

# AUSTRALIAN GOVERNMENT IN-HOUSE COUNSEL DAY

Thursday 4 March 2021

*Professional Development and Networking for the  
In-House Legal Community*

What are your ethical obligations where a colleague or  
employee is a victim of sexual harassment

Presenters: George Marques, Partner, Bede Gahan, Partner, Vanessa  
Flowers, Special Counsel and Elizabeth Carroll, President of the ACT  
Law Society

# Professional misconduct

## What is professional misconduct

- Section 387 of the *Legal Profession Act 2006*
  1. In this Act:
    - a) Unsatisfactory professional conduct of an Australian legal practitioner, if 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 happening **in connection with the practice of law** or happening **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.

# Conduct capable of being professional misconduct

- Section 387 of *the Legal Profession Act 2006 (ACT)*

Without limiting section 386 or 387, the following conduct can be unsatisfactory professional conduct or professional misconduct:

a) Conduct consisting of a contravention of this Act;

...

c) Conduct in relation to which there is a conviction for –

i. A serious offence; or....

# Dishonest and Disreputable conduct

*Legal Profession (Solicitors) Conduct Rule 2015 ACT*

## **Rule 5 Dishonest and Disreputable Conduct**

- 5.1** A solicitor must not engage in conduct, in the course of practice or otherwise, which demonstrates that the solicitor is not a fit and proper person to practise law, or which is likely to a material degree to:
- 5.1.1** be prejudicial to, or diminish the public confidence in, the administration of justice; or
  - 5.1.2** bring the profession into disrepute.

# Anti-Discrimination and Harassment

*Legal Profession (Solicitors) Conduct Rule 2015 ACT*

## **Rule 42 Anti-Discrimination and Harassment**

**42.1** A solicitor must not in the course of practice, engage in conduct which constitutes:

**42.1.1** discrimination;

**42.1.2** sexual harassment; or

**42.1.3** workplace bullying.

# What is sexual harassment

- Section 58(1) of the *Discrimination Act 1991 (ACT)*:  
**sexual harassment** – a person subjects someone else to sexual harassment if the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person or engages in other unwelcome conduct of a sexual nature in circumstances in which the other person reasonably feels offended, humiliated or intimidated.
- Section 58(2) of the *Discrimination Act 1991 (ACT)*  
**conduct**, of a sexual nature, includes the making of a statement of a sexual nature to, or in the presence of, a person, whether the statement is made orally or in writing.

# Case Study

## Facts of the Case Study

- Law Firm X held a CLE Cram session day and solicitors and paralegals from the firm attended.
- Once the session ended a group of lawyers and paralegals went out for drinks and some continued on for dinner in Civic.
- At the dinner a male solicitor made unwanted sexual advances to one of the paralegals and in the process squeezed her knee. These advances were rejected by the paralegal.
- There were two other solicitors from Firm X at the dinner that witnessed the exchange between the paralegal and the solicitor.

# Case Study – Scenarios

## Scenarios for discussion

- Scenario 1: The paralegal makes a formal complaint to Firm X and the Law Society about the solicitor.
- Scenario 2: If the Paralegal does not make a complaint, what are the ethical obligations of the two solicitors that witnessed the conduct.
- Scenario 3: Where a complaint is made to Firm X and after investigation the solicitor is given a warning and the paralegal agrees to sign a non disclosure agreement. What ethical issues arise if you are asked to prepare the non disclosure agreement and have the paralegal sign it.



# Case Study – Scenario 1

**The paralegal makes a formal complaint to Firm X and the Law Society about the solicitor.**

- Is there sufficient connection with the practice of law?
- Is it sufficient to justify a finding that the practitioner is not a fit and proper person to engage in legal practice?
- Is it a serious offence?

# Case Study – Scenario 1

## Relevant Cases

### ***Legal Services Commissioner v Nguyen* [2015] QCAT 211**

- Mr Nguyen was a barrister who sexually assaulted a legal secretary who was instructing him at Court. He pleaded guilty to the offences and on appeal his sentence was reduced to a fine with no conviction recorded.
- The Legal Services Commission pursued disciplinary proceedings on grounds that he engaged in sexual harassment in breach of the Queensland Barristers Rules.
- The Tribunal found that he had engaged in unsatisfactory professional conduct, rather than professional misconduct and fined him \$20,000.

# Case Study – Scenario 1

## Relevant Cases

### ***The Council of the Law Society of the Australian Capital Territory v Hoyle* [2020] ACTSCFC 3**

- This case involved a lecturer in the Business Law course at the University of Canberra. Mr Hoyle was charged on numerous counts of sexual offences perpetrated on young students.
- The plaintiff sought orders that the defendant's name be removed from the roll.
- The question before the Court was whether the defendant is a fit and proper person to practice as a legal practitioner. In addition, this question must be answered as at the time of the decision.
- A criminal conviction alone does not necessarily affect the status of being a fit and proper person to practice law [2020] ACTSCFC 3 at [19].
- The Court found that Mr Hoyle was not a fit and proper person to remain on the roll.

