The Role of the Legal Complaints Review Officer

The Legal Complaints Review Officer (LCRO) is intended to serve a number of functions which are central to the effective working of the new regulatory system which commenced with the coming into force of the Lawyers and Conveyancers Act 2006 on 1 August 2008.

Prior to that date the regulatory regime applying to lawyers under the Law Practitioners Act was concerned only with matters of discipline. The flip side of this was that questions of mere negligence or incompetence were of no concern to the professional body or disciplinary tribunals unless and until the negligence or incompetence reached a level so as to reflect on the lawyer's fitness to practice (s 112(c)). All of this has now changed.

The depth of this change can be seen by noting that it is a stated purpose of the Lawyers and Conveyancers Act "to protect the consumers of legal services" and in doing so the Act is intended to provide "a more responsive regulatory regime in relation to lawyers and conveyancers" (s 3). The fact that duties which were previously considered to be more legal than professional are now captured by the Act is further evidenced by the articulation in s. 4 of the Act of the fundamental obligations of lawyers. They include "the obligation to act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients".

As has long been the case the New Zealand Law Society (at least in respect of lawyers) is the front-line regulator. In the trenches are the Standards Committees who will hear and determine complaints in the first instance. Those committees are in some ways an amalgam of the Complaints Committees and the District Disciplinary Tribunals under the old Law Practitioners Act 1982. Those committees however have significantly increased powers. Under the Lawyers and Conveyancers Act the amount of compensation which may be ordered by these committees has increased significantly. The upper limit of a compensatory order is $25,000. The committees may also make a raft of other orders from inspection of a practice to remission of fees. The other power of the Standards Committees (previously held by Complaints Committees or their councils) is the power to prosecute a matter before the New Zealand Lawyers and Conveyancers Disciplinary Tribunal.

The LCRO sits off to one side of the disciplinary framework. Indeed if the Standards Committees discharged their functions perfectly there would be mercifully little for the LCRO to do. As the name suggests the role is one of review only. That is to say that the LCRO considers only the correctness of the actions or decisions of Standards Committees.

The Legal Complaints Review Officer might be seen as part of a wider legislative project in the Lawyers and Conveyancers Act 2006 to achieve a number of shifts in the regulation of the legal profession. Most obviously it seeks to ensure wider accountability and independent oversight of the profession and to how it disciplines and regulates its members. This is a

role that was previously discharged by the Lay Observers under s.97 of the Law Practitioners Act 1982. Probably the most significant shift from that position is the fact that the LCRO has powers that are more the reporting and recommendatory powers of the Lay Observers. Rather the LCRO may review the actions and decisions of a Standards Committee in their entirety and, if there appears to be an error or flaw, may either vary the orders made, or return it to the Standards Committee for a reconsideration.

The office is independent of the profession being appointed by the Minister of Justice. The holder of the office must not be a lawyer or conveyancer. These constraints are intended to ensure a high degree of confidence in the unbiased resolution of complaints by the profession due to the independent oversight that this brings. Also of interest, and tucked away in the third schedule to the Act, is the obligation of the Ministry of Justice to provide support for the office. The costs are paid by the profession by way of a levy channelled through a trust account held by the Ministry (ss. 217 and 218). While these latter provisions are in a large part mechanical, they signal a significant shift away from the framework in which the Law Society was seen as the appropriate residence for more or less all disciplinary and regulatory functions. The LCRO, like the Disciplinary Tribunal, is now separated from the profession to a greater degree than has ever been the case. It no longer lies with the profession to determine the amount of resources allocated to important parts of the regulatory framework.

A further effect of this new regulatory regime may be the bringing of greater uniformity to professional discipline across New Zealand. While hard facts are difficult to find, there have certainly been suggestions that there has been wide variation across the (now defunct) districts as to how complaints were managed. While there has been no suggestion that any particular districts were “soft” or “hard” on their members, the system was one that did not promote a high degree of uniformity given the effective silo-ing of lower level disciplinary matters at a district level. The LCRO will perform an important function in providing information to committees as to whether their procedures and decisions are in keeping with the majority. This function is also likely to be discharged by the Law Society at the initial level of complaints and discipline by virtue of the fact that Standards Committees are now centrally administered by the New Zealand Law Society. This differs from the situation under the 1982 Act where Complaints Committees and District Tribunals were each administered by different district law societies.

