to 'caution' is new. A caution is specifically excluded from the kinds of disciplinary action required to be published under Part 4.10 of the LPA 2004, although a compensation order made after summary dismissal of a complaint is to be published.

Under s155(5) of the LPA 1987, if the council or commissioner decided to dismiss a complaint or to reprimand under s155(3) and a compensation order had been requested, the payment of compensation or successful mediation of the consumer dispute could be required before the dismissal decision takes effect. Failure to comply with a compensation order made by the commissioner or the Bar Council is professional misconduct under s574(2). Such a compensation order may be filed in the Local Court and then enforced as if it were an order of the court.

A practitioner does not have to consent to a reprimand: s540(5).¹⁴ There is however a right to seek review by the tribunal of a decision to reprimand or make a compensation order under s540. Failure to attend as required by the commissioner or the Bar Council to receive a caution or reprimand is capable of being professional misconduct: s540(3)

Where the commissioner or council is satisfied that there is a reasonable likelihood that the practitioner will be found by the tribunal to have engaged in unsatisfactory professional conduct or professional misconduct, unless s540 applies the council or commissioner must commence proceedings in the tribunal with respect to the complaint: s537(2).¹⁵

Unsatisfactory professional conduct and professional misconduct

'Unsatisfactory professional conduct' and 'professional misconduct' are defined, for the purposes of the LPA 2004, in

ss496 and 497. Section 127 of the LPA 1987 defined those terms for the purposes of Part 10 of the LPA 1987.

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 public is entitled to expect of a reasonably competent Australian legal practitioner: s496. Taking into account that 'conduct' means conduct whether consisting of an act or omission: s495, this definition is the same as that in s127(2) of the LPA 1987.

Section 497(1) provides that 'professional misconduct' includes both:

- 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 – this mirrors s127(1)(a) of the LPA 1987, although 'or maintain' has been added; and
- conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in 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 – leaving aside the change in terminology, 'fit and proper to engage in legal practice', this is broader than s127(1)(b) of the LPA 1987. That referred to 'conduct ... occurring otherwise than in connection with the practice of law which, if established, would justify a finding that a legal practitioner is not of good fame and character or is not a fit and proper person ...'

Section 498 provides that the following conduct is *capable* of being unsatisfactory professional conduct or professional misconduct:

- contravention of the Act, the regulations or the legal profession rules (whether or not the person is also convicted of an offence in relation to the contravention), failing to comply with the requirements of a notice under the Act or the regulations (other than an information notice);
- charging excessive legal costs;
- conviction for a 'serious offence', a 'tax offence', or an offence involving dishonesty and being or becoming an 'insolvent under administration' or 'disqualified from managing' or being involved in the management of any corporation under the *Corporations Act 2001* (see the definitions noted under the heading 'Conduct that may be the subject of a complaint').

In finding that an Australian legal practitioner is not 'fit and proper', regard may be had to the matters that would be considered under ss25 or 42 if the practitioner were an applicant for admission to the legal profession under the LPA 2004 or for the grant or renewal of a local practising certificate – 'suitability matters' – 'and any other relevant matters': s497(2).

Suitability matters

The matters that would be considered under s25 or s42 are suitability matters. Section 25 deals with admission as a lawyer under the LPA 2004. Section 42 applies for the purposes of s48 (grant or renewal of a local practising certificate) and any other provision of the LPA 2004 where the question of whether a person is a fit and proper person to hold a local practising certificate is relevant. Section 42(2) provides that the Bar Council may take into account any suitability matter relating to the person, and any of a series of factors including contravention of a condition of an Australian practising certificate, the LPA 2004 or a corresponding law, the regulations, the legal profession rules or an order of the tribunal. The matters set out in ss25, 42 and 497(2) are clearly not intended to be exclusive, as the Admission Board, council or tribunal may at each stage consider any other 'relevant' or 'appropriate' matters.

Suitability matters are defined in s9 of the LPA 2004 in a comprehensive way. The section should be read carefully. Suitability matters include:

- good fame and character;
- convictions (note the extended definition of conviction in s11);
- being or having been an insolvent under administration;
- practising in contravention of any condition applying to any present or previous admission to practice; and
- past or pending disciplinary action.

