



# CORO

CONFERENCE OF REGULATORY OFFICERS

**Regulation: Dealing with BIG issues**

**23 - 25 OCTOBER 2023 | HOTEL GRAND CHANCELLOR HOBART | TASMANIA**

# Case Round Up – Significant cases and BIG issues



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# Council of the New South Wales Bar Association v EFA (a pseudonym) [2021] NSWCA 339

- “Legal Profession Uniform Conduct (Barristers) rules, rule 8:  
A barrister must not engage in conduct which is:
  - (a) Dishonest or otherwise discreditable to a barrister,
  - (b) Prejudicial to the administration of justice, or
  - (c) Likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute.
- S298(b) Uniform Law: breach of Uniform Rules conduct capable of constituting professional misconduct or unsatisfactory professional conduct



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- Professional misconduct at common law
- Professional misconduct within s 297(1)(b) of the Uniform Law which includes conduct of a lawyer 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 lawyer is not a fit and proper person to engage in legal practice;
- Or unsatisfactory professional conduct within s 296 of the Uniform Law which includes conduct of a lawyer 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 lawyer.



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58. H was offended by the pushing of her head by [the respondent] and the words ‘suck my dick’ which, we have found, he said to her as he did it. [The respondent’s] action and his words self-evidently had a sexual character and were inappropriate conduct towards a clerk who was previously unknown to him in the context of the barristers’ clerks’ dinner. [The respondent’s] words and actions were not, however, in context, an ‘advance’. [The respondent] was not actually inviting H to have oral sex with him. It seemed, rather, from the CCTV footage, that he was extending to her an abridged echo of the greeting he had offered to A. He was including her in the horseplay he had engaged in with A. It was very poorly judged, doubtless on account of [the respondent’s] significant level of intoxication. [The respondent] failed to take into account H’s likely feelings of anger, embarrassment and humiliation. Using the words of the Application, [the respondent’s] conduct was ‘sexually inappropriate conduct’ (or, more accurately, inappropriate sexual conduct), but it was not ‘a sexually inappropriate advance’ or any kind of advance at all.

59. The pushing of H’s head and the speaking of the words ‘suck my dick’ was unwelcome conduct of a sexual nature towards H. A reasonable person, having regard to all of the circumstances, would have anticipated that H would be offended and humiliated. H was, in fact, offended and humiliated. This was a reasonable and proportional response.



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76. [The respondent's] conduct was poorly judged, vulgar and inappropriate. He failed to consider H's likely reaction to his actions. His level of intoxication was also inappropriate at a function connected with the practice of law. However, we do not consider that [the respondent's] actions during the incident on the night of 21 July 2017 indicate that he has a character flaw which would render him unfit to practice [sic] the law for any length of time, let alone permanently. Had his actions and words to H actually constituted a sexual advance, we would have characterised it differently, but we are satisfied that his actions and words were not a sexual advance.



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164. We accept that, in rejecting the Council's contention that the respondent's conduct constituted professional misconduct within the meaning of s 297(1)(b), on the basis that it was not established that he was not a fit and proper person, the Tribunal applied a more rigorous test than is called for by the provision. Conduct that would *justify* a finding of unfitness is not necessarily conduct that *must* result in such a finding: there is a range of conduct that would justify, but not necessarily result in, such a finding; there is a range of conduct with respect to which reasonable minds might differ on whether it did, in fact, demonstrate unfitness. Section 297(1)(b) is concerned with the capacity of the conduct to constitute unfitness.



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169. There is something of a paradox in s 297(1)(b). On a literal interpretation the paragraph focuses on the objective circumstances of the conduct found (“conduct of a lawyer whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law”). Yet, as the majority judgments in *Ziems*, (particularly that of Kitto J), show, a finding of unfitness involves more than an objective analysis of the impugned conduct, absent other relevant (often extenuating) circumstances. The question of fitness to engage in legal practice focuses not only on the objective circumstances of the conduct in question but also on the personal qualities of the lawyer in question, and other circumstances that bear upon the conduct. Unfitness is ultimately a finding about character, although conduct plays an important role in the evaluation of character.



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171 To justify a finding of unfitness the conduct in question must be seen in context. But, in the two-stage process by which disciplinary proceedings are ordinarily conducted in the Tribunal, much of that which properly informs a holistic assessment of the character of the lawyer concerned, and therefore his or her fitness to engage in legal practice, will not be known until Stage 2 – by which time the conduct has been characterised as unsatisfactory professional conduct or professional misconduct. It does not seem right to characterise conduct as professional misconduct merely because, objectively speaking, it would justify a finding of unfitness if, after consideration of other relevant factors, such a finding would not be justified or warranted. It is only necessary to look at the facts in *Ziems* and *A Solicitor* to see that unfitness is not measured by the objective circumstances of the conduct alone.