One of the unusual attributes of the LCRO and also the Standards Committees is that they serve a number of quite distinct functions. The most obvious function of the LCRO is clearly administrative/adjudicative. In reviewing the decisions of Standards Committees orders of considerable significance may be made. Those orders may themselves be divided into two distinct classes. Firstly orders of a compensatory nature may be made. The most obvious example is an order that a sum of money by way of compensation be paid, although a raft of other possibilities such as orders requiring the remission of fees or the correction of an error are possible.

This reflects the consumerist shift of the legislation which looks to not only sanction lawyers for falling below accepted standards, but also to provide redress to clients.

While the disciplinary tribunals have long had the power to make compensatory orders these were relatively modest in size and (anecdotally) infrequently made. This fact, in conjunction with the historic absence of a concept of unsatisfactory conduct, meant that the focus had been on discipline rather than redress. This will change under the new framework.

The other key role of Standards Committees and the LCRO is disciplinary in nature. While the general thrust of professional discipline is protective rather than punitive the orders that may be made have a decidedly punitive aspect. Most obviously a censure or fine may be imposed (s 156). While there may be some punitive element in such orders it is important to note that the rationale behind such orders is primarily deterrent. The reasoning is that by imposing such sanctions both the practitioner in question and other practitioners (who know of the existence or possibility of such sanctions) will ensure that their future behaviour does not fall below the accepted standards.

A less obvious function of the Standards Committees and LCRO is the “rehabilitation” of the practitioners who are subject to discipline. The 1982 Act had provisions under which the tribunals could require a lawyer’s practice to be inspected, or that the lawyer “take advice” in respect of the management of his or her practice (ss 106 and 112). However, the latter order in particular was not often made and suffers from an obvious “horse-to-water” problem.

The New Act contains a similar ability to make orders in respect of inspection or taking advice which track more or less exactly the provisions of the old Act. One addition is the ability to require a practitioner to “undergo practical training or education” (s 156(1)(m)). Given the shift to consumer service standards and the new professional standard of unsatisfactory conduct, there may be room for an increased use of such orders, particularly if the practitioner indicates a willingness to engage with improving their skills as part of the complaint and discipline process. The appropriateness of such an order is perhaps reinforced by the recognition of competence in the Rules of Professional Conduct and Client Care. Rule 3 sets out the fact that competence is an essential professional attribute. Rule 3.9 extends this in stating that it is the responsibility of a lawyer to “undertake the necessary continuing education and professional development necessary to ensure an adequate level of knowledge and competence in his or her fields of practice” (r 3.9).

The final function that falls to both Standards Committees and the LCRO is that of prosecuting practitioners who are alleged to have been guilty of misconduct (as opposed to the lesser wrong of unsatisfactory conduct where a finding may be made and orders imposed). This prosecutorial role is quite distinct from the adjudicative functions which have been discussed

above and the existence of both an ability to dispose of lesser matters summarily and the ability to prosecute matters before the Tribunal is in some senses unusual.

Standards Committees / LCRO

The primary function of the LCRO is the review of the decisions or actions of Standards Committees. However, the relationship between the LCRO and the Standards Committees is complicated by the fact that the LCRO has the ability to return a matter to Standards Committees either for reconsideration or with a direction to prosecute the matter before the Tribunal. There are a number of tensions which arise from such powers, especially given the fact that the LCRO also has the ability to make his or her own orders, or to prosecute a matter on his or her own initiative.

There may be some cases where there has been an oversight or flaw in procedure that is easily remedied by a Standards Committee reconsidering the matter by having reference to the omitted matter, or rectifying its procedure appropriately. However, where the LCRO has conducted a substantive rehearing which suggests an inappropriate decision by the committee, sending the matter back may have the effect of prolonging the resolution of the matter. In light of the repeated references to complaints being dealt with expeditiously (for example s 120(2)(b)), there is a pragmatic reason for the LCRO to determine the matter rather than to send it back to a Standards Committee if it can reasonably be disposed of. Conversely if it can be demonstrated that the Standards Committees will be able to promptly deal with a matter referred back to them such a course will be more likely.