Right to review for complainants

As under the LPA 1987¹⁶, complainants may apply to the commissioner for a review of the Bar Council's decision to dismiss a complaint, caution or reprimand a practitioner or omit matter which was originally part of the complaint from the allegations particularised in a disciplinary application made to the tribunal in respect of a complaint: s543, in Part 4.6. The commissioner has broad powers on a review, set out in s545. They include confirming the decision of council, reinvestigating the matter or directing the council to do so, cautioning or reprimanding the practitioner and commencing proceedings.

Conditions

Section 50 of the LPA 2004, in Part 2.4, is new. Under s50 the Bar Council may impose conditions on a local practising certificate when it is granted or renewed, or – in accordance with s61 – during its currency. Consent is not required. Section 61 is a statutory procedural fairness regime which applies where the Bar Council believes grounds exist to 'amend' a practising certificate (where amend includes impose conditions on, suspend or cancel).

Conditions imposed under s50 must be reasonable and relevant. Such conditions may for example require the holder of the certificate to use the services of an accountant or financial specialist in connection with his or her practice, or to provide the Bar Council with evidence as to any outstanding tax obligations of the holder and as to the provision made by the holder to satisfy any such outstanding obligations: s50(3)(f) and (g).

Transitional provisions

As would be expected, there are detailed transitional provisions regarding pending complaints and complaints made after the commencement of the LPA 2004 about conduct which occurred before 1 October 2005 (Schedule 9 clauses 15 to 17):

- where proceedings have been instituted under the LPA 1987, the complaint is to be dealt with as if the LPA 2004 had not been enacted;
- if a complaint had been made under the LPA 1987, but proceedings had not been instituted before 1 October 2005, the complaint is to be dealt with as if the LPA 2004 had not been enacted *except* in relation to proceedings in the tribunal. That is, the Bar Council or commissioner would determine the complaint under s155 (or ss139 or 155A) of the LPA 1987, but any proceedings would be commenced under the LPA 2004. The Tribunal may not, however, make any determination or order of a disciplinary nature against the legal practitioner that is 'more onerous than could have been made under' the LPA 1987;
- 'old conduct' may be the subject of a complaint made under the LPA 2004, and that complaint will be dealt with under Chapter 4 of the LPA 2004. The commissioner, the Bar Council or the tribunal may not make any 'more onerous' determination or order of a disciplinary nature against the legal practitioner.

Tribunal hearing

Proceedings in respect of a complaint are commenced in the tribunal by filing a 'disciplinary application': s551. Under the LPA 1987, proceedings were commenced by the filing of an information: s167(1).

Section s560 of the LPA 2004 creates a presumption that all hearings will be open to the public, unless the tribunal decides to make an order under s75 of the *Administrative Decisions Tribunal Act 1997*. This is new. Under s170(1) of the LPA 1987, a hearing relating only to a question of unsatisfactory professional conduct was held in the absence of the public unless the tribunal directed otherwise.

Penalties

The tribunal's power to make orders if it is satisfied, after a hearing, that the practitioner has engaged in unsatisfactory professional conduct or professional misconduct are broader under s562 of the LPA 2004 than under s171C of the LPA 1987. Section 562(1) of the LPA 2004 provides that the tribunal may make such orders as it thinks fit, *including* any one or more of the orders specified in the section. Subsections (2) and (4) provide that the tribunal may make orders of the following kinds:

- removal from the roll;
- suspension of a local practising certificate;
- reprimanding the lawyer;
- imposing a fine – the maximum fines have been increased, to \$10,000 in the case of unsatisfactory professional conduct not amounting to professional misconduct and \$75,000 in the case of professional conduct: s562(7) (\$5,000 or \$50,000 respectively under s171C(1)(d) of the LPA 1987);
- imposing conditions on a local practising certificate;
- requiring the lawyer to complete a specified course of further legal education;
- requiring the practitioner to use the services of an accountant or other financial specialist in connection with the practitioner's practice.

The tribunal has an expanded power to make costs orders under s566 of the LPA 2004 compared with s171E of the LPA 1987.

