

When the personal becomes professional

Personal misbehaviour is hardly immune from professional disciplinary consequence



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The case law makes plain that the principal aim of professional disciplinary proceedings is to protect the public.¹ When speaking of protection of the public here, it is trite to note that it targets protection from a person *in the practice of the law*. It cannot be directed to protection from that person's acts or omissions *in another capacity*; should the public need protection from those acts or omissions, the law should provide this through another avenue. Professional disciplinary proceedings, to this end, do not perform (or duplicate) the role of, say, the broader criminal law.

The foregoing, if taken to its logical conclusion, may suggest that conduct by a lawyer outside the course of practice should be irrelevant to the protective aim underscoring professional disciplinary proceedings. There is nothing, it could be reasoned, in this conduct that triggers a need for public protection for acts or omissions in the course of legal practice. The disciplinary language — via the reference to *professional* misconduct and unsatisfactory *professional* conduct — moreover ostensibly targets behaviour that relates to the profession, as distinct from personal (or private) behaviour.

In *Ziems v Prothonotary of the Supreme Court of New South Wales*,² perhaps the leading Australian disciplinary case in this context, Kitto J refused to strike from the roll a barrister who had been convicted of motor manslaughter, reasoning that, aside from not indicating a tendency to vice or violence or any lack of probity, the conviction had neither connexion with nor significance for any professional function. But merely because there is no such connection or even significance does not mean that *personal* misconduct is immune from professional (disciplinary) consequence. Kitto J added that “[i]t is not difficult to see in some forms of conduct, or in convictions of some kinds of offences, instant demonstration of unfitness for the Bar”.³ And in the same case, Fullagar J likewise accepted that personal misconduct may be a ground for disbarring “because it may show that the person guilty of it is not a fit and proper person to practise”.⁴

In each instance, though, it is difficult to accurately locate the justification for this disciplinary response by reference to protecting the public, except to the extent that personal misconduct has the propensity to translate into the professional sphere. For instance, courts and disciplinary bodies see proven dishonesty in a lawyer's personal life as “a defect of character”⁵ so pervasive as to make it difficult to dissociate from similar conduct in practice.⁶ The assumption may be that a person who is dishonest in one endeavour is, or is likely to be, dishonest in others.

But in other instances of personal misconduct, appeals to the protective aim must necessarily take a back seat to reality. As a conviction for an offence, in a private capacity (as in any other capacity), is indicative of disrespect for the law, there may well be sense in it triggering a disciplinary response in view of the role the public expects of lawyers vis-à-vis the law. This, however, goes not to protecting the public but to maintaining the reputation of the profession, as committed to the integrity of the law, in the broader public eye, and the confidence its members can have in one another. The case law on lawyers who have been disciplined for shirking their tax obligations illustrates the point.⁷

Under this banner the case law has more recently witnessed the disciplinary consequences of lawyers who are convicted of possessing, accessing or transmitting child pornography.⁸ In each instance there was no scope to allow the lawyer to continue practising, not because of the need for public protection from lawyers who engage in this behaviour, but because it was “incompatible with the judgment and understanding required of members of the legal profession”⁹ and damaged “a practitioner's ability to maintain a relationship of trust and confidence with other members of the profession and with clients”.¹⁰

That in each case the acts underscoring the convictions involved no actual contact with the victims — which in several other instances had justified striking off¹¹ —

did not incline any of the respective judges to downplay the seriousness of the offending or mollify the appropriate disciplinary response. One judge added that, as legal practice demands both empathy and insight into the victims of criminal behaviour if it is to be performed to the requisite standard, “[a]ny conviction which appears to show a disdain for such victims will raise a serious concern about a practitioner's professional and moral fitness to remain an officer of the court”.¹² The upshot is that what lawyers do in private, even alone, may generate the most serious disciplinary consequence if it reflects badly on their broader reputation.

NOTES

1. A leading statement is found in *Southern Law Society v Westbrook* (1910) 10 CLR 609 at 622 per O'Connor J.
2. (1957) 97 CLR 279 at 299.
3. (1957) 97 CLR 279 at 298.
4. (1957) 97 CLR 279 at 290.
5. Using the language of Kitto J in *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279 at 298.
6. See, for example, *Legal Practitioners Complaints Committee v Dixon* [2006] WASCA 27.
7. See, for example, *New South Wales Bar Association v Cummins* (2001) 52 NSWLR 279.
8. *Legal Services Board v Williams* [2009] VSC 561; *Legal Services Board v McGrath (No 2)* (2010) 29 VR 325; *Legal Practitioners Conduct Board v Power* [2013] SASCFC 118.
9. *Legal Services Board v McGrath (No 2)* (2010) 29 VR 325 at [25] per Warren CJ.
10. *Legal Practitioners Conduct Board v Power* [2013] SASCFC 118 at [39] per the court.
11. See, for example, *Barristers' Board v Pratt* [2002] QCA 532; *Law Society of South Australia v Liddy* [2003] SASC 379. Cf *A Solicitor v Council of the Law Society of New South Wales* (2004) 216 CLR 253.
12. *Legal Services Board v McGrath (No 2)* (2010) 29 VR 325 at [15] per Warren CJ.