### ***New South Wales Bar Association v Cummins* [2001] NSWCA 284 at [56]**

- *“Professional misconduct may include acts which do not occur in the ordinary course of practice but which are sufficiently closely connect to practice or which manifest the presence or absence of qualities which are incompatible with, or essential for, the conduct of practice.”*

# Case Study – Scenario 2

**If the Paralegal does not make a complaint, what are the ethical obligations of the two solicitors that witnessed the conduct?**

- What are the ethical obligations of the solicitors that witnessed the conduct?
  - Should they:
    - report it to the ACT Law Society?
    - do nothing?
- Barriers to reporting another practitioner to the ACT law society.

# Duty to report

- There is a duty on the Council to report a person where it suspects on reasonable grounds, after an investigation or otherwise, that a person has committed a serious offence. A serious offence for this section is an offence that is punishable by imprisonment for at least 1 year (where committed in Australia) (section 467 *Legal Profession Act 2006 ACT*).
- There is no corresponding duty on a legal practitioner to report either to the Law Society or police in certain circumstances.
- In New South Wales, there is a positive obligation, with certain exceptions, to report serious offences as set out in section 316 *Crimes Act (NSW)*.

# Case Study – Scenario 3

**Where a complaint is made to Firm X and after an investigation the solicitor is given a warning, and the paralegal agrees to sign a non disclosure agreement. What ethical issues arise if you are asked to prepare the non disclosure agreement and have the paralegal sign it?**

- What are your ethical obligations in preparing the non disclosure agreement?
- Should you include clauses that specifically prevent reporting to the law society, other regulators and law enforcement agencies or making disclosures which are protected by law?

# Case Study – Scenario 3

- In the UK the Solicitors Regulation Authority has issued guidance notes on the use of non disclosure agreements. The following are the principles to be considered by solicitors to act:
  - In a way that upholds constitutional principle of the rule of law and administration of justice
  - In a way that upholds public trust and confidence in the solicitors' profession and in legal services provided by authorised persons
  - With independence
  - Act with integrity

# Recent research

*Us Too? Bullying and Sexual Harassment in the Legal Profession (May 2019)*

- The International Bar Association (**IBA**) and Acritas conducted the largest-ever global survey on bullying and sexual harassment in the profession.
- The IBA received nearly 7,000 responses from 135 countries which included respondents who worked at law firms, in-house, barristers' chambers, government and the judiciary.



# Extract of some of the Survey Findings



**Sexual harassment is also common, with:**

**1 in 3 female respondents and 1 in 14 male respondents** having been sexually harassed in a work context.

**Targets do not report. In:**



**57% of bullying cases and 75% of sexual harassment cases,** the incident is never reported.



**Targets don't report due to: the status of the perpetrator, fear of repercussions and the incident being endemic to the workplace.**

**Targets are leaving unsupportive workplaces.**

**65% of respondents who have been bullied and 37% of respondents who have been sexually harassed** left or are considering leaving their workplaces.



Source: page 8 Us Too? Bullying and Sexual Harassment in the Legal Profession (May 2019)

In their words:

- *“Once, the managing partner left me alone with a senior lawyer the firm was courting, who ran his hands up my legs and tried to kiss me. I bumped into the managing partner as I was running from the restaurant, and he suggested I should consider a relationship with this man.” Female, law firm, Canada*
- *“A fellow trainee solicitor groped me during a social event. He was drunk and had, up until that point, been someone I considered a friend. I thought about reporting him, but realised that there was a serious chance he would never qualify as a solicitor if I did. I told him that if I ever heard of or witnessed any inappropriate behaviour on his part, I would go to HR. I am still not entirely sure that I did the right thing, but I knew how hard everyone had worked to get to the point we were at. I was not prepared to ruin his future over this.” Female, law firm, Curaçao*

# Law Council of Australia

- National Action Plan to Reduce Sexual Harassment in the Australian Legal 23 December 2020  
[https://www.lawcouncil.asn.au/publicassets/4c3d5a37-b744-eb11-9437-005056be13b5/National%20Action%20Plan%20to%20Reduce%20Sexual%20Harassment%20in%20the%20Australian%20Legal%20Profession\\_FINAL.pdf](https://www.lawcouncil.asn.au/publicassets/4c3d5a37-b744-eb11-9437-005056be13b5/National%20Action%20Plan%20to%20Reduce%20Sexual%20Harassment%20in%20the%20Australian%20Legal%20Profession_FINAL.pdf)
- The Law Council's proposed solutions and recommendations include:
  - Advocating for federal law reform amendments to the *Sex Discrimination Act 1984 (Cth)*
  - Supporting the work of the Australian Human Rights Commission
  - Driving cultural change in the legal profession
  - Advocating for the establishment of a Federal Judicial Commission.

# Assistance and Support



**acacia EAP**  
employee assistance program

**No matter what life challenges you face**  
Acacia EAP's professional counselling support can help.  
Phone: 1300 364 273 Text: 0401 33 77 11  
Website/Live Chat: [www.acaciaconnection.com](http://www.acaciaconnection.com)



Call 13 11 14

# Team Contacts



**George Marques**

Partner

P +61 6151 2182

E gmarques@hwle.com.au



**Bede Gahan**

Partner

P +61 6151 2154

E bgahan@hwle.com.au



**Vanessa Flowers**

Special Counsel

P +61 6151 2336

E vflowers@hwle.com.au

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