Failure by a person to comply with an order of the tribunal under the LPA 2004 is capable of being unsatisfactory professional conduct or professional misconduct: s596(1). A person who fails to comply with an order of the tribunal is not entitled to apply for the grant or renewal of a local practising certificate while that failure continues: s596(2). A compensation order made by the tribunal is enforceable under s87 of the *Administrative Decisions Tribunal Act 1997*.

Show cause events

The 'notification' obligations are now found in the LPA 2004, rather than considering both the 2002 Regulation and the LPA 1987. The LPA 2004 introduces the concept of 'show cause event'. In relation to local practising certificates, s65 defines 'show cause event', in Division 7, to mean:

- becoming bankrupt or being served with notice of a creditor's petition,
- presenting a debtor's petition or giving notice of intention to present such a petition,
- applying to take the benefit of any law for the relief of

bankrupt or insolvent debtors, compounding with creditors or making an assignment of remuneration for their benefit, or

- being 'convicted' of a 'serious offence' or a 'tax offence', whether or not in New South Wales and whether other persons are prohibited from disclosing the identity of the offender (see the definitions noted under the heading 'Conduct that may be the subject of a complaint').

The first three bullet points largely carry over the definition of 'act of bankruptcy' in s3(3) of the LPA 1987. There is a change in that s65 refers to being *served with* the creditor's petition rather than being *the subject* of a creditor's petition under the LPA 1987 definition. This avoids the difficulty that theoretically arose under the LPA 1987, if a creditor's petition was presented but not served, where an 'act of bankruptcy' as defined would be committed before a person could reasonably be expected to have known. The notification requirements under Part 3 Division 1AA of the LPA 1987, ss38FA – 38FJ referred to 'indictable offences' and 'tax offences'.

As under the former provisions, ss66 and 67 of the LPA 2004 deal separately with an application for the grant of a local practising certificate and a show cause event happening in relation to a holder of a local practising certificate.

Applying for a practising certificate

Section 66 of the LPA 2004 requires an applicant for the grant of a local practising certificate to provide to the Bar Council a written statement about a show cause event which has *happened* in relation to the person explaining why, despite the show cause event, the applicant considers himself or herself to be a fit and proper person to hold a practising certificate: s66(2). That statement must be provided as part of the application: s66(2).

Contravention of s66(2) is professional misconduct: s66(3). No statement need be provided under s66(2) if a statement under the section has been provided previously or if a notice and statement have been provided under s67(2).

Regulation 11 of the 2005 Regulation sets out what must be included in an application for the grant or renewal of a local practising certificate. Under clause 11(1)(j) the application is to 'provide or be accompanied by' the nature of any *offence*¹⁷ of which the applicant has been convicted, other than an 'excluded offence'. Clause 11(2)(b) expressly provides that clause 11(1)(j) applies to a conviction even if other persons are prohibited from disclosing the identity of the offender. Clause 11(1)(k) requires details of a show cause event that has happened in relation to the applicant and clause 11(l) requires details of a 'pre-admission event' that has happened in relation to the applicant. Pre-admission event means a show cause event before the applicant was admitted to the legal profession in NSW or another jurisdiction: s4.

These sub-clauses are to the same effect as clause 7 of the 2002 Regulation, in particular sub-clauses 7(1)(g) and (h). Clause 7(1)(g) of the 2002 Regulation referred to offences of which the practitioner had been found guilty, and applied to a finding of guilt of an offence whether or not the court proceeded to a conviction for the offence, and even if other persons are prohibited from disclosing the identity of the offender: clauses 7(2)(b) and (d).

Continuing disclosure obligations

Notification under Division 7

Section 67(2) of the LPA 2004 requires a barrister to provide the Bar Council with both:

- written notice that a show cause event *happened*, within seven days of the *happening* of the event; and
- a written statement explaining why, despite the show cause event, the person considers himself or herself to be a fit and proper person to hold a local practising certificate, within 28 days after the *happening* of the event (not the giving of notice under s67(2)(a)).

Contravention of s67(2) is professional misconduct: s67(3).

