Unsatisfactory Conduct

On 1 August 2008 a new concept entered the legal firmament - unsatisfactory conduct. Section 12 of the Lawyers and Conveyancers Act creates this entirely new (for New Zealand) concept. In general unsatisfactory conduct will be conduct which is not so egregious as to amount to misconduct, but is still deserving of being marked out as falling below the standard of conduct or behaviour that clients and the public are entitled to expect. It is a professional lapse.

A breach of the unsatisfactory conduct standard may have significant consequences for a practitioner. In particular on such a finding Standards Committees may make one or more of the orders found in s 156 of the Act. At one end of the spectrum modest orders of censure or requiring an apology may be made. However, far reaching orders such as compensation (up to $25 000), a fine (up to $15 000), remission of fees, and orders relating to the management and/or inspection of his or her practice may be made. These orders are made on a summary procedure in which there is no right to be heard in person (s 153). It is perhaps of note that while a Standards Committee may not make a finding of misconduct, the powers to make significant orders far exceeds that of their predecessors the District Disciplinary Tribunals.

There are a number of different ways in which a practitioner may be found to fall foul of the unsatisfactory conduct standard. They will be considered in turn.

Competence

Probably the most significant change wrought by the concept of unsatisfactory conduct is the fact that a lack of competence is now considered a professional breach. Section 12 provides that unsatisfactory conduct will exist where a practitioner is guilty of "conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer". It is of note that the Act looks to the standards expected of *a member of the public* and what they are entitled to expect from a *reasonably competent lawyer*. This is an articulation of the well established "reasonable consumer test" which focuses not on the views of professional people (i.e. a peer based standard) as to proper standards, but the reasonable expectations of ordinary people. While in practice the two will frequently converge, the shift in focus is an important signal.

Standards Committees are empowered by s 156 and their own rules to make compensatory orders where "it appears to the Standards Committee that any person has suffered loss by reason of any act or omission". This appears therefore that the appropriate standard will mirror the contract / tort duty of care (which is itself found in consumer legislation, see for example s 28 of the Consumer Guarantees Act 1993). The upshot of this is that orders may be made by the professional body for wrongs which were not previously considered professional breaches. Oversights, slips, and other errors which fall foul of the "reasonably competent lawyer" test will amount to unsatisfactory conduct.

Conduct unbecoming and unprofessional conduct

The Act proceeds to state that unsatisfactory conduct will exist where the lawyer engages in conduct "that would be regarded by lawyers of good standing as being unacceptable, including conduct unbecoming a lawyer or an incorporated law firm or unprofessional conduct". The term "conduct unbecoming" is one that is familiar from ss 106 and 112 of the Law Practitioners Act 1982. However, there is an important distinction: whereas conduct unbecoming has usually been found where the conduct was engaged in outside of legal

practice, unsatisfactory conduct on this basis will only exist where the conduct occurs at a time the practitioner is "providing regulated services". Having noted that, the inclusion of conduct unbecoming within the definition of unsatisfactory conduct accords with the widespread understanding that it has generally involved conduct which is less egregious that misconduct.

Conduct unbecoming has been given a somewhat clearer meaning in the context of medical professionals. In particular it has generally been seen as part of a graduated scale of possible offending: *B v Medical Council* [2005] 3 NZLR 810n per Elias J at p 810 and also *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 at paras 57 to 74 (although it should be noted that in the later case some doubt was cast on the utility of such graduation).

Some observations flow from those cases. Firstly conduct unbecoming is more than a mere error or negligence. In that sense it might be thought to be more serious than a finding of unsatisfactory conduct for a breach of the competence standard discussed above, though there may be considerable overlap. Serious negligence may, however, amount to conduct unbecoming. Further, the standard is a professional one and unlike the competence / consumer standard the test will be whether the conduct is acceptable according to the standards of "competent, ethical, and responsible practitioners" (per Elias J in *B v Medical Council* at p 811). See also *Cullen v Preliminary Proceedings Committee* [2005] 3 NZLR 801. This is echoed in s 12(b) itself, which introduces conduct unbecoming as "conduct that would be regarded by lawyers of good standing as being unacceptable".

While unsatisfactory conduct on the basis of conduct unbecoming is likely to be less serious that misconduct, it appears from the cases that an element of wrongdoing will need to exist. That is to say that a finding of conduct unbecoming has some moral colour, though clearly not of the same degree that serious misconduct might have. It was noted in *Re M* (New Zealand Law Practitioners Disciplinary Tribunal, 19 May 1986) that the profession has traditionally not responded with professional sanctions to merely technical breaches of obligations. While there is clearly now a statutory requirement to respond in to innocent breaches, it is probably appropriate to reserve findings of conduct unbecoming for actions which can properly be set apart as an unacceptable professional breach. See further *Waikato Bay of Plenty District Law Society v Baledrokadroka* [2002] NZAR 197.

