

MISCONDUCT OF AUSTRALIAN LAWYERS UNDER LEGISLATION BASED ON THE NATIONAL MODEL — ALIGNING THE COMMON LAW TESTS WITH THE NEW STATUTORY REGIME

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*Under a recent Model Bill providing for the regulation of the Australian legal profession, statutory misconduct of lawyers is described as 'unsatisfactory professional conduct' and 'professional misconduct'. These terms have been in use over the past decade or so in legislation in various Australian jurisdictions and now uniformly appear in state and territory Acts based upon the Model Bill. These statutory terms as such are not substantively defined but certain conduct is included within the 'definitions', namely a lack of competence and diligence and conduct evidencing unfitness to practice, and instances of both forms of statutory misconduct are provided. The courts have in the past determined whether conduct constitutes statutory professional misconduct by reference to the common law test of disgraceful conduct formulated in *Allinson v General Council of Medical Education and Registration*. Similarly, they have determined whether conduct constitutes statutory unprofessional conduct by reference to the common law test of conduct falling short formulated in *Re R*, A Practitioner of the Supreme Court. An issue arising generally and from the inclusive definitions of the statutory terms under the current legislation is whether it remains appropriate for courts and disciplinary tribunals to continue to apply these common law tests in determining whether the conduct under consideration constitutes professional misconduct and unsatisfactory professional conduct, respectively. The principal aim of this article is to demonstrate by reference to the language of and policies underlying the new legislation that neither test is apt for that purpose and that a new approach is required.*

I THE ARGUMENT

[A]lthough prolonged veneration of the oft-quoted words of Lopes LJ [in *Allinson v General Council of Medical Education and Registration*, establishing the disgraceful conduct test for professional misconduct] has

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clothed them with an authority approaching that of a statute, they are not particularly illuminating.¹

There was, in earlier years, a tendency in some judgments in the Court to distort the content of some of these constitutional guarantees by restrictive legalism or by recourse to artificial formalism. Thus, a series of decisions ... substituted for [the words of the *Constitution*] a ritualistic formula ...²

Notwithstanding comprehensive new state and territory legislation governing the Australian legal profession, including in relation to complaints and discipline, courts and disciplinary tribunals continue to use the traditional and ‘time honoured’ common law tests for determining whether ‘professional misconduct’ or ‘unsatisfactory professional conduct’ as defined under this legislation has been established. The test for professional misconduct as formulated in *Allinson v General Council of Medical Education and Registration*³ (here described as ‘disgraceful conduct’) and the test for unprofessional conduct as formulated in *Re R, A Practitioner of the Supreme Court*⁴ (here described as ‘conduct falling short’) were devised in response to earlier legislation. This legislation contained different descriptions of misconduct without including instances of such misconduct, provided for different penalties, established differently constituted disciplinary authorities and conveyed different purposes. They were also developed at a time when the legal profession was self-regulated and when the focus was on maintaining the standards of the profession rather than protecting the interests of the public. In relation to the medical profession, legislative changes of this nature have led courts to abandon the disgraceful conduct test as the criterion for judging statutory professional misconduct.

That courts and tribunals continue to invoke these tests in lawyers’ disciplinary cases, rather than formulating new descriptions of misconduct by reference to the current legislation and the policies underlying it, has several adverse consequences. The tests impose a threshold for misconduct different from that justified by the current legislation. A close reading of the disciplinary provisions in context suggests that a finding of statutory professional misconduct does not require the disciplinary authority to reach the conclusion that practitioners of good repute and competence would reasonably regard the conduct as ‘disgraceful or dishonourable’. Further, a finding of statutory unsatisfactory professional conduct does not require the disciplinary authority to reach the conclusion that the conduct substantially falls short of the standards of practitioners of good repute and competence. Moreover, the authority may determine that the conduct is, for example, serious enough to constitute statutory professional misconduct and then ‘stretch’ its reasoning so as to be able to attach the ‘disgraceful conduct’ appellation. In so applying the common law tests, the authority’s reasoning process is distorted and the focus directed away from provisions which give content to the definitions of misconduct and the viewpoint from which the standard is determined. Finally,

1 *McEniff v General Dental Council* [1980] 1 All ER 461, 464 (Privy Council) (citations omitted).

2 *Street v Queensland Bar Association* (1989) 168 CLR 461, 522 (Deane J) (citations omitted).

3 [1894] 1 QB 750 (‘*Allinson*’).

4 [1927] SASR 58 (‘*Re R*’).

the application of the common law tests forecloses the effective involvement of lay members of regulatory authorities, given the tests are each founded on the views of 'professional brethren of good repute and competency'. In summary, the common law tests are no longer appropriate as a condition or aid for a finding of statutory misconduct and need to be reconfigured by reference to relevant aspects of the current legislation and the policies disclosed by them.

