I INTRODUCTION

The general conduct of lawyers, and not only in their daily legal practice, has been placed under close scrutiny in recent times. This is especially so in New South Wales, where solicitors and barristers must now notify their professional body of any finding of guilt in relation to all but the most trivial of traffic offences, and where a number of barristers have been disbarred for failing to pay tax. The High Court of Australia was recently required to determine whether a New South Wales solicitor with convictions for aggravated indecent assault should be allowed to remain a member of the legal profession and, in a unanimous judgment, the Court held that he could.

Most disciplinary charges are now heard within a statutory framework rather than within the court’s inherent jurisdiction, and there is a vast array of matters that legislation now deems to constitute professional misconduct. This, coupled with the threat by Attorneys-General in New South Wales, Queensland and Western Australia to enact legislation to avoid a similar outcome in any future case, may mean the decision is not of great practical significance. However, given the public outcry that resulted from the decision to allow the solicitor to remain in practice, it

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1 Legal Profession Regulation 2002 (NSW) reg 133.


4 Most appeals to the High Court in recent times have dealt with whether statutory disciplinary bodies have complied with legislation rather than with the merits of a particular case: eg Walsh v Law Society of New South Wales (1999) 198 CLR 73. Prior to A Solicitor, the High Court had not been required to rule on a lawyer’s fitness to practise since New South Wales Bar Association v Evatt (1968) 117 CLR 177.

5 To ensure that a conviction for such crimes would automatically disqualify a person from practice, whatever the circumstances of an individual case: Marcus Priest, ‘States Oppose Abuse Ruling on Lawyer’, Australian Financial Review, 9 February 2004, 3.

is unfortunate that the High Court did not take the opportunity to express its view on the main cause of public concern: the circumstances, if any, in which a criminal conviction may justify a person’s automatic removal from legal practice.

II FACTS

The solicitor was convicted in February 1998 on four counts of aggravated indecent assault involving his stepchildren, which occurred during April and May 1997. He was initially sentenced to three months’ imprisonment. However, on appeal the sentence was fully suspended after the solicitor agreed to enter a three year good behaviour bond.

The Law Society of New South Wales then initiated disciplinary action against him in the Administrative Decisions Tribunal, arguing that he was unfit to practise. Those disciplinary proceedings were dismissed by the Tribunal in October 2000, because the Law Society had failed to give the solicitor written advice as to the outcome of its investigation. Correspondence then ensued between the Law Society and the solicitor to determine whether the it would bring fresh proceedings against him. In May 2000, the solicitor was charged with further offences, of which he was convicted on 7 November 2000, but the Law Society remained unaware of this until informed by the solicitor in August 2001.

The Law Society then commenced proceedings before the New South Wales Court of Appeal, invoking that Court’s inherent jurisdiction to discipline legal practitioners.

III PROCEEDINGS IN THE COURT OF APPEAL

While the statutory power to remove a practitioner from the roll requires a preliminary finding of professional misconduct or unsatisfactory professional conduct, the Supreme Court has the inherent power to remove a lawyer from practice merely on the basis that he or she is no longer fit to practise. Nevertheless, both the Court of Appeal and the High Court chose to consider the issue of professional misconduct. The Court of Appeal found that, although the indecent assaults in April and May 1997 did not occur in the course of the solicitor’s practice, such conduct did amount to professional misconduct because it led to his conviction on four counts of a serious crime involving serious breaches

