

11 ANCILLARY ISSUES FOR CONSIDERATION

11.1 The following sections of this Issues Paper consider the third substantive concern raised by the LRC in Report 99, namely the adequacy of the current definitions of unsatisfactory professional conduct and professional misconduct, as well as a number of ancillary issues, relating to the procedural requirements set out in the Act.

11.2 Unsatisfactory professional conduct and professional misconduct

11.2.1 The LRC (in Report 99) favoured retaining the current division between unsatisfactory professional conduct and professional misconduct, which reflects differing degrees of culpability in a professional disciplinary sense. The LRC also noted that, in other Australian jurisdictions, the definition of professional misconduct is similar to that in the NSW Act.

11.2.2 Section 127 of the Act provides that:

unsatisfactory professional conduct includes conduct (whether constituting and act or omission) occurring 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 [legal practitioner]¹.

11.2.3 Section 127(1) provides that professional misconduct includes:

unsatisfactory professional conduct that involves a substantial or consistent failure to reach reasonable standards of competence and diligence [and] conduct not in connection with legal practice which would justify a finding that a practitioner is not of good fame and character, or is not a fit and proper person to remain on the role of practitioners².

¹ *Legal Profession Act 1987 (NSW)* section 127.

11.2.4 The Act states that certain other acts or omissions failures will amount to professional misconduct while other conduct may amount to such conduct³, for example, where a legal practitioner fails to disclose their estimated costs to a client or if a legal practitioner breaches the Professional Conduct and Practice Rules (made by the Council of the Law Society) or the Barristers' Rules (made by the Council of the Bar Association). The Regulations to the Act may also prescribe that certain behaviour constitutes professional misconduct of unsatisfactory professional misconduct.

11.2.5 The definitions of unsatisfactory professional conduct in the Australian Capital Territory, South Australia, Tasmania and Victoria are similar to the NSW definition⁴.

11.2.6 The definition of professional misconduct in the Act should be considered in the context of the case law on the common law meaning of professional misconduct⁵. The origins of the current definition in the Act are found in *Allinson v General Council of Medical Education and Registration*⁶. Most recently in *New South Wales Bar Association v Cummins*⁷ and *New South Wales Bar Association v Somosi*⁸, the NSW Court of Appeal considered the meaning of professional misconduct under the general law. The Court affirmed the role of the professional paradigm in establishing the standard of conduct for barristers⁹. The Court commented that the words "professional misconduct" are broad and general words, that their meaning may vary from context to context and that the meaning of such words can vary from one area or discourse to another and from time to time¹⁰. The words were sufficiently

²Legal Profession Act 1987 (NSW) section 127(1).

³For a detailed list of these matters see New South Wales Law Reform Commission *Complaints Against Lawyers: An Interim Report* Report 99, April 2001 at 37.

⁴Legal Practice Act 1970 (ACT), s37; Legal Practitioners Act (SA) s5(1); Legal Profession Act 1993 (Tas) s56.

⁵For a detailed analysis of the case law on the meaning of professional misconduct see 35,00 to 35,585 in Frank Riley *New South Wales Solicitors Manual* Looseleaf Service, Butterworths 2000.

⁶[1894] 1 QB 750.

⁷*New South Wales Bar Association v Cummins* [2001] NSWCA 284 CA 40496/01 (*Cummins*).

⁸*New South Wales Bar Association v Cummins* [2001] NSWCA 285 CA 40197/01.

⁹*Cummins* at paragraph 22 per Spigelman CJ (with whom Mason P and Handley JA agreed).

¹⁰*Cummins* at paragraph 51-55.

flexible to accommodate conduct that did not occur directly in the course of professional practice¹¹. The decision in *Cummins* appears to demonstrate the ability of the general words used in the definition to accommodate novel circumstances, including past acts which reflect on the present character of a barrister or solicitor but which are not directly connected with legal practice.

