



## Précis Paper

### Professional Misconduct by Health Practitioners

A thorough presentation by the Hon Frank Marks, an experienced practitioner and judge, on the key principles relating to professional misconduct by health practitioners.

#### **Discussion Includes**

- Overview of the complaints jurisdiction
- Unsatisfactory professional conduct and professional misconduct
- The complaints process
- Considerations of the Tribunal in making disciplinary orders
- What conduct constitutes misconduct?
- Novel and experimental treatments
- Procedural issues and onus of proof

## Précis Paper

### Professional Misconduct by Health Practitioners

1. In this edition of BenchTV, the Hon Frank Marks (Mediator and Arbitrator, Sydney) and Ian Benson (Solicitor, AR Conolly & Company) discuss the key issues relating to professional misconduct by health practitioners.

#### Overview of the Complaints Jurisdiction

2. Professional misconduct by health practitioners is regulated in NSW by the *Health Practitioners Regulation National Law Act 2009* (NSW). This is a national law that applies throughout Australia, however there are some differences in the NSW legislation.
3. Health practitioners are not confined to medical practitioners, but include dentists, physiotherapists, chiropractors, nurses, podiatrists, practitioners of Chinese medicine, and some other categories.
4. There are two types of misconduct by health practitioners: unsatisfactory professional conduct and professional misconduct. Unsatisfactory professional conduct is the less serious of the two, and only professional misconduct would allow the Tribunal to cancel or suspend a practitioner's registration. The legislation is aimed at the protection of the public, and ensuring that only practitioners who can practice safely are allowed to practice.
5. Complaints are made to the relevant Council for the profession, and are either dealt with by the Council or taken up by the Health Care Complaints Commission. Ultimately, the Tribunal (in NSW, the NSW Civil and Administrative Tribunal) can also examine complaints of misconduct.
6. The Tribunal is constituted of one judicial member, two professional members of the same profession as the practitioner under investigation and one lay member. Complaints are usually made by members of the public, but can also be made by other health practitioners.

#### Unsatisfactory Professional Conduct and Professional Misconduct

7. Section 139B of the *Health Practitioners Regulation National Law Act* defines unsatisfactory professional conduct of a health practitioner to include:

(a) *Conduct that demonstrates the knowledge, skill or judgment possessed, or care exercised, by the practitioner in the practice of the practitioner's profession is*

*significantly below the standard reasonably expected of a practitioner of an equivalent level of training or experience.*

*(b) A contravention by the practitioner (whether by act or omission) of a provision of this Law, or the regulations under this Law or under the NSW regulations, whether or not the practitioner has been prosecuted for or convicted of an offence in respect of the contravention*

8. This definition requires the Tribunal to ask: what is the standard reasonably expected of a practitioner with an equivalent level of training or experience? The reference point for this standard is usually provide by a medical practitioner retained by the Council to express an opinion about the conduct of the practitioner and whether it meets the required standard. The standard is dependent on the practitioner's level of experience.
9. The definition of unsatisfactory professional conduct also includes contraventions of a provision of the Law, including failure to renew registration or register as a specialist; advertising in a manner that is misleading or deceptive; offering a gift, payment or inducement to someone as a means of attracting business; or failing to maintain proper and adequate clinical records (including of attendance, diagnosis, treatment and treatment plans).
10. Section 140 of the Act has a mandatory notification requirement for health practitioners, obliging them to report notifiable conduct by other practitioners. Notifiable conduct includes practicing while affected by alcohol or drugs; engaging in sexual misconduct; or placing the public at risk of substantial harm because of a practitioner's impairment or by departing from acceptable professional standards. Where a health practitioner becomes aware of notifiable conduct, he or she must report that conduct, and failure to make a report could constitute misconduct.
11. Section 139E of the *Health Practitioners Regulation National Law Act* defines "professional misconduct" of a health practitioner as:
  - (a) unsatisfactory professional conduct of a sufficiently serious nature to justify suspension or cancellation of the practitioner's registration; or*
  - (b) more than one instance of unsatisfactory professional conduct that, when the instances are considered together, amount to conduct of a sufficiently serious nature to justify suspension or cancellation of the practitioner's registration.*
12. In determining whether misconduct is sufficiently serious to justify suspension or cancellation of registration, the disciplinary body will consider the *raison d'être* of the

legislation, the protection of the public. A practitioner's registration will only be cancelled or suspended if necessary in the public interest.