A further power of the LCRO on review is to either prosecute a matter before the Tribunal himself or herself, or to require a Standards Committee to do so. Where the LCRO and a Standards Committee have differed on whether or not a matter should be prosecuted before the Disciplinary Tribunal a real issue arises as to which is the proper prosecuting body. There are obvious reasons why the Society would like to prosecute. On a principled basis there is an argument that the prosecution of “one’s own” is a hallmark of professionalism. It might also be thought that the Society has greater expertise and experience. They are, it might be said, better equipped. On a pragmatic level, there are compelling incentives to minimise the cost of such prosecutions when the prosecuting authority has to levy members directly to cover those costs.

However, there is an obvious objection to requiring an unwilling Standards Committee to prosecute a practitioner who it thought did not warrant such a sanction. While there may be little merit in the suggestion that a Standards Committee which had been given such a direction would prosecute in a half-hearted manner, there is a danger that a complainant/client would feel that the prosecution lacked the necessary independence. Given the emphasis in the Act on public confidence and consumer protection (s 3) there may be good reasons for the LCRO to take such prosecutions to

ensure that the office is acting in a demonstrably independent manner. The public interest in such an approach would be especially apparent where the practitioner in question was well known or particularly senior, or where the Standards Committee in question served a relatively closely-knit part of the profession.

Dispute Resolution and Discipline

The Act sets out as a function of the LCRO the promotion of the resolution of complaints by negotiation, conciliation or mediation (s 192). Standards Committees have a similar obligation. Alongside this both entities are important parts of the disciplinary framework of the profession. There is a tension inherent in this. The fundamental tension is that the resolution of a complaint made by a client is not always consistent with the objectives of professional discipline. Most obviously there are compelling public interest reasons for prosecuting a lawyer who is accused of serious misconduct notwithstanding full restitution to wronged parties. Professional regulation serves a number of functions including the maintenance of confidence in the profession by ensuring an effective mechanism for deterring professional wrongdoing and if necessary removing practitioners who pose a risk of future harm to clients. This latter power has a protective aspect. Where a practitioner poses a risk to clients and/or the public the disciplinary machinery is expected to operate to reduce that risk to acceptable levels.

Alongside these traditional objectives of discipline there is in the Lawyers and Conveyancers Act an expectation that at the same time as effective discipline is meted out, complaints will "be processed and resolved expeditiously and, in appropriate cases, by negotiation, conciliation, or mediation" (s 120). One important observation is that neither the Standards Committees nor the LCRO is mandated to mediate or conciliate themselves. Rather the Act contains provisions by which the respective entities can postpone proceedings so that the parties might themselves explore the possibility of resolving the matter without any adjudication.

There will doubtless be times where it is obvious that a dispute concerns no issues of misconduct and the parties would be better to come to an agreement with which they can each live rather than risk the vagaries of an adjudication. When the matter is being considered by a Standards Committee it is presumptively dealt with on the papers and therefore any encouragement to the parties will likely be by correspondence (s 153). By contrast the LCRO presumptively holds hearings in person (s 206). Arguably in such a forum the opportunity for signalling to parties the usefulness of an agreed settlement will be greater. Conversely it may be that by the time that the parties meet before the LCRO matters may have progressed too far.

All discussion of the resolution of disputes must be understood against the background of the obligation (of Standards Committees and the LCRO) to ensure the hearing and determination of disciplinary charges expeditiously (s 120(3)). 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)). The 2006 Act contains no such words. However, s 152 (in respect of Standards Committees) and s 211 (in respect of the LCRO) do not use mandatory language and indicate that the committee or LCRO "may" make certain orders. This is consistent with a longstanding convention of prosecutorial discretion.

This does create something of a bind. Where a finding of unsatisfactory conduct is made orders may follow. Neither a Standards Committee nor the LCRO has jurisdiction to make findings of misconduct. This is distinct from the old district disciplinary tribunals which did make findings of misconduct (and indeed could only make orders on the basis of such a finding). It may be that where there is no wider interest in prosecuting a charge of misconduct (and issues of redress have been adequately dealt with) the committee or LCRO will make a finding of the "lesser charge" of unsatisfactory conduct.