11.2.7 There is little case law on the meaning of unsatisfactory professional conduct.

In *Re King*¹² the Tribunal held that unreasonable delays in dealing with pressing matters, lack of communication on behalf of the practitioner and failure to act on urgent instructions can amount to unsatisfactory professional conduct. Unsatisfactory conduct is also likely to include failure to take all reasonable care in responding to an enquiry from the Law Society¹³.

11.2.8 The approach taken in the Act of defining certain conduct to be, or to be capable of being, professional misconduct, might be criticised for being too complicated and generating uncertainty.

11.2.9 One means of overcoming this complexity would be an amendment to Part 10 to provide that any wilful or reckless breach of the obligations or duties contained in the Act will constitute professional misconduct. This approach has been taken in other jurisdictions¹⁴. However, in Report 99 the LRC rejected this approach, reasoning that the Act is a lengthy and complex piece of legislation consisting of 15 Parts and 421 sections, covering a wide range of matters.¹⁵ It would, therefore, be unreasonable for every breach to constitute misconduct¹⁶.

¹¹ *Cummins* at paragraph 56.

¹² 1998 1 LPDR 11

¹³ See *Re Roberts* [1997] 5 LPDR 9

¹⁴ In the Northern Territory, wilful or reckless contravention of the Legal Practitioners Act 1974 (NT), regulations or rules constitutes professional misconduct. In Victoria contravention of the Legal Practice Act 1996 (Vic), regulations or rules is unsatisfactory conduct and professional misconduct if done intentionally or recklessly. In Tasmania, there is no distinction between wilful or reckless, any breach of the Legal Professional Act 1993 (Tas), regulations or rules can amount to misconduct.

¹⁵ New South Wales Law Reform Commission *Complaints Against Lawyers: An Interim Report* Report 99, April 2001 at 51.

¹⁶ New South Wales Law Reform Commission *Complaints Against Lawyers: An Interim Report* Report 99, April 2001 at 52.

11.2.10 Another criticism which can be made relates to the definitions themselves, which might be considered to be too general and to offer insufficient guidance to practitioners and consumers. The *Medical Practice Act 1992 (NSW)* partially codifies behaviour expected of a medical practitioner. Sections 36 and 37 of the *Medical Practice Act* provide broad guidelines as to the behaviour which will constitute unsatisfactory professional conduct or professional misconduct. Section 36(1) states that the following matters can amount to unsatisfactory professional conduct:

- a. lack of skill;
- b. certain criminal convictions or findings;
- c. accepting particular benefits in order to gain pecuniary advantages;
- d. engaging in over-servicing; and
- e. inappropriate supervision.

11.2.11 This is not an exhaustive list of the behaviour constituting a breach of professional standards, but is intended to give guidance to what standards are expected of medical practitioners¹⁷. Further codification of the definitions of unsatisfactory professional conduct and professional misconduct in the Act could lead to greater certainty. The definitions could also assist consumers in understanding the behaviour that amounts to unsatisfactory professional conduct or professional misconduct. Further codification may give flexibility for the law to develop and include other behaviour to be determined as unsatisfactory professional conduct or professional misconduct as they arise.

11.2.12 However, codification could also stagnate the development of professional conduct standards, increase confusion and lead to a greater emphasis on individual consumer complaints, rather than the maintenance of professional standards. The LRC has commented that:

¹⁷See Division 1, Part 4 of the *Medical Practice Act 1987 (NSW)*.

The system should be ... more attuned to redressing the grievances of individual complainants, but this should not be at the expense of the general public interest in ensuring that licensed legal practitioners conduct their work with honesty diligence and competence, and that the standards of practice required of lawyers are maintained at a sufficiently high level¹⁸.

11.2.13 Other issues for consideration may be whether the current definitions of unsatisfactory professional conduct or professional misconduct should remain inclusive or whether they should exhaustively list all behaviours which attract disciplinary action under Part 10.

