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CONFERENCE OF REGULATORY OFFICERS

Regulation: Dealing with BIG issues

23 - 25 OCTOBER 2023 | HOTEL GRAND CHANCELLOR HOBART | TASMANIA

Concepts of ‘Misconduct’

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“It has not generally been useful or necessary to distinguish the terminology of ‘professional misconduct’ from other phrases such as a ‘fit and proper person’, ‘good fame and character’, ‘unprofessional conduct’, ‘unsatisfactory professional conduct’ etc. Statutory formulations differ from one jurisdiction to another. Some of the terminology, originally based on statute, has been adopted in cases decided under the inherent jurisdiction. In the exercise of this jurisdiction, it is not appropriate that the Court should indulge in the splitting of fine hairs on terminology.” (*New South Wales Bar Association v Cummins* (2001) 52 NSWLR 279 at [50] per Spigelman CJ)

The *Allinson* case: “infamous conduct in any professional respect”

“In this our nineteenth century of boasted civilization the drug doctors are not so successful in the cure of disease as were the ancients nearly 2000 years ago. Then the healers relied mostly on diet and baths, not having found out the poisonous drugs now employed. A patient is now fed up with useless and disease-producing animal broths, meat-extracts, or so-called beef tea, which contains most of the refuse which the kidneys would have thrown out if the animal had lived. The patient is usually dosed with poisonous drugs which upset his stomach, derange the other organs, greatly lessen his chance of recovery, and lengthen the duration of his illness.”

The *Allinson* formulation

"If it is shewn that a medical man, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency, then it is open to the General Medical Council to say that he has been guilty of 'infamous conduct in a professional respect." (*Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750 at 763 per Lopes LJ)

A shift?

"There is, in New South Wales, no category of professional misconduct constituted by conduct that would reasonably be regarded (by professional peers) as 'disgraceful or dishonourable'. That is not to say that the *Allinson* formulation is irrelevant; as can be seen from the cases discussed above, it has been treated as a useful test in the determination of the fitness of a legal practitioner to remain on the roll. It does not, however … create or constitute a category of professional misconduct independent of, and different from, that class of conduct contemplated as rendering the legal practitioner 'not a fit and proper person' to remain on the roll of legal practitioners." (*Council of the New South Wales Bar Association v EFA (a pseudonym)* (2021) 106 NSWLR 383 at [156], [157])

Recall from earlier …

"It has not generally been useful or necessary to distinguish the terminology of 'professional misconduct' from other phrases such as a 'fit and proper person', 'good fame and character', 'unprofessional conduct', 'unsatisfactory professional conduct' etc. Statutory formulations differ from one jurisdiction to another. Some of the terminology, originally based on statute, has been adopted in cases decided under the inherent jurisdiction. In the exercise of this jurisdiction, it is not appropriate that the Court should indulge in the splitting of fine hairs on terminology." (*New South Wales Bar Association v Cummins* (2001) 52 NSWLR 279 at [50] per Spigelman CJ)

Translation to ‘personal’ misconduct?

“Personal misconduct, as distinct from professional misconduct, may no doubt be a ground for disbarring, because it may show that the person guilty of it is not a fit and proper person to practise as a barrister: see, eg *Re Davis* (1947) 75 CLR 409. But the whole approach of a court to a case of personal misconduct must surely be very different from its approach to a case of professional misconduct. Generally speaking, the latter must have a much more direct bearing on the question of a man’s fitness to practise than the former.” (*Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279 at 290 per Fullagar J)

Translation to ‘personal’ misconduct?

“It is true that the conduct involved a form of breach of trust, being the trust reposed in the appellant by the mother of the children (who later forgave, and married, him) and the children themselves. However, the nature of the trust, and the circumstances of the breach, were so remote from anything to do with professional practice that the characterisation of the appellant’s personal misconduct as professional misconduct was erroneous.” (*A Solicitor v Council of the Law Society of New South Wales* (2004) 216 CLR 253 at [34])

Translation to ‘personal’ misconduct?

“… conduct [unconnected with professional practice] has always been capable of founding an order for removal, because it may manifest unfitness and incompatibility with the requisite personal qualities for membership of the profession, and may do so even in the absence of a criminal conviction. Thus a finding of ‘professional misconduct’ — let alone a formal declaration to that effect — is not a necessary precondition of an order for removal. Nor is a declaration that the practitioner is not of good fame and character a necessary precondition of an order for removal, although a finding to that effect might well warrant such an order. Moreover, as conclusion of unfitness is inherent in the making of the order, so again a declaration to that effect is unnecessary surplusage.” (*Council of the Law Society of New South Wales v Parente* [2019] NSWCA 33 at [45] per Brereton JA)

Statutory ‘misconduct’ terminology

- NT 1982 includes ‘neglect or undue delay’
- Qld 1938: ‘malpractice, professional misconduct, or unprofessional conduct or practice’
- SA 1981 ‘unprofessional conduct’ vs (in 1998) ‘unsatisfactory conduct’
- Tas 1993 ‘professional misconduct’ vs ‘unprofessional conduct’
- Vic 1978 inclusive list of ‘misconduct in a professional capacity’; 1996 ‘misconduct’ vs ‘unsatisfactory conduct’
- WA 1893 ‘unprofessional conduct’; 2003 also ‘unsatisfactory conduct’

Modern ‘unsatisfactory professional conduct’

- includes ‘… conduct of a lawyer 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 lawyer’

- meaning of ‘occurring in connection of practice of law’

- scope for operation outside of legal practice?

What is capable of being ‘unsatisfactory professional misconduct’ (or pm)

(a) conduct consisting of a contravention of this Act, the regulations or the legal profession rules;
(b) charging of excessive legal costs in connection with the practice of law;
(c) conduct in respect of 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 2001 of the Commonwealth;
(f) conduct consisting of a failure to comply with the requirements of a notice under this Act or the regulations …
(g) conduct of an Australian legal practitioner in failing to comply with an order of the Tribunal made under this Act …
(h) conduct of an Australian legal practitioner in failing to comply with a compensation order made under this Act or a corresponding law.

Statutory ‘professional misconduct’

- ‘… unsatisfactory professional conduct of an Australian legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence’

- ‘… conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring 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’

Where does this take (or leave) us?

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