Unsatisfactory Conduct as a Professional Standard

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 defined in the Act (in ss.12–14) and is a professional standard. Professional consequences flow from a breach of that standard. However, it is fundamentally different from the more familiar concept of misconduct.

A finding of misconduct has connotations of 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. 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. A Standards Committee may make a finding of misconduct on the basis of a summary procedure in which the parties are not given a right to be heard in person (s 153). It is only on review (before the LCRO) or where a charge of misconduct is laid (before the Disciplinary Tribunal) that a right to be heard arises.

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. 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. It should however be noted that the Act provides Standards Committees and the LCRO 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 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.

The concept of the imposition of penalties for conduct which cannot of itself be considered reprehensible is familiar. Indeed in recent years there has been increased use of "civil penalties" to deter conduct which is less than criminal (see for example s 47T the Securities Markets Act 1988 as amended by Securities Markets Amendment Act 2006). Regulatory sanctions exist for all kinds of conduct which have no moral turpitude. Obvious examples are traffic and parking infringements although our statute books and regulations are littered with offences for which liability is strict and may be committed through ignorance or mere oversight. While we complain when we are found to have fallen foul of such offences, there is little objection in principle to such an approach.

Indeed many economically minded commentators would suggest that sanctions in such cases are useful to deter "efficient breaches" of regulation and ensure resources are expended on compliance. In particular there has to be a reason why lawyers don't simply ignore costly and inconvenient rules on the basis that most breaches will not be detected. Sanctions, along with the possibility of reputational damage give greater incentives to lawyers to comply with otherwise inconvenient regulation. The introduction of the concept of unsatisfactory conduct to the wider landscape of professional regulation is a necessary part of the shift to a focus on standards of service and competence. It will be important not to view a finding of unsatisfactory conduct alone as a damning mark against a practitioner's record.

Review

A key question in terms of the office of the LCRO is what exactly is required when a review is requested. While the Act contains some limited procedural guidance there is little indication as to the nature of the review to be conducted. Section 200 provides that the review should be conducted with "as little formality and technicality, and as much expedition" as is

consistent with the Act, a proper consideration, and the rules of natural justice". Opinions as to what this means are, however, likely to differ between parties to a review.

The function is self evidently one of review and will therefore primarily involve looking at matters that have already been considered by a Standards Committee. The Act makes clear in s 203 that the LCRO may look at any aspect of the inquiry or investigation which took place before the Standards Committee. In doing so the LCRO may make requests and enquiries of the Standards Committee (s 204).

However, the powers accorded to the LCRO under the Act go well beyond those needed for a bare review. Section 204 not only empowers the LCRO to seek information from the Standards Committee but also confers a more general power to make further inquiries or investigations into any complaint or any aspect of a complaint or any aspect of the manner in which a complaint was handled or investigated. Moreover, to give effect to the ability to inquire or investigate all of the considerable powers of the Standards Committee are conferred on the LCRO (s 204(d)). In addition the Act explicitly allows the LCRO to receive new evidence and to undertake such further investigations and inquiries as he or she thinks fit (s 207).

It may however be that such broad powers will be exercised on review only rarely. A short but very important provision is found in s 205 of the Act which notes that the LCRO may decline to make any further inquiry or any further investigation into the complaint or matter when undertaking the review. While only time will tell exactly what is needed to effectively review the conduct of a Standards Committee, it may be that in many cases the material already available will suffice.

This approach is reinforced not only by the natural meaning of a "review" (which means to re-examine or look over a matter again) but also by looking at other review functions. Probably the most widely known review function is that of judicial review. It is of note that the drafters of the Lawyers and Conveyancers Act have drawn on the judicial review provisions found in the Judicature Acts, for example by including a specific power to refer matters back to the Standards Committee (in s 209) which is modelled on that found in s 4(5) of the Judicature Amendment Act 1972.

However, the LCRO's powers extend beyond simply setting aside a decision reached below. Rather the power exists to make or vary orders effectively disposing of the matter. This is a stark contrast to the judicial review function which is generally concerned only with whether the decision under review is valid or not and if it is whether it should be set aside. Such power of substantive review exists in a number of administrative contexts. Examples include Part 4 of the Films, Videos, and Publications Classification Act 1993 and Part 3 of the Legal Services Act 2000 (where there also exist powers both to determine the matter or to refer the matter back to the original decision-maker).