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Without limitation, the following conduct is capable of constituting unsatisfactory professional conduct or professional misconduct—

- (a) conduct consisting of a contravention of this Law...
- (b) conduct consisting of a contravention of the Uniform Rules;
- (c) conduct involving contravention of the Legal Profession Uniform Law Act of this jurisdiction (other than this Law), whether or not the person has been convicted of an offence in relation to the contravention;
- (d) charging more than a fair and reasonable amount for legal costs in connection with the practice of law;
- (e) 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;
- (f) conduct as or in becoming an insolvent under administration;
- (g) conduct in becoming disqualified from managing or being involved in the management of any corporation under the Corporations Act;
- (h) conduct consisting of a failure to comply with the requirements of a notice under this Law or the Uniform Rules;
- (i) conduct in failing to comply with an order of the designated tribunal made under this Law or an order of a corresponding authority made under a corresponding law (including but not limited to a failure to pay wholly or partly a fine imposed under this Law or a corresponding law);
- (j) conduct in failing to comply with a compensation order made under this Chapter.



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195. The question for this Court is what measure is called for to mark the Court's intolerance of conduct of the kind in question and to convey its intolerance to others who might be tempted similarly to engage in conduct that is demeaning to women and perpetuates unacceptable attitudes. We consider that, notwithstanding (as we have already mentioned) that the objective of disciplinary orders is protective and not punitive, some guidance may be taken from two well established principles of sentencing law: (i) proportionality and (ii) weight that may be given to extra-curial punishment. It is appropriate to note the level of extra-curial punishment (in some respects going far beyond any action the Court could take) that has already been visited on the respondent. This includes:

- notwithstanding the non-publication orders, a level of public notoriety and humiliation;
- a four year period of anxiety, while the Council's investigations proceeded;
- a further period of anxiety since the filing of the Council's appeal;
- severe impact on the respondent's mental health, detailed in the reports of Dr Bowers and Dr Nielszen;
- the termination of the respondent's marriage and disruption to his family;
- a very significant quantifiable cost resulting from the variation in the terms of the respondent's policy of professional indemnity insurance for 2022, with an unquantifiable potential penalty in forthcoming years (already, the annual cost has dwarfed the maximum fine this Court could impose); and
- an unquantifiable but real and significant impact on the respondent's practice.



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# Council of the New South Wales Bar Association v EFA (a pseudonym) [2021] NSWCA 339

## 123 Anti-discrimination and harassment

(1) A barrister must not in the course of, or in connection with, legal practice or their profession, engage in conduct which constitutes:(a) discrimination,

(b) sexual harassment

...

*(2) For the purposes of subrule (1), conduct in connection with a barrister's profession includes, but is not limited to:(a) conduct at social functions connected with the bar or the legal profession, and*

*(b) interactions with a person with whom the barrister has, or has had, a professional relationship.*



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## 5 Standard of conduct—dishonest or disreputable conduct

5.1 A solicitor must not engage in conduct, in the course of legal practice or otherwise, which—5.1.1 demonstrates that the solicitor *is not a fit and proper person to practise law*, or

5.1.2 is likely to a material degree to—

- (i) be prejudicial to, or diminish the public confidence in, the administration of justice, or
- (ii) bring the profession into disrepute.



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# Council of the New South Wales Bar Association v EFA (a pseudonym) [2021] NSWCA 339

## 42 Anti-discrimination and harassment

42.1 A solicitor must not in the course of, or in connection with, legal practice or their profession, engage in conduct which constitutes—

42.1.1 discrimination,

42.1.2 sexual harassment,

42.1.3 any other form of harassment, or

42.1.4 workplace bullying.



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# Legal Profession Board of Tasmania v W [2023] TASFC 1

Council of the Law Society of NSW v Webb [2013] NSWCA 423

21 By the *Legal Profession (Amendment) Act 1987*, that distinction between minor and serious professional misconduct was replaced with one between unsatisfactory professional conduct and professional misconduct; the latter including unsatisfactory professional conduct which involves a substantial or consistent failure to reach or maintain the required standard of competence and diligence. As defined (see [5] above), professional misconduct includes by paragraph (b) conduct which, if established, would justify a finding that the legal practitioner is not a fit and proper person to engage in legal practice. *In this context, and having regard to the history of these provisions, particularly the distinction drawn in the 1987 Act as originally enacted, it is plain that paragraph (a) of the definition describes serious misconduct which calls into question the lawyer's competence and diligence and, in those respects, his or her fitness to continue in practice.*

22 The distinction made by that definition is between conduct which involves a "substantial" failure to reach or maintain the required standard and conduct which involves a "consistent" failure to do so. *The former directs attention to the nature and consequences of the failure, which may be sufficiently serious to raise questions as to the lawyer's competence and diligence and thereby warrant the description "substantial".* The reference to a "consistent failure" is to ongoing or persisting acts of failing on different occasions to reach or maintain the required standard. The same or similar failures which occur on a series of related occasions and are explained by an overarching error of judgment on the part of the lawyer (which is not itself the or a relevant failure which is the subject of complaint) do not involve a "consistent failure" in the sense in which that expression is used in this definition.



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# Legal Profession Board of Tasmania v W [2023] TASFC 1

1. I do not have the slightest doubt that it is professional misconduct for a lawyer to offer to settle a client's dispute with another person on the condition that the other person withdraw a criminal complaint that person has made against the client and which is pending before a court.