#### Considerations in Disciplinary Proceedings

13. The key considerations for the Tribunal are the protection of the public; the deterrent effect of the order on the practitioner; the deterrent effect on other practitioners; and the effect of the order on the confidence of the public in health practitioners generally. Orders are intended to be protective, not punitive.
14. Mr Marks considered the example of a doctor who over-prescribed drugs of addiction. Conduct of this nature could indicate that it is unsafe for that doctor to practice medicine. Although a doctor may offer to surrender the entitlement to prescribe drugs of addiction in the disciplinary process, the disciplinary body will still need to consider what drove the doctor to over-prescribe the drugs in the way that he or she did. If the health practitioner showed a disregard for the law, then he or she may not be a fit and proper person to practice medicine safely. If, on the other hand, the justification for the conduct was that the doctor was weak-willed and could not resist the demands of his or her patients, this may also indicate that he or she cannot safely practice medicine.
15. Ultimately, every case must be considered on its own facts. Undertaking psychiatric counseling or attending training may work in the practitioner's favour.
16. There is some suggestion in the case law that a person's registration cannot be cancelled unless they are permanently unfit to practice the profession: *Ex Parte Lenehan* (1948) 77 CLR 403. However, this may mean that someone is unfit at the time of the disciplinary proceedings, but it is difficult to say that they are permanently unfit. In practice, if the practitioner is likely to be unfit to practice medicine for a significant period of time, the Tribunal has determined in the past that it is appropriate to cancel the registration.

#### What Conduct Constitutes Misconduct?

17. Mr Marks discussed a number of examples of types of conduct or behaviour that can constitute misconduct. First, any close encounter between a health practitioner and a patient must be for a therapeutic purpose. This means that whenever an intimate procedure is carried out, a health practitioner should take a number of steps: first, inform the patient what is going to happen and why; and second, obtain the consent of the patient for the procedure. Practitioners should also be aware of cultural circumstances and vulnerabilities, and it may be appropriate to have an appropriate chaperone present. Fundamentally, all procedures must be justified therapeutically.

18. In addition, practitioners must not have sexual relationships with patients. If the sexual relationship is already in existence, it is inappropriate for the health practitioner to treat that person. This is because the health practitioner may lose objectivity where he or she is involved sexually with the patient.
19. Second, Mr Marks noted that a large part of the work of the Tribunal is taken up by dealing with doctors who inappropriately prescribe drugs of addiction. The taking of illegal drugs by a practitioner may also be sufficient to constitute professional misconduct.
20. Third, incompetence in practice will expose a practitioner to the risk of a complaint.
21. Fourth, excessive treatment can constitute unsatisfactory professional conduct. For example, a practitioner who unnecessarily requires a patient to attend appointments on a weekly basis could be engaging in misconduct. Similarly, overcharging of patients could also give rise to complaint.
22. Fifth, the use of medication that is not therapeutically justified could be regarded as misconduct. Unless there is a scientifically demonstrated benefit for taking or prescribing the substances, there can be a cause for complaint. Practitioners should also enquire as to whether the patient is taking any other substances which may interfere with the prescribed drugs. As there will always be new techniques introduced in the practice of medicine, it is acceptable for a medical practitioner to use a novel technique, provided that there is informed consent, and that there is some scientific basis for the new technique. Practitioners should tread carefully in areas where there is some novelty in order to avoid any concerns.

#### Procedural Issues and Onus of Proof

23. In proceedings before the Tribunal, the *Briginshaw* standard is applied: *Briginshaw v Briginshaw* (1938) 60 CLR 336. This means that the complainant must establish the complaint and the particulars of the complaint on the balance of probabilities. The Tribunal needs to be comfortably satisfied that the complaint has been made out.
24. Complaints must be carefully framed so that the practitioner understands exactly what case is being brought. Although the rules of evidence do not apply, the Tribunal is careful to ensure that the evidentiary material is of a proper and appropriate standard. Evidence is usually produced in documentary form. The Tribunal is required to give reasons for its decisions.

25. Protective orders are not confined to cancellation or suspension of registration, but can include the imposition of conditions, including supervision, the appointment of a mentor, audit of records, or requiring a practitioner to undertake training or education.

## **BIOGRAPHY**

### The Honourable Frank Marks

Mediator and Arbitrator, Sydney

Frank Marks started his career as a solicitor, practicing for 30 years in employment law, insurance law and aviation law. He was appointed as a Judge of the Industrial Relations Commission in 1993 and served 19 years before retiring in 2002. He is now practicing as a private mediator and arbitrator. Mr Marks has also served as an Acting Judge of the District Court of NSW and a Principal Member of the NSW Civil and Administrative Tribunal.

### Ian Benson

Solicitor, AR Conolly and Company, Sydney

Ian Benson is a solicitor at AR Conolly and Company and holds a first class honours degree in law.

## **BIBLIOGRAPHY**

### Cases

*Ex Parte Lenehan* (1948) 77 CLR 403  
*Briginshaw v Briginshaw* (1938) 60 CLR 336

### Legislation

*Health Practitioners Regulation National Law Act 2009* (NSW)