Statutory condition regarding offences

A number of statutory conditions are imposed on practising certificates. It is an offence for the holder of a current local practising certificate to contravene a condition to which the certificate is subject: s58(1).¹⁸

Section 55(1) imposes a statutory condition that a holder must notify the appropriate council – within seven days of the event, and in writing – that the holder has been:

- convicted of an offence that would have to be disclosed under the admission rules¹⁹ in relation to an application for admission to the legal profession under the LPA 2004; or
- charged with a serious offence.

Giving notice in accordance with Division 7 in relation to a conviction for a serious offence satisfies the condition.

Comparison with Part 3 Division 1AA of the LPA 1987

Clauses 133 and 134 of the 2002 Regulation required notification of the finding of guilt of an indictable offence or tax offence or commission of an 'act of bankruptcy' within seven days. Section 38FB of the LPA 1987 then required a legal practitioner applying for, or the holder of, a practising certificate to provide a written statement in accordance with the regulations, showing why, despite the act of bankruptcy or finding of guilt and any circumstances surrounding the act or finding, the legal practitioner or barrister considered that he or she is a fit and proper person to hold a practising certificate. A finding of guilt had to be notified whether or not the court proceeded to conviction for the offence and even if other

persons are prohibited from disclosing the identity of the offender: s38FB(7)(b) and (e), clauses 7(2)(b) and (d) and 133(2)(b) and (d) of the 2002 Regulation.

Clause 135(2) of the 2002 Regulation required the s38FB(3) written statement by the holder of a practising certificate to be provided within 14 days of the 'appropriate date', that is the (first) date on which the act of bankruptcy was committed or finding of guilt made: clause 135(3). An s38FB(1) statement by an applicant for a practising certificate was required within 14 days after making the application for a practising certificate: clause 135(1).

The requirement for notification of the happening of the event within seven days has been maintained, but the holder of a practising certificate now has 28 days after the happening of the event to give the Bar Council a s67(2)(b) statement whereas an applicant for a practising certificate must provide a written statement under s66(2)(b) as part of the application.

Investigation of show cause events

Part 4.4 (Investigation of complaints) and the provisions of Chapter 6 relevant to Part 4.4 apply to a matter under Division 7 as if the matter were the subject of a complaint under Chapter 4: s77(1). In practical terms, that allows the issue of an s660(1) notice by an authorised person.

Determination by council

Section 68 of the LPA 2004 provides for investigation and consideration of a show cause event by the Bar Council. On 'becoming aware' of the happening of a show cause event in relation to an applicant or a holder, council must investigate, and within the 'required period' determine, whether the applicant or holder is a fit and proper person to hold a local practising certificate.

'Required period' is defined in s68(5), as the period of three months commencing on the earliest of receipt by council of a written statement under ss66 or 67 in relation to the show cause event or the issue of a notice under s68(2) to the applicant or holder by the council. The period may be extended by one month by the commissioner. The LPA 1987 provided that the determination was to be made within the 'relevant period', defined in s38FA in similar terms to s68(5). However, although s68(5) of the LPA 2004 refers to receipt of a written statement under s67, it will be recalled that a holder is required to give both *notice* of the happening of the event under s67(2)(b) and an explanatory *statement* under s67(2)(b). Under s38FA of the LPA 1987, time began running once the Bar Council received notification of the commission of an act of bankruptcy or finding of guilt, which may suggest that the reference to written statement under s67 should be to written notice under s67(1)(a).

Section 68(2) requires that within 28 days of becoming aware of the happening of a show cause event, the Bar Council must give notice in writing to the applicant or holder dealing with the following matters:

- if the Bar Council has not received a statement under s66 or 67 in relation to the show cause event, requiring the applicant or holder to provide the required statement, and
- informing the applicant or holder that a determination in relation to the matter is required to be made under Division 7, of the required period in relation to determination of the matter (and that the applicant or holder will be notified of any extension of the period) and of the effect of the automatic suspension provisions in s70 if the matter is not determined by the Bar Council or the commissioner within the required period.

Under s 38FC(2) of the LPA 1987, council was required to give notice of those matters set out above within 14 days of becoming aware of the event.