Section 12 also states that unsatisfactory conduct will exist where a lawyer engages in "unprofessional conduct". Unprofessional conduct is not a term familiar to the regulation of the legal profession and appears on our statute book only in the Lawyers and Conveyancers Act. Clearly it is not simply another way of expressing the term "misconduct" (which is how it is sometimes used in discussions of discipline in the medical profession which should therefore be avoided). It may be that the words add little other than colour to the concept of unsatisfactory conduct as a whole and indicate simply that a failure of professional standards adhered to by lawyers of good standing will be unprofessional and therefore unsatisfactory conduct. See further D Searles 'Professional Misconduct – Unprofessional Conduct: is there a Difference?' (1992) 23 QLSJ 239; *Clough v Qld Law Society Inc* [2000] QCA 254.

Contravention of the Act rules or practice restrictions

One of the least complex provisions in respect of unsatisfactory conduct is found in s 12(c). That section provides that unsatisfactory conduct means conduct consisting of "a contravention of this Act, or of any regulations or practice rules made under this Act … or of any other Act relating to the provision of regulated services". This means that any

breach of the (many) rules and regulations or statutory provisions touching on the provision of legal services will amount to unsatisfactory conduct.

The provision excludes a breach which amounts to misconduct under s 7. Importantly s 7 provides that where a breach of rules is "wilful or reckless" it will amount to misconduct. The upshot of this is that a breach of rules which is merely negligent will amount to unsatisfactory conduct. There is therefore no mental element required; rather the matter is effectively one of strict liability. It is important to note that a breach of the rules will be unsatisfactory regardless of significance. While there is a power to dismiss a complaint which is trivial (or frivolous, vexatious or not made in good faith) under s 137, the starting place must be that any breach of rules is a matter for concern.

The section continues to state that a failure to comply with a condition or restriction to which a practising certificate held by the lawyer is subject will also be unsatisfactory conduct. This is also effectively a strict liability offence. Where the failure is wilful or it will amount to misconduct under s 7.

The nature of a finding of unsatisfactory conduct

The relationship between a finding of misconduct and unsatisfactory conduct raises an important point of principle: namely the question of the nature of a finding of unsatisfactory conduct. Unsatisfactory conduct is clearly a professional standard. Professional consequences flow from a breach of that standard. However, it is fundamentally different from a finding of misconduct.

A finding of misconduct has connotations a serious failure of professional standards. While misconduct may be found where there was no intention to engage in wrongdoing, the conduct in question must be a serious failure in respect of professional obligations. In the recent words of the High Court "a range of conduct may amount to professional misconduct, from actual dishonesty through to serious negligence of a type that evidences an indifference to and an abuse of the privileges which accompany registration as a legal practitioner" (*Complaints Committee No 1 of the Auckland District Law Society v C* 29 April 2008 High Court - Auckland Randerson J, Williams J, Winkelmann J CIV-2007-404-4646 at para 33).

In contrast, the Act makes it quite clear that a finding of unsatisfactory conduct may be made on the basis of mere negligence of a practitioner (s 12(a)) or an entirely unintentional (and minor) contravention of one of the new rules or regulations (s 12(c)). It is also of note that the procedure by which a practitioner might be found guilty of unsatisfactory conduct is fundamentally different from that in relation to misconduct. Questions of unsatisfactory conduct may be determined by the summary procedure of the Standards Committees. In contrast, misconduct may only be found by the Disciplinary Tribunal the procedures of which are largely indistinguishable from those of a court.

It is also perhaps useful to look at the term itself. To mark out conduct as unsatisfactory is hardly damning condemnation. To state the obvious, lawyers' conduct can either be satisfactory or not. It is suggested that the choice of the only faintly damning description of "unsatisfactory" indicates that a finding of unsatisfactory conduct is not intended to be an indicator of any kind of egregious conduct, but is rather an indication that the practitioner in question "must try harder". There will be cases where a finding of unsatisfactory conduct is made on the basis that a breach has occurred, but no penalty beyond a censure is made (along with compensatory orders if appropriate). It is important to note that such findings may have no reflection on the professionalism of the practitioner overall.