This article opens with some background to the Model Bill, the more recent *Legal Profession National Law*, the *Legal Profession Uniform Law Application Act 2014* (Vic) and the national professional conduct rules. It then examines the uniform statutory definitions of misconduct. First, it considers how the courts have construed the concepts of a lack of competence and diligence and unfitness to practice, which form part of the definitions. Second, it assesses the manner in which the definition of professional misconduct is being interpreted by the courts by reference to the existing common law test of disgraceful conduct. Third, it refers to instances where the interpretation of unsatisfactory professional conduct has drawn on the common law test of conduct falling short. The article then traces the abandonment of the *Allinson* test for professional misconduct in medical disciplinary cases (from which *Allinson* was derived), showing that very similar considerations operate to diminish its utility in lawyers' disciplinary cases under the current legislation. The article suggests that the test is currently being applied by way of a 'ritualistic formula'. Next, the article examines what is revealed as to the meaning of the statutory terms professional misconduct and unsatisfactory professional conduct by a textual analysis of the legislation and, by reference to that, what principles might better guide a determination of what constitutes statutory misconduct under the current legislation.

II BACKGROUND AND CONTEXT

Constitutionally, each Australian state and territory retains the power to regulate its own legal profession. Such regulation covers matters such as admission to practice, annual certification of practitioners, the form of legal practice and complaints and discipline. In consequence, whilst regulation of the profession in each jurisdiction covered essentially the same subjects, the legislation and professional conduct rules evolved independently. This led to different rules for admission and practice, inhibiting lawyers from one state or territory practising in another,⁵ and different standards of conduct and methods for the investigation of complaints. During the 1990s there was a move to address these discrepancies as part of a scheme to subject the legal profession to the principles of open

5 See, eg, *Street v Queensland Bar Association* (1989) 168 CLR 461, where Mr Street was denied admission in Queensland because he was and intended to remain a resident of, and practitioner in, New South Wales.

markets and competition and to greater accountability to the public.⁶ As regards the lawyer's relationship with the public, there was a view that clients were generally at a disadvantage to the extent that the client was unlikely to know precisely what legal services were required and what was a reasonable price for such services. The focus of regulation came to be seen as the protection of legal consumers and the need to maintain public confidence in a legal system in which lawyers occupied a critical role. One method of advancing those objects was thought to lie in reducing the level of self-regulation of the profession by law societies and barristers' councils, and providing for disciplinary procedures by independent statutory bodies having public membership. Resistance to these consumer orientated proposals, including on the basis that treating a law practice as a business would in fact increase litigation and weaken professional standards, was overridden during a period in which politicians, the media, law reform commissions and sometimes the judiciary were outspoken in criticising lawyers seen as motivated by self-interest and profits rather than concern for their clients and the greater public interest.⁷

At both federal and state level, governments intervened to provide for increased levels of statutory controls over the profession. Following moves to allow interstate practice and facilitate greater competition within the legal profession, the Standing Committee of Attorneys-General (SCAG) (now the Standing Council on Law and Justice) in 2001 agreed on proposals for model laws regulating the legal profession to be adopted in legislation of each state and territory. Under the Legal Profession Model Laws Project, SCAG produced a Model Bill (Model Provisions) in 2004, which was revised and released in August 2006.⁸ The model provision as to the purposes of the adopting legislation declared that the relevant Act was to

provide for the regulation of legal practice ... in the interests of the administration of justice and for the protection of consumers of the services of the legal profession and the public generally [and] to facilitate the regulation of legal practice on a national basis across State and Territory borders.⁹

6 A restriction on practitioners crossing borders was only one target. Cost scales were seen as a form of price fixing. Requiring the intercession of a solicitor in the briefing of barristers was seen to duplicate services and add to costs. The requirement that lawyers practice as sole practitioners or in partnership with other solicitors was thought to restrict the competitive advantages of corporate structures and multi-discipline organisations. There were also court-initiated reforms during the 1990s which are now reflected in the various Supreme Court Rules. Under the principles of Case Management, a greater emphasis was placed on practitioners seeking an early settlement of cases and otherwise prosecuting cases with reasonable diligence and on the substantive issues. That the court processes were sometimes used for improper purposes is illustrated by the lawyers' conduct the subject of *Flower & Hart (a firm) v White Industries (Qld) Pty Ltd* (1999) 87 FCR 134.

7 For an examination of these reforms, and the extent to which there was further work to be done, see Christine Parker, 'Regulation of the Ethics of Australian Legal Practice: Autonomy and Responsiveness' (2002) 25 *University of New South Wales Law Journal* 676. For a more recent review of the reforms, see G E Dal Pont, *Lawyers' Professional Responsibility* (Lawbook, 5th ed, 2013) 7–26.

