



## *Lawyers, Clients and the Business of Law*

**A Symposium Series hosted by Griffith Socio-Legal Research Centre and the  
Legal Services Commission**

### *Unsatisfactory Professional Conduct*

A report of the Symposium

19 July 2007

## Table of Contents

Introduction.....	3
Excerpt from the Legal Profession Act 2007.....	6
Scenario One.....	8
Scenario Two .....	10
First Panel Presentation.....	11
Second Panel Presentation .....	25
APPENDIX 1. Program.....	28

The Symposium was organized by John Briton and Lyn Aitken of the Legal Services Commission and Professor Jeff Giddings and Associate Professor Michael Robertson of the Griffith Law School.

# 1. Introduction

The symposium series *Lawyers, Clients and the Business of Law* brings regulators together with practising lawyers and legal academics to discuss ethical issues arising in the course of legal practice in Queensland. The third symposium in the series – *Unsatisfactory Professional Conduct* - was held on 19<sup>th</sup> July 2007. The topic was chosen to provide an opportunity for a cross-section of the legal community to reflect on and discuss the important question of the meaning of the concept “unsatisfactory professional conduct” as it appears in the Legal Profession Act 2007.

The symposium was held as a lunchtime event and there were around 50 participants including lawyers in private practice and community legal centres, legal academics, members of the Commission’s staff, staff of the Queensland Law Society, the Queensland Public Interest Legal Clearing House and Legal Aid Queensland.

The organisers developed two scenarios demonstrating different forms of questionable practitioner conduct. These were circulated to all participants prior to the workshop in order to help focus discussion on the day. Two panellists helped stimulate discussion by talking briefly to the issues raised in the scenarios from their particular points of view. The panel comprised:-

John Briton	Legal Services Commissioner
Associate Professor Kay Lauchland	Bond University

The problem considered in the symposium can be described with reference to an excerpt from John Briton’s paper presented to the symposium:-

## **The local statutory framework: the two key concepts**

There are two key concepts underpinning our system for dealing with complaints and discipline – the concepts of unsatisfactory professional conduct and professional misconduct. The *Legal Profession Act 2007* (the Act) defines both concepts in exactly the same terms as they are defined in the national model laws and hence in the counterpart legislation in every other Australian state and territory. It doesn’t define either term exhaustively but says simply that:

- **unsatisfactory professional conduct** ‘includes conduct of an Australian legal practitioner happening 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 Australian legal practitioner’ viii; and

- **professional misconduct** ‘*includes* unsatisfactory professional conduct... if the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence and conduct... 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 a person is not a fit and proper person to engage in legal practice

So just how unsatisfactory does a practitioner’s conduct in connection with the practice of law have to be to amount to unsatisfactory professional conduct, and how substantially unsatisfactory does it have to be to amount to professional misconduct?

The second question is easier than the first. There are occasional problems at the cusp, as it were, but professional misconduct generally announces itself by reason of its gravity. The question in relation to unsatisfactory professional conduct is more problematic.<sup>1</sup>

The Commissioner then outlines some of the perspectives that provide bases for differing interpretations of the concept and how it may best be used for consumer protection, with the discussion enabling participants to reflect on the genesis and implications of their own interpretations. A key point is that:-

The adoption of the new and almost certainly tougher benchmark implies, so it seems to me, that the Act envisages the concept of unsatisfactory professional conduct extending beyond the technical legal competencies practitioners are entitled to expect of each other to the service delivery competencies consumers are entitled to expect of any professional service provider, including providers of legal services - and hence to embrace the sorts of minor incompetence and neglect and poor standards of service that give consumers less than a good or a fair deal.<sup>2</sup>

Following panel presentations the symposium participants worked together in small groups to consider the conduct outlined in each of the scenarios and decide where, in their view, the conduct crossed the line into unsatisfactory professional conduct. Each of the 6 small groups then reported back to the whole group – and this prompted further discussion from the floor.

This report sets out the symposium program, the two scenarios that were circulated in advance and the full text or notes of the two panel presentations. Unsatisfactory Professional Conduct is a large and important topic and attendees found it valuable to consider the related dilemmas and points raised in the scenarios and presentations.

This report does not draw conclusions from the reflections and discussions of the panel and participants because given the scope of the topic it would be to no advantage to come to any

---

<sup>1</sup> John Briton (2007) *Unsatisfactory Professional Conduct*, paper delivered to the Symposium on Unsatisfactory Professional Conduct July 2007, p.6-7

<sup>2</sup> John Briton (2007) p.8

preliminary conclusions and cut short what we hope will continue to be an engaging discussion.

## Excerpt from the Legal Profession Act 2007

This excerpt is provided as an additional resource to assist the discussions at the LSC/GLS symposium on 15 March.