Questions

12. Are the current definitions of unsatisfactory professional conduct and professional misconduct adequate?

13. Should the definitions be further codified?

14. What types of behaviour would be included?

11.3 Incapacity of practitioners

11.3.1 The Act allows a Council to suspend or cancel the practising certificate of a practitioner on the ground of infirmity, to require the practitioner to be medically examined, and to hold an inquiry¹⁹. However, situations may arise where a practitioner's ability to appreciate his or her own incapacity to practise is affected by his or her circumstances, and he or she may not grasp the existence, or extent of, any impairment. In such a situation the Council may have difficulty in gathering the necessary evidence to suspend or cancel a practising certificate. A particular difficulty may arise in the case of a

¹⁸ New South Wales Law Reform Commission *Scrutiny of the Legal Profession Complaints Against Lawyers* Report 70, February 1993 at 72.

¹⁹ LPA, section 38A.

practitioner stops practising because of an impairment, but who lacks the insight to make arrangements for matters to be taken over by another practitioner. In the case of solicitors, this issue can be addressed by the appointment of a manager or a receiver to the practice, but no comparable procedures exist for barristers. In order to protect the interests of consumers in such a situation, it may, for example, be useful for the Bar Association to be given authority to access all necessary files and documents in order to manage any outstanding matters for the benefit of clients.

11.3.2 It is suggested that the Act might be amended to include provision for the Councils to make applications to the Tribunal for orders concerning impaired practitioners, including orders for medical examinations and for the Council to make arrangements as to the practice of a solicitor or barrister. The Councils could also be given the authority to issue practising certificates subject to certain requirements in cases where the practitioner's incapacity can be managed provided certain requirements (such as regular consultations with health professionals, taking prescribed medication) are met.

Question

15. How should the scheme deal with the incapacity of a practitioner?

11.4 Simplifying procedures and removing overlap

11.4.1 Report 99 notes that the Act is a lengthy and complex piece of legislation, covering a wide range of matters from admission to disciplinary proceedings²⁰. The High Court has commented that Part 10 of the Act is particularly difficult to navigate through and is the cause of misunderstandings in how to correctly and efficiently deal with disputes²¹.

²⁰ New South Wales Law Reform Commission *Complaints Against Lawyers: An Interim Report* Report 99, April 2001 at 52.

²¹ See the comments of Kirby J at 113 to 114 that the Act is not necessarily logical and the comments of Gleeson CJ, Gaudron and McHugh JJ at 68 to 71 and further comments from

11.4.2 The detailed procedural requirements for dealing with complaints specified in Part 10 can also hamper the efficient and effective resolution of serious complaints by the Councils and the LSC. Recent cases in which decisions of the Councils, the LSC and the Tribunal have been overruled by the Courts have largely turned on compliance with the procedural requirements set out in the Act, rather than the merits of the complaint. While the LRC's recommendations in Report 99 would simplify procedures, it is suggested that consideration should be given to the further revision of the Act, to remove unnecessary procedural requirements and reduce the scope for unmeritorious challenges to the exercise of powers by the Councils.

11.4.3 Some judicial decisions have concerned complaints that took several years to be resolved, and media commentary has been critical of the Councils for the delay in investigating complaints. It is recognised that the complaints which are dealt with by superior Courts are often the most complex and that these matters will necessarily involve a lengthy investigation. Further, the LRC recognised in Report 99 that delays in investigations are frequently generated by the failure of practitioners to co-operate by, for example, not complying with request for documents. The LRC recommended the conferral of new powers on the LSC, to enter and search the premises of practitioners, to overcome this problem²². The implementation of this recommendation would remove one impediment to the rapid investigation and resolution of complaints.

11.4.4 The Act also duplicates procedures for dealing with errant practitioners. While this paper concentrates on the procedures for dealing with complaints set out in Part 10 of the Act, it is noted that there is considerable overlap between the provisions of Part 3 of the Act and Part 10. Part 3 deals with the granting of applications for practising certificates, and empowers the Councils

Kirby J at 86 to 89 regarding inconsistencies in the drafting of Part 10 of the Act in *Barwick v Law Society of New South Wales & Ors*.