8 Standing Committee of Attorneys-General, *Legal Profession Model Laws* (2nd ed, 2006) <<http://www.pcc.gov.au/uniform/pcc-legal-prof-2006-d21.pdf>> ('Model Bill').

9 *Ibid* s 1.1.3.

Although it was proposed that the model provisions would be adopted throughout Australia, the *Model Bill* allowed for a measure of choice by state and territory legislatures. This is reflected in three categories of provisions provided by the *Model Bill*: first, core provisions requiring textual uniformity; second, core provisions not necessarily requiring textual uniformity; and third, non-core, optional, provisions. Amongst the core provisions requiring textual uniformity are the sections defining ‘unsatisfactory professional conduct’, ‘professional misconduct’ and ‘conduct which is capable of constituting unsatisfactory professional conduct and professional misconduct’. All states and territories except (temporarily) South Australia have enacted legislation based on the *Model Bill* and incorporated the core provisions.¹⁰

These reforms were regarded by the agencies involved as not going far enough. In early 2009, the Council of Australian Governments initiated the National Legal Profession Reform Project to create completely uniform regulation.¹¹ By its National Legal Profession Reform Taskforce, the Council produced the *Legal Profession National Law* (draft 31 May 2011) and *Legal Profession National Rules* (draft December 2010), with a view to both eliminating the continuing differences in the new state and territory legislation (ie outside the core provisions requiring textual uniformity) and simplifying the provisions of the *Model Bill*, including making it more ‘outcomes focused’. A further object is to avoid continuing duplication in matters such as admission and the issue and renewal of practise certificates.¹² The *Legal Profession National Law* model provides for the establishment of two new national bodies. Under pt 8.2 of the *Legal Profession National Law*, the National Legal Services Board is responsible for the general administration of the scheme, including making national rules and overseeing admissions and licensing. The National Legal Services Commissioner is responsible under pt 8.3 for overseeing complaints and compliance by legal practitioners with the new law. There has been considerable resistance to state regulators being subject to such bodies, notwithstanding proposals for certain functions to be delegated back to local regulators. To date, only Victoria (which, in the manner contemplated by the *Legal Professional National Law*, has recently introduced the prototype legislation as the ‘host jurisdiction’) and New South Wales (which is to be the ‘host jurisdiction’ for the national bodies, now described

10 *Legal Profession Act 2004* (NSW); *Legal Profession Act 2004* (Vic); *Legal Profession Act 2006* (ACT); *Legal Profession Act 2006* (NT); *Legal Profession Act 2007* (Qld); *Legal Profession Act 2007* (Tas); *Legal Profession Act 2008* (WA).

11 For a discussion of the reasons for and objects of national regulation, see Roger Wilkins, ‘Agenda for Reform: National Regulation of the Legal Profession’ (2009) 47 (August) *Law Society Journal* 50; Glenn Ferguson, President, Law Council of Australia, ‘National Legal Profession Reform in Australia: An Overview’ (Speech delivered at the American Bar Association Annual Meeting International Bar Leader Roundtable Panel, 6 August 2010) <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/speeches/20100806NationalLegalProfessionReforminAustralia.pdf>>.

12 For the background to these reforms, the perceived problems existing under the *Model Bill* structure, the objectives of the project, the available options, the level of consultation, an impact analysis and final recommendations, see National Legal Profession Reform Taskforce, *National Legal Profession Reform Project — Consultation Regulation Impact Statement* (May 2010).

under that legislation as the Legal Services Council and the Commissioner for Uniform Legal Services Regulation¹³ have proceeded with the new scheme.¹⁴

For present purposes, it is of note that under pt 5.4 of the *Legal Profession National Law* and pt 5.4 of the *Uniform Law* (adopted in Victoria and New South Wales), the definitions of ‘unsatisfactory professional conduct’ and ‘professional misconduct’ are in the terms provided under the *Model Bill* and the legal profession legislation. The description of ‘conduct capable of being unsatisfactory professional conduct or professional conduct’ under pt 5.4 of the *Legal Profession National Law* and pt 5.4 of the *Uniform Law* also follows the *Model Bill* and the legal profession legislation, but with some modifications (noticeably, the insertion of ‘charging more than a fair and reasonable amount for legal costs’ in place of ‘charging excessive legal costs’).