### Part 4.2 Key concepts

#### 418 Meaning of *unsatisfactory professional conduct*

*Unsatisfactory professional conduct* includes conduct of an Australian legal practitioner happening 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 Australian legal practitioner.

#### 419 Meaning of *professional misconduct*

(1) *Professional misconduct* includes—

- (a) unsatisfactory professional conduct of an Australian legal practitioner, if the conduct involves a substantial or consistent failure to reach or keep 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.

#### 420 Conduct capable of constituting *unsatisfactory professional conduct* or *professional misconduct*

The following conduct is capable of constituting unsatisfactory professional conduct or professional misconduct—

- (a) conduct consisting of a contravention of a relevant law, whether the conduct happened before or after the

commencement of this section;

*Note—*

Under the Acts Interpretation Act 1954, section 7, and the Statutory Instruments Act 1992, section 7, a contravention in relation to this Act would include a contravention of a regulation or legal profession rules and a contravention in relation to a previous Act would include a contravention of a legal profession rule under the Legal Profession Act 2004.

- (b) charging of excessive legal costs in connection with the practice of law;
  - (c) conduct for which there is a conviction for—
    - (i) a serious offence; or
    - (ii) a tax offence; or
    - (iii) an offence involving dishonesty;
  - (d) conduct of an Australian legal practitioner as or in becoming an insolvent under administration;
  - (e) conduct of an Australian legal practitioner in becoming disqualified from managing or being involved in the management of any corporation under the Corporations Act;
  - (f) conduct of an Australian legal practitioner in failing to comply with an order of a disciplinary body made under this Act or an order of a corresponding disciplinary body made under a corresponding law, including a failure to pay wholly or partly a fine imposed under this Act or a corresponding law;
  - (g) conduct of an Australian legal practitioner in failing to comply with a compensation order made under this Act or a corresponding law.
- (2) Also, conduct that happened before the commencement of this subsection that, at the time it happened, consisted of a contravention of a relevant law or a corresponding law is capable of constituting unsatisfactory professional conduct or professional misconduct.
- (3) This section does not limit section 418 or 419.

## Scenario One

Ms Smith consults a legal practitioner. She instructs that a real estate company, Homes R Us, has received confidential information in the form of a computer programme and database for property management developed by Ms Smith, resulting in substantial loss for her.

She instructs that she wants the programme to be returned to her, and/or to be compensated for the programme.

The practitioner writes to Mr Jones, the Director of Homes R Us, in the following terms:

*I act for Ms Smith. She instructs me that you are wrongfully in possession of a computer programme developed and created by her. Your unauthorized use of the programme in these circumstances has resulted in a substantial loss for her. My client demands that all copies of the programme held by you be returned immediately and that she be compensated for the loss sustained by your use of the programme in the sum of \$50,000. If this does not occur within 14 days of the date hereof, my client shall take such further action as advised.*

There is no response. The practitioner writes again:

*I refer to my previous letter and note that I have had no response to same.*

*Please find **enclosed** a copy of correspondence requesting an investigation into your theft of her property [the programme] which my client has instructed me to forward to the Officer in Charge of the Fraud Squad.*

*Should I not receive a response to my previous correspondence by [date] I will activate my client's letter of complaint to the Fraud Squad.*

Again, no response is received. The practitioner's next letter reads:

*You have failed to respond to my last two letters.*

*You do not appear to appreciate the gravity of the situation in which you find yourself. Not only is your conduct a blatant breach of sections 498 and 408 C of the Criminal Code, it also demonstrates an appalling lack of fitness to operate as a Real Estate Agent, and have any responsibility for the money of others.*

*Should you not return the programme and pay the money by [date] then I will advise my client to instruct me to not only report your conduct towards her to the QPS but I will also recommend that the QPS undertake an investigation into all your financial dealings. Further, I will report your conduct to the Office of Fair Trading with a view to having your licence revoked. At the same time I will commence civil proceedings against you without further notice. You will be responsible for my substantial costs if I am compelled to take this action by your continued intransigence.*

The failure to respond continues. The final letter reads:

*Your calculated and malicious actions have ruined my client's life. My client hopes that you experience the same hurt, harm and detriment, and emotional pain and anguish that she continues to suffer due to your blatant dishonesty. I will not correspond with you further and will see you in court where justice will be done.*

**Questions:**

1. At what point, if any, do the practitioner's communications amount to unsatisfactory professional conduct?
2. What aspects of the various communications, if any, are unsatisfactory?
3. Would the situation be different if the letters were addressed to a practitioner acting on behalf of Homes R Us?
4. Would any of your answers above be different if the database was actually being used by the real estate agency?
5. Would the situation be different if, on the instructions of Ms Smith, the practitioner reported these matters to the Queensland Police Service and Office of Fair Trading without writing the final letter?
6. Would the situation be different if the practitioner advised Ms Smith to report the matters directly herself?
7. Does any aspect of the practitioner's conduct amount to professional misconduct? If not, what circumstances would change this into professional misconduct?