Section 68(3) of the LPA 2004 provides that the Bar Council must determine the matter by:

- deciding that the applicant or holder *is* a fit and proper person to hold a local practising certificate;
- deciding that the applicant or holder *is not* a fit and proper person to hold a local practising certificate; or
- deciding that the applicant or holder *is* a fit and proper person to hold a practising certificate *but* that it is appropriate to impose conditions on the applicant's or holder's local practising certificate for a specified period.

Section 38FC of the LPA 1987 provided that Bar Council must refuse to issue or must cancel or suspend a practising certificate if council considered that the relevant act of bankruptcy, indictable offence or tax offence was committed in circumstances that show the applicant or holder is not a fit and proper person to hold a practising certificate.

If the Bar Council or the commissioner determines that an applicant or holder is not a fit and proper person to hold a local practising certificate, it or he may also decide that the applicant or holder is not entitled to apply for a grant of the local practising certificate for a specified period not exceeding five years: s74. The equivalent provision of the LPA 1987 was s38FF.

The Bar Council may renew a holder's local practising certificate when the end of the financial year for the current practising certificate is imminent and the Bar Council has not yet made an s68 determination: s69. The equivalent provisions of the LPA 1987 were s38FC(3) and (4).

Section 68(4) of the LPA 2004 provides that in investigating and determining a matter under s68 council is not limited to investigating and making its determination on the basis of just

the show cause event, and must have regard to the facts and circumstances that surround, arise in connection with, relate to or give rise to the show cause event concerned. This is more broadly drafted than the words in s38FC(1), 'the circumstances in which' the act of bankruptcy, indictable offence or tax offence was committed.

Determining a matter by *imposing* conditions under s68(3)(c) is new. The power to impose conditions is found in s50 of the LPA 2004, in Division 5 of Part 2.4. Although s50(1)(b) refers to the Bar Council imposing conditions on a local practising certificate 'during its currency (in accordance with s61 . . .)', s61 cannot apply to Division 7 matters. Section 61 is in Division 6 and s59 provides that Division 6 does not apply to Division 7 matters.

Implementation of decisions

Section 72 provides for the implementation of decisions under Division 7. If the Bar Council decides that the applicant or holder is not fit and proper person to hold a local practising certificate it must refuse the grant of, or immediately cancel or suspend, the person's local practising certificate. If the Bar Council decides that it is appropriate to impose conditions, it must give effect to that decision by imposing the conditions, under s72(3). A cancellation or suspension of, or imposition of conditions on, a local practising certificate takes effect when the Bar Council gives notice in writing of it to the holder, under s72(8).

If the Bar Council or the commissioner decides under Division 7 that the applicant or holder is a fit and proper person to hold a local practising certificate, subject to the LPA 2004 the Bar Council must grant a practising certificate or lift any suspension, under subs (5).

The contravention of a condition imposed on a practising certificate under Division 7 without reasonable excuse is professional misconduct, and under s73(1) the Bar Council may, by written notice to the holder, cancel or suspend the local practising certificate.

The council may also make a complaint in relation to the matter under Part 4.2, or institute proceedings under Part 4.8 as if the matter had been the subject of complaint and investigation under Chapter 4: that is, the bypassing the complaint and investigation process. Council must notify the commissioner if such proceedings are instituted, under subs (2).

Summary determination

Sections 66(7) and 67(6) provide that the Bar Council may refuse to issue, or may cancel or suspend, a local practising certificate if the applicant or holder:

- is required to provide a written statement about a show cause event and has failed to provide the statement in accordance with the section; or

- has provided a written statement in accordance but, in the opinion of the Bar Council, has failed to show in the statement that the applicant or holder is a fit and proper person; or
- has failed without reasonable excuse to comply with a requirement under Chapter 6 made in connection with an investigation of the show cause event concerned or has committed an offence under Chapter 6 in connection with any such investigation.

These sections are the equivalent of s38FE of the LPA 1987, described in *New South Wales Bar Association v Murphy*²⁰ as a 'summary procedure', distinct from the informed procedure envisaged under s38FC.

Failure to notify

A failure to provide a written notice about a show cause event or a written statement explaining why the person is still a fit and proper person to hold a practising certificate as required under s66(2) or 67(2) is professional misconduct.