With a view to the development of a uniform set of professional conduct rules consistent with the terms of the *Legal Profession National Law*, the Law Council of Australia and the Australian Bar Association produced model conduct rules for solicitors and barristers respectively.¹⁵

III PURPOSES OF ‘COMPLAINTS AND DISCIPLINE’ PROVISIONS OF THE LEGAL PROFESSION LEGISLATION

Part 4 of the *Model Bill* deals with complaints and discipline. The purposes of pt 4 of the *Model Bill*, which have been adopted in a similar form in the legal profession legislation, the *Legal Profession National Law* and the *Uniform Law*, include:

- (a) to provide a nationally consistent scheme for the discipline of the legal profession ... in the interests of the administration of justice and for the protection of consumers of the services of the legal profession and the public generally;

13 The *Legal Profession Uniform Law Application Act 2014* (Vic) was given assent on 26 March 2014. The *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 (‘*Uniform Law*’) sets out the Legal Profession Uniform Law, which adopts with minimal changes the *Legal Profession National Law*. The purposes of the Act, by s 1, include the application of the *Uniform Law* as a law of Victoria, the provision for ‘certain local matters to complement’ the *Uniform Law* and the repeal of the *Legal Profession Act 2004* (Vic). It is intended that the *Uniform Law* will commence on a date agreed with other jurisdictions: Explanatory Memorandum, Legal Professional Uniform Law Application Bill 2013 (Vic) 2 cl 2. On 27 March 2014, the New South Wales Attorney General introduced the Legal Profession Uniform Law Application Bill 2014 (NSW) into the New South Wales Legislative Assembly. The Bill applies the text of the *Uniform Law* as a law of New South Wales.

14 In February 2011 the Attorney-General for Western Australia announced that it would not be part of the national scheme but would reform the *Legal Profession Act 2008* (WA) to complement the national model. In October 2012 the Queensland Attorney-General announced Queensland’s decision to ‘opt out’ of the National Scheme.

15 Law Council of Australia, *Australian Solicitors’ Conduct Rules* (June 2011); Australian Bar Association, *Barristers’ Conduct Rules* (November 2010). The Australian Bar Association has since amended its model conduct rules: see Australian Bar Association, *Barristers’ Conduct Rules* (May 2013).

- (b) to promote and enforce the professional standards, competence and honesty of the legal profession;¹⁶
- (c) to provide a means of redress for complaints about lawyers;
- (d) to enable persons who are not lawyers to participate in complaints and disciplinary processes involving lawyers.¹⁷

There follows model provisions governing mediation, investigation of complaints, proceedings before the relevant regulatory body and disciplinary tribunal, compensation orders, and general provisions covering the continuing jurisdiction of the Supreme Court and the treatment of claims of privilege and confidentiality.

IV KEY CONCEPTS — THE DEFINITIONS OF UNSATISFACTORY PROFESSIONAL CONDUCT AND PROFESSIONAL MISCONDUCT

For the purposes of the *Model Bill*, each adopting Act, the *Legal Profession National Law* and the *Uniform Law*:

unsatisfactory professional conduct includes conduct of an Australian legal practitioner 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 Australian legal practitioner.¹⁸

professional misconduct includes:

- (a) 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; and
- (b) conduct of an Australian legal practitioner whether occurring in connection with the practice of the law or occurring

16 The notion of 'promoting' such standards may reflect the view that complaints and disciplinary functions affecting individual practitioners at the instigation of individual clients should not be the sole or even the main focus for the maintenance of standards of professional behaviour and that what is required is support for a culture of ethical behaviour.

17 *Model Bill* s 4.1.1 (a non-core provision). See also *Legal Profession Act 2004* (NSW) s 494; *Legal Profession Act 2004* (Vic) s 4.1.1; *Legal Profession Act 2006* (ACT) s 384; *Legal Profession Act 2006* (NT) s 461; *Legal Profession Act 2007* (Qld) s 416; *Legal Profession Act 2007* (Tas) s 417; *Legal Profession Act 2008* (WA) s 401. See also *Legal Profession National Law* s 5.1.1 ('objectives'); *Uniform Law* s 3. As to the importance of identifying the regulatory objectives of legislation governing the legal profession, see Laurel S Terry, Steve Mark and Tahlia Gordon, 'Adopting Regulatory Objectives for the Legal Profession' (2012) 80 *Fordham Law Review* 2685.

18 *Model Bill* s 4.2.1. See also *Legal Profession Act 2004* (NSW) s 496; *Legal Profession Act 2004* (Vic) s 4.4.2; *Legal Profession Act 2006* (ACT) s 386; *Legal Profession Act 2006* (NT) s 464; *Legal Profession Act 2007* (Qld) s 418; *Legal Profession Act 2007* (Tas) s 420; *Legal Profession Act 2008* (WA) s 402. See also *Legal Profession National Law* s 5.4.2; *Uniform Law* s 296. That part of this provision describing conduct showing a lack of competence and diligence is here referred to as '*incompetent conduct*'.

otherwise ... that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.¹⁹

Following these definitions, the *Model Bill*, the legal profession legislation, the *Legal Profession National Law* and the *Uniform Law* give instances (without distinction) of conduct capable of constituting unsatisfactory professional conduct or professional misconduct. These instances include:

- (a) conduct consisting of a contravention of the (relevant) Act, regulations or legal professional rules (professional conduct rules);
- (b) charging excessive legal costs;
- (c) conduct for which there is a conviction for a serious offence, a tax offence, or an offence involving dishonesty;
- (d) conduct as or in becoming ‘an insolvent under administration’ (as defined);
- (e) becoming disqualified from managing or being involved in the management of a corporation;
- (f) a failure to comply with an order of the relevant regulatory body or disciplinary tribunal; and
- (g) failing to comply with a compensation order.²⁰

Neither of the ‘definition’ sections in fact defines or gives content to the principal concepts of ‘unsatisfactory professional conduct’ and ‘professional misconduct’. Rather, these sections provide that the (undefined) concept *includes* the described

19 *Model Bill* s 4.2.2(1). See also *Legal Profession Act 2004* (NSW) s 497; *Legal Profession Act 2004* (Vic) s 4.4.3; *Legal Profession Act 2006* (ACT) s 387; *Legal Profession Act 2006* (NT) s 465; *Legal Profession Act 2007* (Qld) s 419; *Legal Profession Act 2007* (Tas) s 421; *Legal Profession Act 2008* (WA) s 403. See also *Legal Profession National Law* s 5.4.3; *Uniform Law* s 297. The conduct described in para (a) will be referred to as ‘seriously incompetent conduct’ and the conduct in para (b) will be referred to as ‘unfitness conduct’. Unfitness conduct is the basis upon which the court exercises its inherent jurisdiction to order the removal of the practitioner’s name from the roll of practitioners. The connection between the statutory and inherent jurisdictions was noted in *Prothonotary of the Supreme Court of New South Wales v Kearns* [2011] NSWCA 394 (15 December 2011) [8]; *Council of the New South Wales Bar Association v Costigan* [2013] NSWCA 407 (4 December 2013) [5], [6].

20 *Model Bill* s 4.2.3; *Legal Profession Act 2004* (NSW) s 498; *Legal Profession Act 2004* (Vic) s 4.4.4; *Legal Profession Act 2006* (ACT) s 389; *Legal Profession Act 2006* (NT) s 466; *Legal Profession Act 2007* (Qld) s 420; *Legal Profession Act 2007* (Tas) s 422; *Legal Profession Act 2008* (WA) s 404. See also *Legal Profession National Law* s 5.4.4; *Uniform Law* s 298. Various other provisions of the *Model Bill* (largely followed in the legal profession legislation and having counterparts in the *Legal Profession National Law* and the *Uniform Law*) provide that the conduct described may amount to unsatisfactory professional conduct or professional misconduct: see, eg, *Model Bill* s 2.2.6 (breach of requirements for engaging in legal practice), s 2.7.10 (obligations of legal practice director), s 2.7.21 (obligations of legal practice director concerning disqualified persons), s 3.4.18 (failure to meet disclosure obligations in relation to costs), s 5.6.11 (failure to comply with requirements in relation to external intervener), s 6.2.4 (failure to comply with requirements in relation to investigations, examinations and audits) and s 8.1.2 (liability of principals of law practice).

conduct.²¹ The reference to the definitions ‘including’ the (quite limited) matters following therefore provides a gateway to other forms of unsatisfactory professional conduct and professional misconduct.²² In the context of determining what *other* misconduct may be ‘included’ within these ‘definitions’, it is helpful to commence with a brief review of the conduct (incompetent conduct etc) which the legislature has determined is within the scope of statutory misconduct and how the courts have interpreted these concepts. The meaning of ‘professional misconduct’ and ‘unsatisfactory professional conduct’ beyond these concepts would necessarily be interpreted on that basis.

V UNSATISFACTORY PROFESSIONAL CONDUCT — INCOMPETENT CONDUCT

The interpretation of the expression ‘competence and diligence’ would start with the natural and ordinary meaning of the words used. In the Macquarie Dictionary, ‘competence’ includes qualification, adequacy and capability. ‘Diligence’ is constant and earnest effort. Applied to lawyers, these words suggest that the practitioner must have an adequate level of knowledge, skill and experience for the service undertaken, have the time available to undertake it, and must apply himself or herself to completing the task.²³ The expression ‘competence and diligence’ is a composite expression such that a proven lack of competence, or of a lack of diligence, will in each case be sufficient to constitute unsatisfactory professional conduct or, if sufficiently serious, professional misconduct, within the definition. As Handley AJA expresses it: ‘Parliament cannot have considered that either diligent incompetence or dilatory competence was satisfactory professional conduct’.²⁴ In determining whether a practitioner has been guilty of a lack of competence, some assistance might be gained from cases dealing with breaches of contractual or tortious duties, in particular the duty on practitioners

21 The inclusion of the defined conduct (incompetent conduct etc) may be treated as either clarifying or enlarging the existing common law concepts of professional misconduct, unsatisfactory professional conduct and unprofessional conduct in those respects.