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7 The Children (Criminal Proceedings) Act 1987 (NSW) s 11 prohibits the naming of the solicitor, as this would reveal the identity of the children involved.
8 In breach of Legal Profession Act 1987 (NSW) s 171J.
9 This conviction was overturned on appeal on 3 April 2001.
10 This is incidental to the court’s power to admit persons to legal practice: In re Davis (1947) 75 CLR 409.
12 Legal Profession Act 1987 (NSW) s 171C(1).
14 In Ziems v The Prothonotary of the Supreme Court of NSW (1957) 97 CLR 279 (‘Ziems’), there had been serious doubts raised as to whether Ziems had been properly convicted.
of the trust of his stepchildren and thus cast doubt on his inherent qualities and character. The Court thought that, like his stepchildren, vulnerable and unprotected clients must also be able to trust lawyers.\textsuperscript{15} Further, the court found that the failure to disclose the later charges, conviction and sentence also amounted to professional misconduct, as such matters were clearly relevant to the Law Society’s investigation and the solicitor either deliberately withheld relevant information from the Law Society\textsuperscript{16} or failed to comprehend his duty of candour.\textsuperscript{17} That the conviction was later overturned on appeal was of no consequence.\textsuperscript{18}

The Court of Appeal ordered that the solicitor’s name be removed from the roll of legal practitioners. His conduct in 1997 and failure to disclose the November 2000 convictions demonstrated that he lacked the character and trustworthiness required of a lawyer and therefore was not a fit and proper person to practise.\textsuperscript{19} The solicitor then appealed to the High Court.

\textbf{IV \textsc{The High Court's Decision}}

\textsc{A Professional Misconduct}

In a joint decision,\textsuperscript{20} the High Court allowed part of the solicitor’s appeal.\textsuperscript{21} It agreed that the failure to disclose the November 2000 convictions did amount to professional misconduct,\textsuperscript{22} for which a period of suspension would have been appropriate.\textsuperscript{23} However, it did not agree that the conduct in 1997 could properly be categorised as professional misconduct. While statutory definitions of professional misconduct can draw upon aspects of a lawyer’s personal life,\textsuperscript{24} the Supreme Court and High Court were exercising inherent jurisdiction and so were required to apply the common law definition of professional misconduct. The High Court acknowledged the difficult dividing line between personal misconduct and professional misconduct,\textsuperscript{25} but held that conduct outside professional practice could only constitute professional misconduct if it had a sufficient connection with professional practice, such as a barrister’s failure to pay tax on professional

\textsuperscript{15} Council of the Law Society of New South Wales \textit{v} A Solicitor [2002] NSWCA 62, [100]-[101] (Sheller JA), [118] (Giles JA).
\textsuperscript{16} Ibid [108] (Sheller JA); [125] (Giles JA).
\textsuperscript{17} Ibid [109]. Although the solicitor had sought employment without disclosing his November 2000 convictions to his employer, the Court of Appeal did not consider this to constitute professional misconduct, given the solicitor’s ignorance of \textit{Legal Profession Act 1987} (NSW) s 48K(5): ibid [106] (Sheller JA), [119] (Giles JA). This issue did not form part of the appeal to the High Court.
\textsuperscript{18} Ibid [108] (Sheller JA), [124] (Giles JA).
\textsuperscript{19} Ibid [112] (Sheller JA), [126] (Giles JA).
\textsuperscript{20} Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ.
\textsuperscript{22} Ibid [30].
\textsuperscript{23} Of a period no longer than the time of the High Court’s decision: ibid [40].
\textsuperscript{24} For instance \textit{Legal Profession Act 1987} (NSW) s 127(1)(b): professional misconduct includes ‘conduct (whether consisting of an act or omission) 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 to remain on the roll of legal practitioners ...’.
\textsuperscript{25} A Solicitor \textit{v} Council of the Law Society of New South Wales (2004) 204 ALR 8, [20].
earnings.26 Here, there was insufficient nexus between the indecent assaults and the solicitor’s professional life:

It is true that the conduct involved a form of breach of trust, being the trust reposed in the appellant by the mother of the children (who later forgave, and married, him) and the children themselves. However, the nature of the trust, and the circumstances of the breach, were so remote from anything to do with professional practice that the characterisation of the appellant’s personal misconduct as professional misconduct was erroneous.27

B Fitness to Practise

The key issue for the High Court to determine was whether, at the time of the Court of Appeal’s decision, the solicitor was a fit and proper person to practise as a legal practitioner or whether his personal conduct demonstrated a lack of the qualities required of a legal practitioner.28