Failure to notify a conviction of a serious offence or tax offence, or being charged with a serious offence, is also a breach of a statutory condition of a practising certificate, itself an offence.

There is no direct equivalent in the LPA 2004 of ss38FB(2) and (4) of the LPA 1987 requiring an applicant or holder to provide a written statement showing why the person is a fit and proper person to hold a practising certificate despite a failure to notify, nor of s38FD permitting the Bar Council to refuse to issue, cancel or suspend a practising certificate if the applicant or holder failed, without reasonable cause, to notify a matter where the failure was declared by the regulations to be professional misconduct. That is, failure to notify, without reasonable cause, a finding of guilt of an indictable offence or tax offence or an act of bankruptcy as required by clauses 7(1), 133 or 134: clause 137(1) of the 2002 Regulation. Clause 137(2) provided that a failure to notify, without reasonable cause, information in relation to a finding of guilt of the commission of an offence not being an indictable offence or tax offence as required by clause 7(1)(g) or clause 133 is *capable of constituting* professional misconduct or unsatisfactory professional conduct.

It could be argued that a failure to notify within the time required could be considered by council investigating and determining a matter under s68 of the LPA 2004, in that council is not limited to just the show cause event. As s68(4)(b) relates to the matters already set out relating to the event itself rather than things the applicant or holder has subsequently done or failed to do, the better view may be that the failure is not be taken into account in making the s68(3) determination. However, s77(2) expressly provides that nothing in Division 7 prevents a complaint being made under Chapter 4 about a show cause matter. Accordingly, a complaint

of professional misconduct could be made in relation to a failure to provide a show cause statement under s66 or 67 at all (which could in any event have summary consequences), or a failure to provide it within the time required.

Statutory suspension where no determination within the required period

Section 70 of the LPA 2004 provides that if council has not determined a show cause matter under s68 within the required period, the commissioner must take over determination of the matter from the council, and, if the matter concerns the holder of a local practising certificate, the local practising certificate of that person is suspended. The equivalent provisions of the LPA 1987 were s38FH and s38FG.

A holder whose local practising certificate is suspended under s70(1)(b) may make an application to the tribunal to remove the suspension under s70(3). Previously, an application for removal of a statutory suspension was to be made to the Supreme Court, under s38FH of the LPA 1987. Unless the tribunal orders its removal, the statutory suspension under s70(1)(b) remains in force until the commissioner decides that the holder is a fit and proper person to hold a local practising certificate or the council has given the effect to any other decision of the commissioner as required by s72.

Right to review by the tribunal

Section 75 of the LPA 2004 provides for a right of review by the tribunal for an applicant or holder dissatisfied with a decision of the Bar Council or the commissioner under Division 7. The person asserting their fitness has the onus of establishing that they are a fit and proper person under s75(3)(a). An application to the tribunal for a review of a decision referred to in s72 does not of itself affect the operation of the decision: s72(9). The tribunal may make any order it considers appropriate on a review under s75.

Transitional provisions

Clause 11 in Schedule 9 of the LPA 2004 deals with notification matters under consideration as at 1 October 2005. Generally, sub clause (3) gives the commissioner or the Bar Council an option as to whether the existing matter is continued under Division 1AA of the LPA 1987 (if the LPA 2004 had not been commenced), or under Part 2.4 Division 7 of the LPA 2004, although sub-clause (2) applies the LPA 1987 provisions to a pending application for a practising certificate.

Other action regarding practising certificates

Section 37(1)(a) of the LPA 1987 provides that the Bar Council may refuse to issue, may cancel or may suspend a practising certificate if the applicant or holder is required by the council to explain specified conduct, whether or not related to practice as a barrister or solicitor, that the council

considers may indicate that the applicant or holder is not a fit and proper person to hold a practising certificate and fails, within a period specified by the council, to give an explanation satisfactory to the council.

Section 60 of the LPA 2004 in Part 2.4, Division 6, sets out grounds on which a local practising certificate may be suspended or cancelled, which include that the holder is no longer a fit and proper person to hold the certificate. The procedural fairness requirements of s61 of the LPA 2004 apply where the Bar Council is contemplating amending, suspending or cancelling a local practising certificate (amending includes imposing conditions under s50).