22 SCAG’s position in relation to the *Model Bill* was that the definitions should be inclusive rather than exhaustive to allow scope for other categories of misconduct to be developed through case law. There has been some criticism of this type of approach: see New South Wales Attorney General’s Department, ‘Legal Profession Act 1987: A Further Review of Complaints against Lawyers’ (Report, November 2002) 49–57.

23 See *Law Society of Tasmania v Turner* (2001) 11 Tas R 1, 20–1, where a literal interpretation of the statutory expression was made. The Court accepted that interpreting the provision literally may mean that relatively trivial matters might constitute a lack of competence and diligence and therefore be treated as unsatisfactory professional conduct, but considered that if that was the case, it was a matter for Parliament. That may be applying the literal meaning of the words without regard to their context. A finding of unsatisfactory professional conduct has a serious impact on a lawyer’s professional reputation and within the context of the legislation would require a justification by reference to protecting the public and maintaining professional standards. (It is acknowledged that criticising this aspect of the decision, which seeks to rely on the ordinary meaning of the words used rather than invoking common law notions, might appear inconsistent with the main aim of this article, but context and purpose remain important in determining statutory meaning.) Cf *Re a Solicitor* [1960] VR 617 (Dean J), as discussed (and criticised for different reasons) below nn 114–15.

24 *Fitzgibbon v Council of New South Wales Bar Association* [2011] NSWCA 165 (20 June 2011) [16].

to exercise reasonable skill and care in the provision of legal advice.²⁵ Moreover, a test based upon what a member of the public is entitled to expect of a ‘reasonably competent legal practitioner’ would take into account the status of the lawyer under investigation. The standard to be observed by a specialist lawyer, whether a solicitor, barrister or in-house counsel, would be that of a lawyer exercising and professing to have that special expertise.

VI PROFESSIONAL MISCONDUCT — SERIOUSLY INCOMPETENT CONDUCT AND UNFITNESS CONDUCT

The statutory definition of ‘professional misconduct’ includes the concept of unsatisfactory professional conduct, but is limited to that involving ‘a substantial or consistent failure’ of competence and diligence. However, whereas the definition of ‘unsatisfactory professional conduct’ provides as the standard that which ‘a member of the public is entitled to expect of a reasonably competent Australian legal practitioner’, under the definition of ‘professional misconduct’ the standard is ‘a reasonable standard of competence and diligence’. Notwithstanding the use of different language, it is difficult to see how there could be any difference in meaning between these standards (beyond the level of seriousness), if only because the statutory definition of ‘professional misconduct’ incorporates the notion of ‘unsatisfactory professional conduct’. The ‘reasonable’ standard would be judged from the standpoint of a member of the public.

In order to constitute professional misconduct, the failure to reach or maintain the requisite standard must be ‘substantial’ or ‘consistent’.²⁶ These words were examined by the disciplinary tribunal in *Council of the New South Wales Bar Association v Asuzu*.²⁷ The Tribunal, by reference to earlier case law, adopted the view that ‘substantial’ in this context means a failure to meet the requisite standard in a way that is meaningful or relevant to the practitioner’s ability to practice law. This might be illustrated by *Fidock v Legal Profession Complaints Committee* where the Court postulated that a misleading statement to a court on a matter of importance, made as a result of gross carelessness, might in all the circumstances qualify as seriously incompetent conduct and therefore constitute professional misconduct.²⁸ As regards a ‘consistent’ failure, the Tribunal in *Asuzu*, referring to the dictionary meaning, reasoned that this meant ‘repeated or

25 *Council of the New South Wales Bar Association v Asuzu* [2011] NSWADT 209 (31 August 2011) [49]–[51].

26 In *Xu v Council of the Law Society of New South Wales* (2009) 236 FLR 480, 488 [41], the Court of Appeal held that sloppy conveyancing did demonstrate a lack of competence and diligence but not a ‘substantial’ or ‘consistent’ failure. It substituted its finding of unsatisfactory professional conduct for the tribunal’s finding of professional misconduct.

27 [2011] NSWADT 209 (31 August 2011) [38]–[43] (*‘Asuzu’*).

28 [2013] WASCA 108 (23 April 2013) [102]. The Court had earlier reasoned that a practitioner’s false statement to a court in closing about the facts, made without any genuine belief that the evidence supported the assertion, might constitute (common law) professional misconduct: at [100]. See also *Council of the Law Society of New South Wales v Graham* [2005] NSWCA 127 (25 March 2005) [41] (*‘Graham’*), where the Court held that ‘willfulness’ was not a condition of professional misconduct either under the legislation or at common law.

persistent failure resulting from ... the same mistakes of principle or acting in the same inappropriate way in a variety of situations'.²⁹ The 'repeated' instances of misconduct would all need to be the subject of the current charge of professional misconduct and could not draw on a previous instance of similar misconduct.