## Scenario Two

Mr Black lost his driver's licence as a result of an accumulation of points. He instructs his practitioner, Mr Blue, to lodge an appeal against the loss of his licence. Mr Black pays the sum of \$600 into Mr Blue's trust account as a retainer.

The appeal must be lodged within the next 28 days. During the next 27 days Mr Black receives no communication from Mr Blue. Mr Black makes five attempts in person and by phone to contact his practitioner, but without success.

In the afternoon of the 28th day, Mr Blue contacts Mr Black and advises that he has prepared the appeal documents. He tells Mr Black that they must meet at court as soon as possible on that day so that the documents can be signed and lodged prior to the deadline.

Mr Black has to cancel appointments and to make a special trip to sign the documentation, which is subsequently lodged just in time. Disgruntled by the way in which the matter had been handled, Mr Black terminates his retainer and makes a complaint to the LSC.

### Questions

Under which of the following circumstances, if any, would Mr Blue's conduct amount to unsatisfactory professional conduct, and why?

- The reason for the delay in attending to Mr Black's matter is that the person in Mr Blue's office who is responsible for the "bring up" system leaves and no one else can access the system.
- The reason for the delay in attending to Mr Black's matter is that Mr Blue is sick over the period between the 21<sup>st</sup> and 28<sup>th</sup> days, when he would have turned his attention to Mr Black's documents.
- The reason for the delay in attending to Mr Black's matter is that the client doesn't pay money into trust until the 27<sup>th</sup> day (even though Mr Blue has been sending out reminders).
- The reason for the delay in attending to Mr Black's matter is that there are problems in establishing communication. This is because
  - Mr Black goes away on holiday and Mr Blue is unable to contact him while preparing the documents.
  - Mr Black provides a mobile phone number, and a wrong numeral is recorded, making it difficult to contact him.

## **First Panel Presentation**

### **UNSATISFACTORY PROFESSIONAL CONDUCT**

**a presentation to a symposium co-hosted by  
the Legal Services Commission and Griffith Law School**

**19 July 2007**

#### **John Briton - Legal Services Commissioner**

I think it is fair to say that the professional bodies in the past conceived and many practitioners even today conceive the system for dealing with complaints and discipline primarily if not exclusively in terms of upholding high ethical standards within the profession and weeding out the bad apples - the small number of practitioners who wilfully or recklessly flout the ethical rules and accepted standards of professional conduct and practice.

It's a view that reflects the traditional common law approach to the inherent disciplinary jurisdiction of the courts - that courts will exercise their punitive powers only when practitioners are guilty of conduct that 'would reasonably be regarded by [fellow practitioners] of good repute as disgraceful and dishonourable', and guilty in a way that can be sheeted home to them personally.<sup>3</sup>

I don't want to understate the importance of getting rid of the bad apples - that is an essential ingredient of any effective regulatory regime - but the statutory system for dealing with complaints and discipline has to be conceived much more fundamentally, in terms of promoting and protecting the rights of consumers in their day to day dealings with legal practitioners and improving standards of conduct in the profession more generally.

---

<sup>3</sup> The leading case is *Myers v Elman* [1940] AC 282

The language might be new but there is nothing particularly novel in seeing things this way. The purpose of disciplinary proceedings has long been seen not to punish errant practitioners but ‘for the protection of the public and to maintain confidence in the profession in the estimation of the public’.<sup>4</sup>

It is hard to overstate the importance of the re-conceptualisation. That is because only very few complaints describe ethical violations of a kind that might warrant practitioners being struck off or suspended, or having conditions imposed on their right to practice. The vast majority describe conduct of more much more prosaic kinds, many of them conduct of a kind that in the context of an employment relationship would be seen as a performance management rather than a disciplinary issue. Most complaints describe one-off mistakes and misjudgements and poor standards of service rather than misconduct as that term is commonly understood, much less ethical violations.

It follows, if we want to protect the public and to maintain public confidence in the profession, that the system for dealing with complaints and discipline has to be able to deal not only with the occasional bad apple but also and in particular with the many more practitioners who are not and whose conduct is less serious and often even inadvertent but yet is unsatisfactory in any ordinary sense of the word and gives rise to legitimate cause for grievance.

So the question to ask, then, is whether and how well the system established under the *Legal Profession Act 2007* meets this challenge.

### **Experience elsewhere – two examples**

---

<sup>4</sup> *Baker v Legal Services Commissioner* [2006] QCA 145

It might be helpful in answering this question, if only by way of context, to ask how the counterpart systems in some other parts of the world have responded to the challenge.