11. Such a conclusion involves an evaluative exercise, however to my mind the gravity of the attempt to have charges pending before a court withdrawn or undermined justifies a conclusion that the conduct amounts to "substantial failure to reach or maintain a reasonable standard of competence". Whatever his client's instructions were and no matter what his belief in those instructions was, the respondent's conduct had a tendency to prevent or defeat the due course of justice or the administration of the law. I reject the respondent's submissions to the contrary, notwithstanding that the charge of perverting the course of justice against the respondent's client was not proceeded with, and the charges against him were dismissed or discontinued.



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# Legal Profession Board of Tasmania v W [2023] TASFC 1

Legal Profession Board of Tasmania v Lester [2022] TASSC 14 at [11]

I think it is clear that these statutory definitions provide the relevant basis upon which the Court must characterise the practitioner's conduct. It is clear, in my view, that the definitions are intended to replace any notions of what amounts to unsatisfactory professional conduct or professional misconduct, formulated under the common law and statutory schemes which are no longer in effect. Under the legislative definitions, the first step is to determine whether the conduct amounts to unsatisfactory professional conduct. This involves an evaluative assessment of the conduct, measured against the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner. The second step is to determine whether the unsatisfactory professional conduct amounts to professional misconduct. In making this determination, an assessment must be made as to whether the conduct involved a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence. It is the finding that the relevant failure has been substantial or consistent which is critical to this determination. A further observation which can be made about the legislative scheme incorporated into this legislation is that the standard of competence and diligence required of a legal practitioner is to be evaluated on the basis of what a reasonable member of the public would be entitled to expect of the practitioner. I think that this results in an important shift of emphasis away from the formulation which preceded this legislation, which depended upon what practitioners of good repute and competency would reasonably consider to be conduct which could be described as disgraceful or dishonourable. .. This change of emphasis in favour of the expectation of a reasonable member of the public, as opposed to other practitioners, is, in my view, entirely consistent with the primary purpose of disciplinary proceedings, which is the "protection of the public, the preservation of the reputation of the legal profession and the proper administration of justice". ... Of course, conduct which falls within those earlier definitions may also inform this Court's exercise of its inherent jurisdiction, ... but this is in addition to the statutory definitions, and not instead of them.



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# Angeleska v Victorian Legal Admission Board [2023] VSCA 220

In his reasons for judgment, Kyrou J made various observations about the applicant's conduct as litigation guardian and lay advocate. First, he said this:

*By any measure, acting as Mr Slaveski's litigation guardian without legal representation was always going to be a difficult task for Mrs Slaveska. She had to conduct a large and complex trial over several months virtually on her own. She had to read a large number of documents; to prepare detailed questions for 17 of her own witnesses as well as for 40 defence witnesses, which included 34 experienced police officers and three experts; to learn the rules of evidence and trial procedures; and to perform her task in the face of constant outbursts from Mr Slaveski. It is likely that most lay people would have found the burden too onerous and would have given up. To her credit, Mrs Slaveska had the courage to persevere and she worked tirelessly in the pursuit of Mr Slaveski's claims. I have no doubt that no other lay advocate could have done a better job in presenting his case.*



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# Angeleska v Victorian Legal Admission Board [2023] VSCA 220

However, his Honour also made a number of criticisms of her conduct of the case, including that she:

- (a) asked questions of witnesses that were aimed at embarrassing witnesses or which contained ‘not-so-subtle threats’ that a witness would be sued;
- (b) put matters to witnesses without any factual foundation and irresponsibly accused all but four of the 40 witnesses she cross-examined of lying to the Court;
- (c) became argumentative on occasion and continued to be so despite an explanation as to why the conduct was improper and a warning not to continue; and
- (d) failed to observed time limits set by the judge for examination of witnesses;
- (e) caused delays by her conduct or late advised non-attendance at court; and
- (f) made speeches ‘for the record’ on occasion.



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# Angeleska v Victorian Legal Admission Board [2023] VSCA 220

Mrs Slaveska had a genuine recollection of some of the key events and made some concessions. I have therefore accepted some aspects of her evidence. **Most of her evidence, however, was rehearsed, self-serving, selective and exaggerated. Some parts were improvised, while others were simply fanciful.**

In cross-examination, Mrs Slaveska was sometimes argumentative. She was also reluctant to change her evidence, even when it was directly contradicted by contemporaneous documents that were put to her.

**Overall, Mrs Slaveska was an unreliable witness** and I have rejected significant portions of her evidence.



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# Angeleska v Victorian Legal Admission Board [2023] VSCA 220

97 As the trial judge correctly observed, trust and confidence in a legal practitioner goes beyond honesty, and relies partly on the ability of the practitioner to exercise judgement, and to have an insight into the effect and consequences of the manner in which they undertake their legal duties. If a person has engaged in inappropriate behaviour in the course of legal proceedings in the past, it will be necessary for them to persuade the admitting body, not simply that they accept that their earlier behaviour was inappropriate, but that they understand why that was so. Otherwise, there remains a real risk that the person will continue to engage in inappropriate behaviour after being admitted to practice. To certify such a person as a fit and proper person would be to undermine the protective purpose of the Uniform Law.



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