²² New South Wales Law Reform Commission *Complaints Against Lawyers: An Interim Report* Report 99, April 2001 at 81-85.

to refuse to issue or suspend the practising certificate of a legal practitioner. Following recent amendments, Part 3 also provides for the Councils to investigate the circumstances surrounding the bankruptcy of a practitioner, or a finding of guilt for certain criminal offences. These investigations are required to be conducted expeditiously, to protect the public. These investigative powers overlap with the investigative role of the Councils under Part 10. However, Part 10 does not allow for the suspension of practising certificates, or impose any limits on the amount of time which may be taken for the investigation of matters by the Councils or the LSC, although if a Council does not notify a complainant of its decision within six months the matter can be reviewed and the complaint is deemed to have been dismissed²³. It is noted that the new Part 3 powers are generally invoked following a notification of an event made by the practitioner, while Part 10 is concerned with complaints involving numerous parties, for this reason the procedure in Part 3 may not lend itself to complaints handling processes. Nevertheless, the result of this inconsistency is that practitioners may be treated differently for different categories of misconduct, even though this conduct might be considered to be equally serious.

11.4.5 Other provisions of the Act also confer differing powers on the Councils and the LSC. The Law Society Council has extensive powers to enter and search the premises of a solicitor in relation to suspected breaches of trust account rules, but not in relation to complaints generally.²⁴ The Bar Association has no corresponding power, presumably because barristers do not hold trust money. Under recent amendments to permit solicitors to be employed by companies incorporated under the *Corporations Act 2001 (Cth)*, the Legal Services Commissioner has a broad power to audit incorporated legal practices, but this power does not apply to partnerships or other business structures used by solicitors, or to barristers.²⁵

²³ LPA, section 158(4)

²⁴ See *Legal Profession Act 1987 (NSW)*.

²⁵ See *Legal Profession Amendment (Incorporated Legal Practices) Act 2000 (NSW)*.

11.4.6 It is suggested that these powers should be rationalised to ensure that the powers available to the Councils and the LSC do not depend on the category of suspected misconduct, or the business structure of the practitioner.

11.4.7 A number of other changes might also be considered to improve efficiency and to protect the public. These changes might include making clear provision for the Councils, the LSC, or the Tribunal to suspend the right to practise of practitioners who are the subject of serious, substantiated complaints. The Tribunal might also be given a broad power to relieve a Council or the LSC from the need to comply with procedural requirements set down in the Act, provided that it could be shown that the practitioner had suffered no detriment from a failure to comply with the procedural requirements or that it was in the public interest to do so.

11.4.8 In addition, it is suggested that the public interest in protecting the community from incompetent or dishonest practitioners could be served by the introduction of time frames for all parties, including complainants, in the complaints and disciplinary process. The Act could require that parties are to respond to requests for information and documentation to assist the resolution of the complaint as expeditiously as possible. The LSC would be empowered to extend the time frames (or, in the case of an investigation carried out by the LSC, the Tribunal) having regard to matters such as the nature and the complexity of the investigation.

Questions

16. Should the Act be revised to simplify the procedural requirements for conducting investigations?

17. Should a broad discretion be conferred on the Tribunal to dispense with the need to comply with procedural requirements, in circumstances where the interests of the practitioner, LSC, Council or complainant are not compromised?

- 18. Should the LSC, Councils and/or Tribunal have the power to suspend the practising certificates of legal practitioners who are subject to complaints until the matter is resolved? If so, at what point in the disciplinary process should the suspension take place?**
- 19. Should the Councils and/or the LSC have a broad power to audit legal practices, modelled on the power of the LSC to audit incorporated legal practices?**
- 20. Should the Councils, the Commissioner and or/the Tribunal be required to conduct investigations and dispose of matters within a fixed time period?**