**a) the US example**

The American Bar Association (the ABA) commissioned in 1989 a detailed study of the effectiveness of the systems for dealing with complaints and discipline that then applied to lawyers in the United States complete with recommendations about how things could be improved. It received the report in 1992.<sup>5</sup>

The study found among other things that ‘the overwhelming majority’ of complaints about lawyers ‘allege minor incompetence, minor neglect or other minor misconduct’ or that lawyers ‘have behaved in ways that are unfair to the client and unprofessional’ and that ‘many of them... state legitimate grounds for client dissatisfaction.’

Crucially, however, it also found that ‘single instances of minor neglect or minor incompetence, whilst technically violations of the rules of professional conduct, are seldom treated as such’ and that ‘most such complaints are dismissed’ - that ‘the system does not address complaints that the lawyer’s service was overpriced or unreasonably slow [and] does not usually address complaints of incompetence or negligence except where the conduct is egregious or repeated. It does not address complaints that the lawyer promised services that were not performed or billed for services that were not authorised [and] does nothing to improve the inadequate legal or office management skills that cause many of these complaints [and] does nothing to correct the lawyer’s behaviour or compensate the clients.’

The study found, in short, that ‘the public is left with no practical remedy’ because ‘the system for regulating the profession is narrowly focused on violations of professional ethics.’ It concluded that ‘the tens of thousands of dismissed

---

<sup>5</sup> *Lawyer Regulation for New Century* - Report of the Commission on Evaluation of Disciplinary Enforcement, American Bar Association Center for Professional Responsibility, February 1992

complaints alleging legitimate grounds for dissatisfaction’ demonstrate ‘the gap between reasonable client expectation and existing regulation’ – but that the profession ‘cannot afford to let legitimate disagreements between lawyers and clients go unresolved’ because, if they are not, ‘clients are harmed and the professions’ reputation unnecessarily suffers.’

The report goes on to argue, however, that ‘cases of minor misconduct seldom justify the resources needed to conduct formal disciplinary proceedings’ and that ‘in most cases... the respondent’s conduct does not justify imposing a disciplinary sanction.’ It says instead that ‘what most of these cases call for is a remedy for the client and a way to improve the lawyers’ skills’ and that ‘it may be appropriate to compensate the client for the lawyers’ sub-standard performance by a fee adjustment or other arbitrated or mediated settlement. The lawyer may need guidance to improve his/her skills or to overcome other minor practice problems.’

The report recommended accordingly that ‘matters in which the alleged misconduct warrants less than suspension or disbarment or other restriction on the right to practice should be removed from the disciplinary system and handled administratively.’ It says, putting it another way, that ‘all jurisdictions should adopt procedures in lieu of discipline for matters in which a lawyer’s actions constitute minor misconduct, minor incompetence or minor neglect’ and that those procedures should include:

- criteria defining those terms;
- if a regulator determines that a matter meets those criteria, ‘authorised’ means by which the regulator ‘may reach agreement with the respondent lawyer to submit the matter to non-disciplinary proceedings’ including, for example, ‘arbitration, mediation, lawyer practice assistance, substance abuse recovery programs [and] psychological counselling’;
- if the lawyer fulfils the terms of the agreement, provision for the regulator to dismiss any disciplinary proceedings; but on the other hand

- if the lawyer fails to comply with the terms of the agreement, provision for the regulator to initiate disciplinary proceedings.

## **b) the example of England and Wales**

The Lord Chancellor commissioned Sir David Clementi in July 2003 to carry out an independent review of the regulatory framework applying to the provision of legal services in England and Wales, received his report in 2004 and, in October 2005, tabled a white paper in the parliament setting out the government's reform agenda.<sup>6</sup> The review was wide ranging but included the arrangements applying to complaints and discipline.

The Lord Chancellor describes in his introduction the government's vision 'of a legal services market where excellence continues to be delivered, and a market which is responsive, flexible and puts the consumer first.' He says 'the professional competence of lawyers is not in doubt... but, despite this, too many consumers are finding that they are not receiving or a good or a fair deal.'

The white paper goes on to describe some significant improvements since problems with the handling of complaints against solicitors first came to light in the mid- 1980s' but found that 'consumers are demanding more' and that 'change is needed to meet their reasonable demands.' It says 'most importantly, they need to be satisfied that complaints are handled independently, without self interest; that they are handled efficiently, fairly and quickly; and that [they] are used to correct faults in the system.'

