

# UNSATISFACTORY PROFESSIONAL CONDUCT<sup>i</sup>

## John Briton - Legal Services Commissioner

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>ii</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.

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>iii</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 more commonly understood, much less ethical violations. Everyday complaints of these kinds are at least as damaging to the reputation of the profession by reason of their weight of numbers alone as the very much less frequent but more serious infractions that find their way into the newspapers from time to time.

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 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**

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>iv</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 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.

Some twenty states have implemented diversion programs subsequent to the report, as I understand it, and deal with minor misconduct (typically meaning conduct that would not result in strike off or suspension) outside their traditional disciplinary systems.<sup>v</sup>

#### **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>vi</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 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.

These reforms have now been implemented. <sup>vii</sup>

### **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’ <sup>viii</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.’

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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.

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 ethical and other comparatively serious shortcomings but to exclude relatively minor matters - poor standards of service and other 'minor incompetence, minor neglect or other minor misconduct' (as the Americans put it) or (as the Lord Chancellor puts it in the UK) conduct 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 conduct.

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>x</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>xi</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 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 the practitioner engaging in 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>xii</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 (let's

call them ‘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 Commissioner considers it does not involve an issue of unsatisfactory professional conduct or professional misconduct.’<sup>xiii</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>xiv</sup> and gives it significant powers of investigation<sup>xv</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>xvi</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>xvii</sup> The Commission’s powers in relation to consumer disputes under our local statute are limited simply to ‘suggesting’ to the parties that they enter into a process of mediation.<sup>xviii</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 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.

So, in summary, we think there is a powerful argument and in fact that the Act obliges us to interpret the concept of unsatisfactory professional conduct broadly to include minor incompetence and neglect and delay and poor standards of service 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.

I can't help but note that the same argument doesn't necessarily apply in New South Wales, for example, where our counterpart Commission has more and better powers to deal with consumer disputes - and hence that the concept of unsatisfactory professional conduct will very likely be interpreted and applied differentially across the border, the uniform national definition notwithstanding.

### **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>xix</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.

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.<sup>xx</sup>

## **Conclusion**

The Commission's approach gives us leverage we wouldn't otherwise have to give consumers a means of redress when comparatively minor things have gone wrong in their dealings with lawyers and more generally to improve standards of legal service delivery and in that way to promote and protect the reputation of the profession.

It would be neater however if the Act more clearly mandated our approach and it seems to me that the best way to achieve that goal - and I say this not to lobby for change but simply to stimulate debate - would be to for the Commission to have powers to require the parties to these sorts of complaints to negotiate a fair outcome and failing that to impose an appropriate outcome.

I've hinted already at some ways that might be achieved - by giving the Commission powers of the kind that its counterpart Commission has in New South Wales, or powers of the kind that its counterpart regulator has in the UK - and perhaps there is another option: simply to give the Commission powers of the kind that the Legal Practice Committee now has to order practitioners 'to do or refrain from doing something in connection with the practitioner engaging in legal practice' or to engage in practice only 'in a stated way' or 'subject to stated conditions' and the like.

That would allow us to interpret the concept of unsatisfactory professional conduct more narrowly and correspondingly to broaden the concept of consumer dispute - and in that way to deal with minor matters separately from matters that warrant a traditional discipline application and without the naming and shaming that inevitably attaches to it.

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**References:**

- <sup>i</sup> This is an edited version of a talk I gave at a symposium on the topic that the Commission co-hosted with the Griffith University Law School on 19 July 2007
- <sup>ii</sup> The leading case is *Myers v Elman* [1940] AC 282
- <sup>iii</sup> *Baker v Legal Services Commissioner* [2006] QCA 145
- <sup>iv</sup> *Lawyer Regulation for New Century* - Report of the Commission on Evaluation of Disciplinary Enforcement, American Bar Association Center for Professional Responsibility, February 1992
- <sup>v</sup> Leslie C Levin, *The Case for Less Secrecy in Lawyer Discipline*, (2007) 20 Georgetown Journal of Legal Ethics, pp.3-5, 18-19
- <sup>vi</sup> *The Future of Legal Services: Putting Consumers First*, Department for Constitutional Affairs, October 2005
- <sup>vii</sup> see <http://www.legalcomplaints.org.uk/how-we-handle-complaints/about-poor-service.page>
- <sup>viii</sup> *Legal Profession Act 2007*, section 418 (previously section 244 of the *Legal Profession Act 2004* )
- <sup>ix</sup> section 419 (previously section 245)
- <sup>x</sup> section 3 (previously section 3 of the *Legal Profession Act 2004* )
- <sup>xi</sup> section 416 (previously section 243)
- <sup>xii</sup> section 458(2)(d)-(g) (previously section 282)
- <sup>xiii</sup> section 440 (previously section 262)
- <sup>xiv</sup> section 436 (previously section 266)
- <sup>xv</sup> section 443 (previously section 269)
- <sup>xvi</sup> *Legal Profession Act 2004* (New South Wales), section 517
- <sup>xvii</sup> *Legal Profession Act 2004* (New South Wales), section 540
- <sup>xviii</sup> *Legal Profession Act 2007*, section 441 (previously section 263 of the *Legal Profession Act 2004*)
- <sup>xix</sup> sections 447 and 448 (previously sections 273 and 274)
- <sup>xx</sup> I note in this regard that we finalised 405 (about 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 (about 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 (about 1 in 14) of them.