Any failure by a lawyer whether of competence or professionalism is less than satisfactory. Where the failure is an isolated oversight, slip, or negligence the regulatory response is likely to be similarly modest with the focus being on redress or compensation for the client in the event that loss has been caused. A disciplinary response of any magnitude is unlikely.

However the spectrum of seriousness of unsatisfactory conduct is very broad indeed. The Act provides Standards Committees with considerable disciplinary powers which may be exercised only on a finding of unsatisfactory conduct. Therefore if a failure is serious or repeated (though not warranting the laying of charges of misconduct before the Tribunal) a significant disciplinary response may be appropriate. The conclusion therefore is that the term “unsatisfactory conduct” covers a range of conduct from the mere slip or oversight which is less than satisfactory to conduct on the border of misconduct which is deserving of serious sanction.

Probably the most significant sanction that may be imposed for unsatisfactory conduct is a fine of up to $15 000. It is a basic principle when imposing punitive sanctions that where the offending is near to the most serious case and there is an absence of special circumstances the penalty at or near to that maximum should be imposed. In light of this a finding of unsatisfactory conduct may have very serious financial consequences.

It is recognised that caution must be exercised in drawing analogies with sentencing. Professional regulation and discipline has significantly different objectives than the criminal law. In particular the prime focus of professional discipline is on the protection of the public from practitioners who are incompetent, dishonest, or otherwise unfit to practice law. It is for this reason alone that orders striking off or suspending practitioners are made. It will be rare for this protective purpose to be effectively served by punitive orders which have a significant element of retribution or denunciation. That is the preserve of the criminal law. It may, however, be that the imposition of penalties (such as a fine) will act as a deterrent both the practitioner involved and the wider profession from engaging in similar conduct in the future. Such a rationale is wholly consistent with the purposes of professional discipline (compare for example pecuniary penalties under the Commerce Act: *NZ Bus Ltd v CC* [2007] NZCA 502 at para 197 per Hammond J).

It perhaps bears noting that the other orders which may be made by Standards Committees in response to a finding of unsatisfactory conduct also serve a protective function. Thus orders that a practitioner undertake further education or take advice are clearly forward looking and aimed at improving the performance of the practitioner. Similarly an order that a lawyer make his or her practice available for inspection is intended to provide a more rigorous and pro-active check on the conduct of a practitioner than merely waiting for complaints.

Unsatisfactory conduct and costs revisions

The costs revisions framework familiar from the 1982 Act has disappeared. In its place clients are given a right to complain to a Standards Committee about a bill of costs rendered under s 132(2) of the new Act. Standards Committees may in response to such a complaint make orders under s 156 which include orders that a practitioner reduce, cancel, or refund fees. An order under s 156 may, however, only be made where the Standards Committee has determined that there has been unsatisfactory conduct (s 152(2)(b)). If unsatisfactory conduct is seen as a serious professional wrong this leaves clients in a conundrum because mere overcharging has not previously been considered a serious

professional breach. Costs revisions has (rightly) been regarded as a mere administrative review of charging practices. It was only where some outright wrongdoing existed that it became a matter of professional conduct to be brought to the attention of a disciplinary body.

However, given the nature of a finding of unsatisfactory conduct, it is clear that a bill of costs may be considered by a Standards Committee on exactly the same basis that a costs revision proceeded under the old costs revisions framework. The test is the same: is the bill of costs "fair and reasonable for the services provided having regard to the interests of both client and lawyer" and of course taking into account the recognised (and recently expanded and reframed) charging factors. The quoted words are found in r 9 of the Lawyers Conduct and Client Care Rules and track almost exactly the old r 3.01.

Where a Standards Committee finds that the bill exceeds what is appropriate it is finding that r 9 has been breached. It need not find any misconduct (indeed it cannot) but may proceed simply on the basis that the charging practice "falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer" in terms of s 12(a). If this is the only basis for a finding of unsatisfactory conduct it is likely that the only order made by the Standards Committee will be a reduction or refund of fees. At least in this regard it appears the world has not changed.

The relationship between misconduct and unsatisfactory Conduct

The discussion so far has proceeded on the basis that unsatisfactory conduct will generally be conduct which is less egregious than misconduct, though still falling foul of the standards set out in s 12 of the Act. This is, however, a generalisation. While the words of the Act support such an interpretation (for example by the fact that wilful acts are misconduct but negligent acts may be merely unsatisfactory) it may be that there is some necessary overlap between the two concepts.