It notes consistent with both the US experience and our experience locally that the majority of complaints are about the standard of service that consumers have received rather than ethical violations. It goes on to recommend reforms which establish a single regulator to receive and assess all complaints about lawyers and, consistent with the reforms proposed by the ABA more than a decade earlier, a

---

<sup>6</sup> *The Future of Legal Services: Putting Consumers First*, Department for Constitutional Affairs, October 2005

system in which complaints about poor standards of service are dealt with separately from complaints which allege unethical or other misconduct – it envisages the regulator referring those complaints to the professional bodies for disciplinary action as appropriate but dealing in-house with complaints about poor standards of service.

It envisages the regulator mediating those complaints but also, and ‘separate to any disciplinary action’, as having significant power ‘in all the circumstances of a complaint’ to require evidence and to make and enforce decisions that give consumers appropriate redress, including powers:

- ‘to require the provider to make an apology to a complainant;
- to require the provider to re-do the work, or otherwise remedy the faults in the service provided to the complainant;
- to require the provider to waive some or all of the fee;
- to require the provider to take other steps in relation to the complainant as the OLC considers just; and
- to order a payment for poor service, loss or distress, such an award to be enforceable as a debt’ – notably, to an upper limit of £20,000.

Those reforms have now been implemented.<sup>7</sup>

### **The local statutory framework: the two key concepts**

---

<sup>7</sup> see <http://www.legalcomplaints.org.uk/how-we-handle-complaints/about-poor-service.page>

There are two key concepts underpinning our system for dealing with complaints and discipline – the concepts of unsatisfactory professional conduct and professional misconduct. The *Legal Profession Act 2007* (the Act) doesn't define either term exhaustively but says only that:

- **unsatisfactory professional conduct** '*includes* conduct of an Australian legal practitioner happening 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 Australian legal practitioner'<sup>8</sup>; and
- **professional misconduct** '*includes* unsatisfactory professional conduct... if the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence and conduct... 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 a person is not a fit and proper person to engage in legal practice.'<sup>9</sup>

So just how unsatisfactory does a practitioner's conduct in connection with the practice of law have to be to amount to unsatisfactory professional conduct, and how substantially unsatisfactory does it have to be to amount to professional misconduct?

The question in relation to professional misconduct is the easier of the two. There are occasional problems at the cusp, as it were, but professional misconduct generally announces itself by reason of its gravity. The question in relation to unsatisfactory professional conduct is more problematic - there are large numbers of complaints at the cusp, and there is little or no case law to help settle the issue<sup>10</sup> (and in any event, even if there was, it is hard to imagine it applying in any straightforward way to all the myriad complaints to which it might have application).

---

<sup>8</sup> *Legal Profession Act 2007*, section 418 (previously section 244 of the *Legal Profession Act 2004*)

<sup>9</sup> section 419 (previously section 245)

<sup>10</sup> Linda Haller, *Imperfect Practice under the Legal Profession Act 2004*, (2004) 23 *The University of Queensland Law Journal*, at p.418

People who conceive the system for dealing with complaints and discipline primarily in terms of weeding out the bad apples will be inclined to interpret and apply the concept narrowly, to include complaints that allege ethical violations and other serious misconduct but to exclude more minor matters - complaints that describe poor standards of service or only ‘minor incompetence, minor neglect or other minor misconduct’ (as the Americans put it) or conduct (as the Lord Chancellor puts it) that gives consumers less than a ‘good or a fair deal.’

People who conceive the fundamental purpose of the system as being ‘to protect the public and the reputation of the profession’, on the other hand, will be inclined to interpret and apply the concept broadly, precisely to include those kinds of complaint.

There are powerful reasons of both philosophical and practical kinds in favour of the second approach, not least these:

- the Act itself embeds the regulation of the legal profession firmly within a consumer protection context - it says one of its main purposes is ‘to provide for the regulation of legal practice in this jurisdiction in the interests of the administration of justice and for the protection of consumers of legal services and the public generally;’<sup>11</sup>
- the Act says the purposes of the system for dealing with complaints are not only to ‘provide for the discipline of the legal profession’ and ‘promote and enforce the professional standards, competence and honesty of the legal profession’ but also to ‘provide a means of redress for complaints about lawyers.’<sup>12</sup>

Most complainants, remember, here as in the US and in England and Wales, are seeking redress for just the sorts of conduct we’re talking about - the sorts of minor incompetence and neglect and poor standards of service that gave

---

<sup>11</sup> section 3 (previously section 3 of the *Legal Profession Act 2004*)

<sup>12</sup> section 416 (previously section 243)

them as they see it less than a good or a fair deal, and legitimate grounds for dissatisfaction;

- the Act doesn't exhaustively define unsatisfactory professional conduct but says only that it *'includes'* conduct that falls short of the standard of competence and diligence a member of the public is entitled to expect of a reasonably competent practitioner. The legislators are making it plain, in other words, that the concept extends beyond the sorts of ethical violations that are encompassed within the traditional common law approach to discipline to include failures of competence and diligence - and importantly, in a further departure from the traditional common law approach, making it plain that the benchmark is no longer the standard members of the profession of good repute are entitled to expect of their fellow practitioners but the standard members of the public are entitled to expect.