Of critical importance was the solicitor’s response to what he claimed was isolated and aberrant behaviour in 1997. The Court of Appeal and High Court disagreed as to the nature of his response. In the Court of Appeal, Sheller JA did not consider the solicitor’s conduct in 1997 to be an isolated lapse, followed by steps to ensure that he would not engage in any further misconduct.29 In contrast, the High Court thought this interpretation gave ‘insufficient weight to the isolated nature of the 1997 offences, and the powerful subjective case made on behalf of the [solicitor]’30 and ordered that his name be restored to the roll of practitioners.

V SIGNIFICANCE OF THE CASE

Some criticism of the High Court’s decision may stem from a misconception of the role of professional discipline, which is to protect the public, not to punish the practitioner.31 Protection can be provided in a number of ways, such as by removing a practitioner considered no longer fit to practise, or by imposing sanctions to deter future misconduct by that individual or others.32

It has been accepted that the public is also protected when disciplinary proceedings maintain public faith in the legal profession. There is no doubt that the effective functioning of the legal system and protection of the public requires the public to

26 Ibid [20], [33], citing New South Wales Bar Association v Cummins (2001) 52 NSWLR 279.
27 Ibid [34].
28 Ibid [20].
30 The Court referred specifically to the solicitor’s ‘character and rehabilitation, the exceptional circumstances in which the 1997 offences were committed, and [the solicitor’s] efforts to obtain professional advice and assistance [following the offences]’: A Solicitor v The Council of the Law Society of New South Wales (2004) 204 ALR 8, [37].
trust lawyers, who ‘should stand free from all suspicion’. 33 However, the case law remains unclear as to whether the maintenance of public trust in lawyers is a sufficient basis for discipline, where no questions of deterrence or unfitness otherwise arise. The decision in _A Solicitor_ can be criticised for not explicitly dealing with the various forms of protection and, in particular, the impact of this conviction upon the public’s trust of lawyers. It was an issue expressly dealt with when _A Solicitor_ was before the Court of Appeal, when Sheller JA (with whom Mason P agreed) pointed out that:

The reputation and standing of the legal profession must be upheld. … The legal profession cannot permit the public to gain the impression that it condones or tolerates or belittles the committing by its members of any serious crime.34

Care must be exercised to ensure that disciplinary action is not taken simply in the interests of the profession, as lawyers themselves have an interest in maintaining public trust. This was acknowledged by the High Court in _Clyne v NSW Bar Association_35 when it noted that a disbarring order is not only made to protect the public but also, ‘from the professional point of view, in order that abuse of privilege may not lead to loss of privilege’. 36

The decision of the High Court in _A Solicitor_ may require issues of public trust, perceptions and the reputation of the legal profession to be reconsidered, as the Court found that, despite the solicitor’s conviction for sexual assault, he was again fit to practise. Those who have criticised the decision largely seem to suggest that a conviction for sexual assault required automatic removal from practice.

In _Ziems v The Prothonotary of the Supreme Court of NSW_,37 the High Court did not consider a barrister’s conviction for involuntary manslaughter automatically to determine unfitness to practise, but Kitto J did suggest _obiter_ that:

It is not difficult to see in … convictions of some kinds of offences, instant demonstration of unfitness for the Bar. … A conviction may of its own force carry such a stigma that judges and members of the profession may be expected to find it too much for their self-respect to share with the person convicted the kind and degree of association which membership of the Bar entails.38

His Honour made no attempt to identify the types of convictions that might demonstrate this instant unfitness. Similar sentiments are suggested by comments of Griffith CJ in _Southern Law Society v Westbrook_:39 the question is ‘whether the Court is justified in holding out the [solicitor] as a fit and proper person to be entrusted with the duties and responsibilities of a solicitor’. 40 The comments of both