One reason for this suggestion is that the definition of misconduct found in s 7 can include conduct which a severe disciplinary response would not be appropriate. There may be situations - for example where a knowing breach of the Rules of Conduct and Client Care (by definition misconduct) – which require little response beyond a censure. One example might be a breach of the courtesy rule (r 3.1). By way of comparison there will be instances where unsatisfactory conduct is a serious mattter. For example it might be that a lawyer who made an inappropriate proposition to a client is considered not guilty of misconduct, but is found to have engaged in conduct unbecoming and therefore guilty of unsatisfactory conduct. Such a wrong might properly be met by a fine or requirement to take advice. If the two wrongs were to be ranked in terms of seriousness it might reasonably be said that the latter is more serious than the former.

It is therefore suggested that it would be inappropriate to see misconduct starting where unsatisfactory conduct stopped (or vice versa). Rather the two concepts refer to distinct professional lapses. In general unsatisfactory conduct will be the less serious wrong, but not always.

A further observation is that it may be unhelpful to adhere to slavishly to existing authorities as to what amounts to misconduct. The starting place should now obviously be s 7 of the new Act. That section uses the terms "disgraceful" and "dishonourable" which are familiar from discussions in the cases of the old provisions. However, the introduction of the concept of unsatisfactory conduct has wrought a major change to the landscape of

professional discipline and it would be wrong to delineate the boundaries of misconduct without taking into account the impact of this newcomer.

For example it needs to be recognised that a unsatisfactory conduct may be made in respect of "conduct unbecoming" – a finding that previously would have been reserved to a disciplinary tribunal. It may be that the old formulations remain workable, however it is suggested that the high threshold to make finding of misconduct under the "disgraceful" or "dishonourable" heads needs to be kept in mind. While intention is not required for a finding of misconduct it will be necessary to establish conduct indicating "indifference and an abuse of the privileges" relating to practice as a lawyer (*Pillai v Messiter [No 2]* (1989) 16 NSWLR 197 per Kirby P. See also *Complaints Committee No 1 of the Auckland District Law Society v C* 29 April 2008 High Court - Auckland Randerson J, Williams J, Winkelmann J CIV-2007-404-4646 at para 33).

It might also be noted that there is now only one disciplinary tribunal able to make findings of misconduct. This is a radical change from the position under the 1982 Act under which any of the district disciplinary tribunals could make orders on the basis of a finding of misconduct. The function of the district tribunals as a low-level disciplinary body has now been assumed by the Standards Committees, however those committees may only make orders on the basis of a finding of unsatisfactory conduct. Any matters of misconduct must be the subject of charges before the New Zealand Tribunal.

If every matter that would previously have been considered by a district tribunal is now charged before the New Zealand Tribunal, that tribunal will have an enormous workload. Clearly matters previously dealt with by a district tribunal as conduct unbecoming (s 106(3)(b)) will now properly be dealt with as unsatisfactory conduct under s 12. However it may also be that some matters that previously were charged as misconduct might properly be dealt with as unsatisfactory conduct at a Standards Committee level.

A final matter to consider is the conundrum faced by a Standards Committee which reaches the view that the conduct complained of is properly considered to be misconduct but the matter (while not trivial) is not deserving of prosecution before the New Zealand Tribunal. There has always been a discretion as to whether or not to charge a practitioner with misconduct. Under the 1982 Act a charge would be laid only where it was considered that "the case is of sufficient gravity to warrant the making of a charge" (s 101(2)). That provision has not found its way into the 2006 Act. However, s 152 (in respect of Standards Committees) and s 211 uses discretionary language in stating that the committee "may" make certain determinations, including a determination to lay charges. This is consistent with a longstanding convention of prosecutorial discretion.

The discussion above argues that it is inappropriate to think of unsatisfactory conduct as simply a less egregious version of misconduct. However, it may be that in some cases it will be appropriate for a Standards Committee to decline to prosecute a matter as misconduct, preferring to make orders based on a "lesser" finding of unsatisfactory conduct.

Conclusion

The Lawyers and Conveyancers Act provides extensive definitions of unsatisfactory conduct and misconduct. The introduction of unsatisfactory conduct as a professional concept radically changes the landscape of professional regulation. It would be unhelpful to see unsatisfactory conduct as simply clipping a consumer protection element on to the

existing concept of misconduct. Unsatisfactory conduct does have a consumer protection element, but is itself a separate and much broader professional standard.

The challenge for the complaints and discipline system will be to apply this standard in a robust and workable way which is both consistent with the words of the Act and its purposes, and enables the effective functioning of both the Standards Committees and Tribunal.

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