The adoption of the new and almost certainly tougher benchmark implies, so it seems to me, that the Act envisages the concept of unsatisfactory professional conduct extending beyond the technical legal competencies practitioners are entitled to expect of each other to the service delivery competencies consumers are entitled to expect of any professional service provider, including providers of legal services - and hence to embrace the sorts of minor incompetence and neglect and poor standards of service that give consumers less than a good or a fair deal.

- the Act gives the Commission no summary reprimand or other like powers – powers of a kind the Law Society had under the previous system for dealing with complaints and that some of the Commission's counterpart regulators have elsewhere in Australia. I will return to this matter shortly, but I note for now only that it follows that the Act contemplates the Commission prosecuting unsatisfactory professional conduct of kinds which would not previously have become subject to discipline applications but would have been dealt with administratively;

- while the Act gives the disciplinary bodies powers to make orders of a kind that are typically associated with discipline and punishment – to strike off and to suspend and to impose conditions on practising certificates and fines and to issue reprimands - it also and in particular gives them powers to make orders that are more in the nature of and which in any other context would be regarded as performance improvement plans more so than discipline per se. They have power to order practitioners to ‘do or refrain from doing something’ in connection with their legal practice or to engage in practice only ‘in a stated way’ or ‘subject to stated conditions’ or to ‘seek advice’ from someone nominated by their professional body.<sup>13</sup>

The implication once again is that the Act envisages unsatisfactory professional conduct extending to the sorts of minor incompetence and neglect and poor standards of service that give consumers less than a good or a fair deal - conduct that demands a formal response, but something less than a traditional disciplinary punishment.

The disciplinary bodies’ powers in this regard are in effect our local equivalent of the powers the ABA and the Lord Chancellor envisage being used in the US and in England and Wales to ‘divert’ minor misconduct from the disciplinary process - our arrangements differ only in that the powers are vested with the disciplinary bodies and not with the Commission as the regulatory authority.

- finally and crucially, the Act gives the Commission only two ways to deal with complaints over which it has jurisdiction - as complaints that allege unsatisfactory professional conduct or worse, professional misconduct (for ease of reference, let’s call complaints of these kinds ‘conduct complaints’) or as consumer disputes. A consumer dispute is a complaint that describes a dispute between a person and a practitioner ‘to the extent that the

---

<sup>13</sup> section 458(2)(d)-(g) (previously section 282)

Commissioner considers it does not involve an issue of unsatisfactory professional conduct or professional misconduct.’<sup>14</sup>

It might be tempting within this definitional framework to treat complaints which allege minor incompetence and neglect and poor standards of service and other conduct that gives consumers less than a good or a fair deal not as conduct complaints but as consumer disputes, and in that way to divert them from the disciplinary process, but here’s the rub: the Act obliges the Commission to investigate conduct complaints<sup>15</sup> and gives it significant powers of investigation<sup>16</sup> but imposes no such obligations on the Commission and gives it no powers in relation to consumer disputes.

The Act gives the Commission no powers, for example, like the powers that the Lord Chancellor has given our counterpart regulator in England and Wales to ‘make and enforce decisions that give consumers redress’. Nor does it give us the powers the New South Wales *Legal Profession Act 2004* gives our counterpart Commission there to require respondent practitioners to enter into mediation<sup>17</sup> and, in certain circumstances, subject to a right of review, to caution or reprimand them or to require them to pay compensation or to impose conditions on their practising certificates.<sup>18</sup> The Commission’s powers in relation to consumer disputes under our local statute are limited to ‘suggesting’ to the parties that they enter into a process of mediation.<sup>19</sup>

It follows, given that one of the main purposes of the system for dealing with complaints and discipline is to provide a means of redress for complaints, that the Act envisages unsatisfactory professional conduct extending to include minor incompetence and neglect and poor standards of service and other conduct that gives consumers less than a good or a fair deal – the very

---

<sup>14</sup> section 440 (previously section 262)

<sup>15</sup> section 436 (previously section 266)

<sup>16</sup> section 443 (previously section 269)

<sup>17</sup> *Legal Profession Act 2004* (New South Wales), section 517

<sup>18</sup> *Legal Profession Act 2004* (New South Wales), section 540

<sup>19</sup> *Legal Profession Act 2007*, section 441 (previously section 263 of the *Legal Profession Act 2004*)

sorts of conduct which is subject to complaint, in the main. The alternative is stark – that the Commission has no powers to ensure redress in relation to the majority of complaints it receives and hence that one of the main purposes of the system for dealing with complaints and discipline is defeated.