Professional misconduct under the legal profession legislation also includes conduct that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice. The seriousness of such a finding is reflected in the judgment that the practitioner is thereby found to be permanently, or indefinitely, unfit to practice. Unless that probability exists, a lesser penalty would necessarily be under consideration.³⁰ The statutory provision includes the situation where the conduct occurred otherwise than in connection with the practice of the law. Conduct which does not involve 'professional' misconduct but is such as to support the conclusion that the person is not a fit and proper person to be in practice, falls within the definition. Nevertheless, in the normal course, the further removed the 'private' conduct is from the practice of law, the less likely it will attract a finding that the practitioner is not a fit and proper person to engage in legal practice.³¹ That principle would seem to continue with respect to all forms of professional misconduct, that is, unfitness conduct not connected with legal practice or other professional misconduct having some connection with legal practice.

With respect to unfitness conduct, the statutory description of which is otherwise devoid of content, the legal profession legislation provides, under the section defining professional misconduct, that regard may be had to the 'suitability matters' governing admission or the grant or renewal of a local practising certificate.³² 'Suitability matters' is defined to include such matters as whether the person is currently of good fame and character,³³ or is or has been insolvent under administration, or has been convicted of an offence and its circumstances, or is currently unable to carry out the inherent requirements of practice.³⁴

In *Law Society of New South Wales v Foreman*, the Court of Appeal indicated that in determining whether someone is a fit and proper person to be a solicitor, the

29 *Asuzu* [2011] NSWADT 209 (31 August 2011) [43].

30 See *New South Wales Bar Association v Cummins* (2001) 52 NSWLR 279, 285.

31 *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279, 290 (Fullagar J).

32 For references to the definition of professional misconduct in the legal profession legislation, see above n 19.

33 As to the meaning of 'good fame and character', see *Council of the New South Wales Bar Association v Sahade* [2007] NSWCA 145 (19 June 2007) [56]–[58] (the focus is on character, not reputation); *Prothonotary of the Supreme Court of New South Wales v Livanis* [2012] NSWCA 325 (9 October 2012) [35]–[41]; *Prothonotary of the Supreme Court of New South Wales v Da Rocha* [2013] NSWCA 151 (31 May 2013) [17]–[18]. It has been held in a related context that the concept of 'good character' 'is not one which bears some special or technical meaning': *Health Care Complaints Commission v Karalasingham* [2007] NSWCA 267 (2 October 2007) [45]. See also *Prothonotary of the Supreme Court of New South Wales v Fitzsimons* [2012] NSWSC 260 (23 March 2012) [9].

34 *Model Bill* s 1.2.6 (a core non-uniform section); *Legal Profession Act 2004* (NSW) s 9; *Legal Profession Act 2004* (Vic) s 1.2.6; *Legal Profession Act 2006* (ACT) s 11; *Legal Profession Act 2006* (NT) s 11; *Legal Profession Act 2007* (Qld) s 9; *Legal Profession Act 2007* (Tas) s 9; *Legal Profession Act 2008* (WA) s 8. The definitions of professional misconduct in the *Legal Profession National Law* and the *Uniform Law* refer to matters relevant to admission and certification and extends to 'any other relevant matters'.

relevant considerations may include: the protection of the public against similar conduct; the character of the solicitor; the effect which an order will have on the understanding (within the profession and amongst the public) of the standard of behaviour required of solicitors; the effect upon relationships which must exist between solicitors; and the circumstances surrounding the impugned conduct.³⁵ For its part, the Law Council of Australia notes the following factors as relevant to an assessment of whether a practitioner is a fit and proper person: disregard for the solicitor's legal and civic obligations; a solicitor's medical condition; lack of integrity or dishonest deceitful or fraudulent conduct; serious disdain for victims of crime; defiance of the court or the rule of law or process of justice; or moral blameworthiness.³⁶

Following a finding of professional misconduct, the court may make a consequential finding that the practitioner is not of good fame and character and therefore unfit to practice. In that respect, the courts have regularly had regard to the following factors:

- (1) whether the misconduct can be satisfactorily explained as an error of judgment rather than a defect of character;
- (2) the intrinsic seriousness of the misconduct in the context of fitness to practice;
- (3) whether the misconduct should be viewed as an isolated incident and hence atypical or uncharacteristic of the practitioner's normal qualities of character;
- (4) the motivation which may have given rise to the proven episode of misconduct;
- (5) the underlying qualities of character shown by previous and other conduct; and
- (6) whether the conduct after the episode demonstrates that public and professional confidence may be reposed in the practitioner to uphold and observe the high standard of moral rectitude required of a practitioner.³⁷

Although the statutory definition of 'professional misconduct' with respect to unfitness conduct speaks in the present tense — 'the practitioner *is* not a fit and proper person to engage in legal practice' — the case law makes it clear that the intention is not to conflate the finding of professional misconduct with the relevant penalty, such that a finding of unfitness *necessarily* carries with it the penalty of a striking off or suspension from practice. Such an interpretation would preclude the tribunal considering the practitioner's conduct between the date of

35 (1994) 34 NSWLR 408, 412–19, 441–6, 471–2, cited in *Prothonotary of the Supreme Court of New South Wales v Da Rocha* [2013] NSWCA 151 (31 May 2013) [29].