Under s105(1) of the LPA 2004, council may require an applicant or holder to give it specified documents or information, be medically examined by a nominated medical practitioner or co-operate with enquiries considered appropriate, to help the council consider whether or not to grant, renew, suspend or cancel a local practising certificate, or impose conditions on a local practising certificate (similar to s37(1)(b) of the LPA 1987). A failure to comply with a notice under s105(1) within the time and in the way required is a ground for council making an adverse decision in relation to the action it is considering: s105(2). Section 105 is found in Division 12 (Miscellaneous), of Part 2.4.

Immediate suspension

Section 78 of the LPA 2004, in Division 8, allows the Bar Council to immediately suspend a local practising certificate on a ground on which the certificate could be suspended or cancelled under Division 6, the happening of a show cause event or any other ground council considers warrants suspension of the local practising certificate in the public interest, whether not action has been taken or commenced under Division 6 or 7.

Under s108 of the LPA 2004 there is a right of appeal to the Supreme Court against a decision of the Bar Council to grant or refuse to renew a local practising certificate, or a decision to amend, suspend a local practising certificate except in respect of a decision made under Division 7, where there is a right to seek review by the tribunal. Lodging an appeal does not, of itself stay the effect of the council decision.

¹ An edited version of a Seminary Paper presented to members of the Bar Association's Professional Conduct committees in September 2005.

² In respect of these first two issues particularly, the earlier article drew heavily on an article by Jeremy Gormly SC, 'Conduct of complaints against barristers' which appeared in the Spring/Summer 1994 issue of *Bar News*; subsequently republished in the February 1998 edition of *Stop Press*.

³ Date of assent 21 December 2004.

⁴ The LPA 2004 and the *Legal Profession Regulation 2005* were gazetted on 19 August 2005.

⁵ The *Courts Legislation Amendment Act 2005* assented to 15 June 2005; the *Legal Profession Amendment Act 2005* assented to 23 June 2005 and the *Statute Law (Miscellaneous Provisions) Act 2005* assented to 1 July 2005.

⁶ That is, a person is enrolled by the Supreme Court as a legal practitioner; a barrister or solicitor is a legal practitioner holding a current practising certificate.

⁷ The second 'roll-over' for those who had been enrolled by the Supreme Court as barristers or solicitors as at 1 July 1994: Schedule 8 to the LPA 1987 had provided that a person who had been enrolled as a barrister or solicitor was taken to be enrolled as a legal practitioner on the date of the original admission.

⁸ The commissioner's functions specifically include assisting and advising complainants in making and pursuing complaints: s688(1)(b).

⁹ The latter are 'official complaints': s495.

¹⁰ Bar Council has a power of delegation under s696(2) of the LPA 2004.

¹¹ This includes, for example, common assault under s61 *Crimes Act 1900* (NSW).

¹² Maximum penalty: 50 penalty units, that is \$5,500.

¹³ Maximum penalty: 100 penalty units, that is \$11,000.

¹⁴ This was also the position under s155(6) of the LPA 1987.

¹⁵ This was the effect of s155 of the LPA 1987.

¹⁶ Division 6 in Part 10, ss158-161 of the LPA 1987.

¹⁷ Clause 11(5) provides that 'offence' includes a tax offence.

¹⁸ Maximum penalty 100 penalty units, that is \$11,000.

¹⁹ That is, the rules made under Part 2.3 by the (new) Legal Profession Admission Board. Clause 23A in Schedule 9, the Savings and transitional provisions of the LPA 2004, provides that the rules made by the Legal Practitioners Admission Board constituted under the LPA 1987 are taken to have been made under Part 2.3 of the LPA 2004, and have effect 'with any necessary adaptations'. The present rules do not make specific provision regarding the offences which must be disclosed. At the time of writing the prescribed Form 10 refers to 'an act of bankruptcy' and being found guilty of 'an indictable offence or tax offence', which were the terms used in clauses 133 and 134 of the 2002 Regulation and s38FB of the LPA 1987.

²⁰ [2002] NSWCA 138; (2002) 55 NSWLR 23 at 49 [98].