In summary, I think the concept of unsatisfactory professional extends to include minor incompetence and neglect and poor standards of service and other conduct that most people, practitioners included, would regard as unsatisfactory in any ordinary sense of the word but which might not previously have been seen as having potential disciplinary consequences, much less as warranting a disciplinary response.

### **The Commission's approach**

Of course it seems harsh, and it is, and it is also highly inefficient to put practitioners who might be 'guilty' of minor misconduct of these kinds through the same disciplinary process as practitioners who might be guilty of dishonesty and other wilful or reckless ethical violations - and that is exactly why the ABA in the US and the Lord Chancellor in England and Wales have recommended ways to deal with them separately to the disciplinary process.

It needs to be said, however, that the strategy recommended by the ABA in the US doesn't separate minor matters out from the disciplinary process so much as divert them pending satisfactory negotiations that secure appropriate redress for dissatisfied consumers, and that the system the Lord Chancellor has brought about in England and Wales separates minor matters out only by giving the regulator significant powers to make and enforce decisions that give consumers redress, including decisions to require practitioners to make payments to consumers for 'poor service, loss or distress' of up to £20,000.

There is a way through, however, within our local statutory framework. It's a way that allows our system for dealing with complaints and discipline to respond to minor incompetence and neglect and to provide redress to complainants who got less than a good or a fair deal but which doesn't needlessly waste time and resources and doesn't

needlessly shame respondent practitioners by putting them through a disciplinary process better suited to more serious transgressions.

The Act gives the Commission only two options after it has investigated a complaint - either to initiate disciplinary proceedings or to dismiss the complaint - but more to the point, it gives the Commission two grounds on which to dismiss a complaint.<sup>20</sup> One is that there is no reasonable likelihood a disciplinary body will make a finding of unsatisfactory professional conduct or professional misconduct, and that might be for evidentiary reasons or, more relevantly in this context, potentially for definitional reasons - because the term 'unsatisfactory professional conduct' doesn't stretch to the conduct at issue. The more minor the conduct, the more likely the latter.

The other ground to dismiss a complaint after investigation is that there is no public interest in initiating disciplinary proceedings - and here is our opportunity. That is because it is hard to see how it could possibly be in the public interest to prosecute practitioners for alleged unsatisfactory professional conduct at this minor end of the spectrum provided only they've apologised to the complainant or re-done the work or waived some or all of their fee or fixed their office systems or undertaken some training and the like - that is to say, done what they reasonably can to make good their mistake or to prevent or reduce the risk of it happening again, or of course both.

So this is our approach: when the facts aren't in dispute and appear to give complainants legitimate grounds to feel aggrieved, we invite respondent practitioners to make any submissions they might care to make about the definitional issue, given their particular circumstances, but more fundamentally we invite them to deal with the issues of substance. We invite them to make submissions that seek to persuade us that no public interest would be served by initiating disciplinary proceedings because, whatever the definitional issue, they have resolved the problem as best they can or fixed whatever it was that went wrong so it doesn't happen again.

---

<sup>20</sup> sections 447 and 448 (previously sections 273 and 274)

If we're persuaded, that's the end of it: complaint dismissed. If not, our options remain open, and we will look again at whether to commence disciplinary proceedings.

I note in this regard that we finalised 405 (or just more than 2 in 3) of the 600 conduct complaints we finalised in 2006-07 on the ground that the evidence after investigation failed to establish any reasonable likelihood of a finding by a disciplinary body of unsatisfactory professional conduct or professional misconduct, and that we finalised 114 (or almost of 1 in 5) of them on public interest grounds of precisely the kind I've been describing - and that we initiated disciplinary proceedings in relation to only 42 (or about 1 in 14) of them.

Of course it would be neater if the Act more clearly mandated this approach but it's working nonetheless, and it seems to us to be delivering outcomes that provide some redress to consumers who've had less than a good or a fair deal from their lawyers, and at the same time to be fair to the lawyers.

Note: This paper has since been published in the October issue of *Proctor* (2007) – John Briton (2007) Unsatisfactory Professional Conduct – should it be handled differently? *Proctor* Vol.27 No.9 p.37. It is available on the LSC website at <http://www.lsc.qld.gov.au/speeches.htm>

## Second Panel Presentation

### *Some Commentary on the Scenarios*

Associate Professor Kay Lauchland

#### **General Notes:**

These scenarios raise some general concerns about the legislative definitions of misconduct. First, the definition of “unsatisfactory professional conduct” closely equates it to negligence. One might not agree that every careless act, although appropriately giving grounds for a claim where damage results, should also provoke a discipline proceeding. Second, there is a narrow focus on diligence and competence which, though pertinent, is inadequate to deal with the range of activities which might amount to misconduct. Third, we are left with the perpetual difficulty of distinguishing between discourteous, rude, insensitive and generally unprofessional behaviour and misconduct.