33 _Re Brounsall_ (1778) 2 Cowp 829; 98 ER 1385.
35 (1960) 104 CLR 186.
37 (1957) 97 CLR 279.
38 Ibid 298 (Kitto J).
39 (1910) 10 CLR 609.
40 Ibid 612 (Griffith CJ) (emphasis added).
Kitto J and Griffith CJ were cited with approval by the High Court in *A Solicitor* in the course of acknowledging that an ‘additional [third] dimension’ may exist to warrant removal from the roll, apart from evidence of professional misconduct or a lack of personal qualities. This third dimension seems to refer to the stigma attaching to certain types of conviction, yet we can only presume from the decision to allow this solicitor to remain in practice that the High Court thought that no such stigma attached to a conviction for aggravated indecent assault.

Notably, the statements in *Ziems* and *Westbrook* may leave open the possibility of removing a lawyer from practice simply on the basis of a conviction, regardless of current fitness. However, the courts have never acknowledged taking such a course and, when determining individual cases, have emphasised that the decision is based on the lawyer’s actual fitness at the time of the disciplinary hearing.

So, while the outcome in *A Solicitor* accords with current case law, the High Court appears to continue to entertain the possibility of automatic disqualification following certain convictions, as first raised in *Ziems*. However, it does not provide clear guidance as to why this would be justified. Further, while it appeared to adopt the ‘third dimension’ of stigma and reputation from *Ziems*, the Court did not consider its application to the facts of the case before it.

The Queensland Court of Appeal has cautioned against giving undue weight to positive character references tendered in support of lawyers facing discipline, articulating the need to examine a lawyer’s intrinsic moral character rather than reputation. *A Solicitor* involved a slightly different issue: the degree to which an adverse reputation arising from a criminal conviction should be relevant. Public debate would have benefited from an explicit discussion of this issue. The High Court did appear to endorse the relevance of the ‘third dimension’ referred to in *Ziems*. However, its close examination of the solicitor’s ‘powerful subjective case’ to the exclusion of any discussion of ‘adverse reputation’, or public perception as occurred in the New South Wales Court of Appeal, suggests that the High Court — like the Queensland Court of Appeal — discounts the relevance of reputation in discipline issues.

It is suggested that this is the correct approach. While the public is protected when disciplinary proceedings maintain public faith in the legal profession, great care...
must be exercised before disciplinary action is taken merely to maintain public faith in the legal profession, where neither deterrence nor unfitness is a factor. Too much emphasis on reputation rather than on actual fitness to practise, on appearance rather than substance, not only disregards the right of an individual lawyer to earn a livelihood if fit to practise, but may also harm clients by portraying an unrealistic view of lawyers as superhuman ‘paragons of virtue’.\(^{46}\) The public may be better protected by understanding the limits of what professional discipline can offer.\(^{47}\)

**VI CONCLUSION**

Given the criticism of the High Court’s decision in *A Solicitor*, it is unfortunate that the Court did not take the time to explore this ‘third dimension’ more closely. That is, to discuss the relevance of certain types of conviction in disciplinary proceedings, to explain the court’s protective function, to acknowledge the need for the public to maintain trust in lawyers, to discuss legitimate and illegitimate means by which that trust can be maintained and to indicate its view as to whether it would ever be legitimate to remove a person from practice merely to preserve the legal profession’s reputation.

While the decision reinforces the High Court’s view that individual circumstances must be considered with ‘meticulous care’\(^{48}\) and that intrinsic character is more important than reputation, state Attorneys-General in New South Wales, Queensland and Western Australia are reported to be planning an approach that appears diametrically opposed. Legislative amendments will provide for automatic disqualification from practice for certain convictions, regardless of individual circumstances or the fitness to practise criterion.\(^{49}\) Such a blanket approach places too much emphasis on the profession’s reputation and so involves some risk to the public. It is to be hoped that these plans will be reconsidered.

\(^{46}\) A characteristic denied by Kitto J in *Ziems v The Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279, 298: ‘The ends which [a barrister] has to serve are lofty indeed, but it is with men and not with paragons that he is required to pursue them’.