Most administrative reviews are, however, conducted on the papers alone. In this the LCRO differs as the parties to the review have a right to be heard in person. In this sense the procedure appears akin to an administrative appeal – such as that of an appeal to Licensing Authority against decisions of District Licensing Agencies found in the Sale of Liquor Act 1989. Under the procedures set out in s 137 of that Act the appeal is stated to be by way of rehearing and the Authority may confirm, modify, or reverse the decision under appeal. This appears very similar to the powers of the LCRO (compare also the Accident Compensation Appeal Authority).

Perhaps the most important observation is that the review function of the LCRO is unique in a number of respects. It occupies an (arguably unusual) intermediate space between the Standards Committees and the Disciplinary Tribunal. It is important because of the exclusively disciplinary focus of the Tribunal above and the need to ensure oversight of the important complaints resolution function of Standards Committee below. It is also unlike the offices it has been compared with above because it concerns professional regulation rather than being a review of a government action. The parties to the review are two citizens rather than citizen and state. It also appears to be unique in professional regulation in New Zealand (though there are similar entities in both Australia and England). Given the unique nature of the office, and the broad discretion conferred by the Act to determine procedure the manner in which reviews are conducted will undoubtedly evolve over time. Some points might however perhaps be made.

The function is in many ways appellate, especially given the fact that Standards Committees will be expected to give reasons for the decisions that they reach (s 158(2)(a)). However, the Act uses the term review rather than rehearing or appeal. As such it would seem appropriate to take notice of the decision of the Standards Committee which should stand unless it can be shown to have been in error. The review is not a de novo rehearing. As such the onus will lie on the applicant for review to show that the decision of the Standards Committee was wrong either in law, or that it rested on insupportable factual inferences, or that some discretion was exercised in an unreasonable or irrational way. However against that background, it would seem that the LCRO is expected to come to his or her own view on the merits of the matter in issue. Certainly this has been stated to be the proper approach to an appeal from a specialist tribunal: *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 (SC).

Many decisions of Standards Committees will involve the imposition of professional judgement. A core aspect of professional regulation is whether the standard of conduct of the practitioner under scrutiny fell substantially below that expected of his or her peers. Standards Committees are comprised predominantly of practitioners with some lay membership. They therefore have the benefit of both professional expertise and a number of minds being turned to such professional issues. Clearly on review it is appropriate to be cognisant of the fact that members of a Standards

Committee "may have an advantage in terms of technical expertise". Certainly it has been recognised that the Disciplinary Tribunal might have more expertise in professional matters than the High Court sitting on appeal (see *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 25). It would therefore be with some caution that the LCRO would disagree with a Standards Committee on a matter of professional propriety.

Having made that observation it is however important to note two things. One is that there is a perceptible shift to conduct being measured not against the views of professional peers but against what a member of the public is entitled to expect (see s 12 in particular). The second is that the error of many does not make it less of an error. One important, though not explicit, function of the LCRO is to ensure uniformity within the complaints framework. If one standards committee is clearly out of kilter with proper professional stands it will be important part of the role of the LCRO to point this out.

However, where the matter under consideration involves the exercise of professional judgment any applicant for review will need to show that the decision was clearly wrong. It will have to be established that the decision was made on wrong principle, or the committee did not advert to relevant material, had cognisance of irrelevant material or was unreasonable in an administrative law sense. In general it would be inappropriate on review to reconsider a matter of professional judgment unless it could first be shown the original decision was plainly wrong in this regard.

Conclusion

The office of the Legal Complaints Review Officer is a small part of a much wider change in professional regulation and discipline of the legal profession in New Zealand. It is representative of a number of shifts. First it demonstrates the shift from self-regulation to co-regulation. The LCRO acts as an independent oversight body of important aspects of the complaints and discipline regime. To a lesser extent the LCRO contributes to the shift to consumer oriented standards. By extending the complaints process to include an independent review the importance of an effective and defensible complaints process for users of legal services is emphasised.

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