#### **First Scenario:**

Questions 1 and 2: When does the behaviour become unsatisfactory professional conduct?

Letter 1. One wonders if there was adequate investigation and evidence in hand to give proper advice to the client to justify taking instructions for the letter.

Letter 2. The threat of criminal proceedings may well be inappropriate and amount to unsatisfactory professional conduct.

Letter 3. This letter is unprofessional in its emotive language, strident tone and further threats. Do the language and tone – which are in my view clearly unprofessional – amount to unsatisfactory professional conduct?

Letter 4. This letter contains irrelevant, hyperbolic material and effectively curses the receiver. Surely this is misconduct.

In my view, letters 3 and 4 are misconduct, but at a low level. This behaviour should be condemned and corrected – as should poor grammar and spelling.

Question 3: Does it make a difference if the letters are sent to a lawyer? No.

Question 4: No.

Questions 5: Reporting the behaviour – if it is genuinely believed to be criminal, and advising the client of this option are acceptable courses of conduct. But this is acceptable in lieu of writing threatening letters and does not justify the threats and the inappropriate style and tone of the later letters.

Question 6: No.

Questions 7: The last letter is outrageous, but as a one-off would not rise to the substantial level of incompetence or lack of diligence required to fall within the definition of professional misconduct. Indeed the series of letters indicates diligence and enthusiasm. The letters flowing in this one matter do not in my view amount to consistent incompetence or lack of diligence required to fall within the definition of professional misconduct. Use of similar correspondence in other files may justify a finding of professional misconduct.

**Second Scenario:**

The lawyer's behaviour in failing to communicate anything with the client over 27 days and not acting until the last minute smacks of incompetence and lack of diligence. This is unsatisfactory behaviour. It suggests poor time management skills and poor client communication skills.

A. Inaccessible back-up system.

Such a system is inadequate. In the period of 27 days, the lawyer should have been able to get assistance to review the files and recreate back-up calendars.

This is a poor excuse for unsatisfactory behaviour. The lawyer failed to meet his/her non-delegable duty to perform the legal work competently and diligently.

B. Mr Blue is sick.

Again, this demonstrates a systemic failure. This troubles me more, because a high percentage of lawyers in Queensland work in small practices or as sole practitioners. This problem is not so easily prevented by systemic change.

It strikes me that a better approach to this issue would be to allow more discretion in extending legislative time limits.

Nonetheless, in this case, over 27-28 days someone (the secretary/receptionist?) should have at least contacted the clients to advise of the delay, so that the clients might instruct someone else. There should at least be a firm policy to contact the Law Society and seek help and advice.

Why is Blue waiting until the last week to do the job?

C. Seeking payment from the client.

It would be significant if the reminders to pay also alerted the client to the crucial time limit, the consequences of missing it and the time the lawyer would need in order to prepare the document after payment was received.

D. Black on holidays.

Did Blue advise the client of the time limit at their first meeting, and indicate that there would be need to further communication with Black before the document could be lodged? The obligation rests on the legal practitioner to be pro-active in providing adequate advice.

E. Wrong contact number.

Whose fault was this? This highlights the need for precision and careful recording. Did Blue also get an address or other means of contact? Did he check the phone book?

This scenario reminds us that our clients need to be pro-active in their own interests too. However, we need to alert them to time-lines in the first meeting. The client should be told when s/he might expect to hear from us – so that if we do not make contact, the client can reasonably be expected to follow up.

A lawyer in such a case can simply and quickly explain to the client:

1. The deadline and its significance;
2. The need for Blue to sign the document before lodging; and
3. The time-line for steps to be taken.

E. Missing the deadline causes worse consequences for the client because the time limit is inflexible. This may be relevant to the penalties applied to the practitioner but does not alter the nature of his /her behaviour.

## APPENDIX 1.

## Program



### *Lawyers, Clients and the Business of Law*

A Symposium Series presented by the Socio-Legal Research Centre and the Legal Services Commission

Please join us for the 3rd symposium of the series:-

## Unsatisfactory Professional Conduct

### Program

11.30 – 12     **Registration**

12 -12.10     **Welcome**  
Professor Jeff Giddings, Socio-Legal Research Centre (Moderator)

12:10 –12.30 **Presentations by panel members**

**Panel members**

John Briton

Associate Professor Kay Lauchland

Legal Services Commission

Bond University

12.30 -1.15     **Group discussions**

1.15 -2         **Report back and general discussion on topics**

2pm             **Close**

**Lunch:**         A working lunch will be provided

**Venue:**         All Saints Conference Centre, 330 Ann St. Expand map:-