36 Law Council of Australia, *Australian Solicitors' Conduct Rules 2011 and Consultation Draft Commentary* (19 October 2012) 5 [5], 5 nn 1–8 <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2000-2099/2012October19-ConsultationDraftCommentary.pdf>>.

37 *McBride v Walton* [1994] NSWCA 199 (15 July 1994) [61]–[62], quoted in *Health Care Complaints Commission v Karalasingham* [2007] NSWCA 267 (2 October 2007) [51], [54]; *Prothonotary of the Supreme Court of New South Wales v Fitzsimons* [2012] NSWSC 260 (23 March 2012) [10]; *Prothonotary of the Supreme Court of New South Wales v Da Rocha* [2013] NSWCA 151 (31 May 2013) [19].

the conduct and the hearing on penalty. Moreover, the legal profession legislation allows for penalty orders for professional misconduct other than striking off or suspension, for example a fine. Rather, the section provides a classification of the conduct according to the importance of the standard and the seriousness of the breach. This position was explained in *Council of the New South Wales Bar Association v Sahade*, where the unfitness conduct provision is described as a 'definitional' rather than an 'operative provision'.³⁸

VII ISSUES ARISING FROM LACK OF DEFINITION OF STATUTORY MISCONDUCT

As mentioned, the reference to the definitions 'including' the matters identified (incompetent conduct etc) opens up the question as to what other forms of unsatisfactory professional conduct and professional misconduct are intended to be included. In this context, the legal profession legislation does give instances (without distinction) of conduct capable of constituting unsatisfactory professional conduct or professional misconduct.³⁹ The difficulty is that the relevant provision includes a wide range of conduct which may fall within the statutory 'definitions', or which, by reference to the 'suitability matters', is relevant to a consideration of unfitness conduct. For example, the former includes a breach of the relevant Act or professional conduct rules. The latter includes matters such as a conviction for an offence and its circumstances. It is apparent that not every breach of the Act or rules, or conviction for an offence, is deserving of a finding of statutory misconduct and the imposition of a penalty.

The immediate issues then are what conduct not specifically identified under the relevant Act as 'included' within the definitions, and what level of seriousness of conduct instanced in the Act, constitutes unsatisfactory professional conduct or professional misconduct. In resolving these questions with respect to professional misconduct and related terms as they appeared in earlier state and territory legislation, the courts called in aid the 'common law' (as that term has been used in this context)⁴⁰ tests of 'professional misconduct' and 'unprofessional conduct' (terms discussed below). They continue to do so in considering 'professional misconduct' under legislation based on the *Model Bill* and there has also been some reference to the common law tests in connection with 'unsatisfactory professional conduct'. As a matter of statutory interpretation the (unexpressed) position the courts have adopted seems to be that insofar as the statutory terms have previously acquired a technical meaning under the general law, it is to be presumed that the statutory descriptions were intended to reiterate the antecedent law or to conform as closely as possible to that law.⁴¹ Put another way,

38 [2007] NSWCA 145 (19 June 2007) [69]. See also at [61]–[75]. See also *Lucire v Health Care Complaints Commission* [2011] NSWCA 99 (20 April 2011) [65].

39 See above n 20.

40 'Significant elements of what now is regarded as "common law" had their origin in statute or as glosses on statute or as responses to statute': *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49, 60 [19] ('*Esso*').

41 See *Sungravure Pty Ltd v Middle East Airlines Airliban SAL* (1975) 134 CLR 1, 22 (Mason J), dealing with circumstances where the statutory language is doubtful or some special ground may be made out, eg if words used have previously acquired a technical meaning.

in enacting these provisions Parliament would be taken to have appreciated the existence of a body of case law governing the interpretation of ‘unsatisfactory professional conduct’ and ‘professional misconduct’. It followed that, in using these expressions, Parliament intended their legal technical meaning.⁴²

VIII THE COMMON LAW CONCEPTS OF PROFESSIONAL MISCONDUCT AND UNPROFESSIONAL CONDUCT

The source of the common law concept of professional misconduct is the interpretation given to a provision of the UK *Medical Act 1858*, 21 & 22 Vict, c 90, s 29, which stated: ‘if any registered medical practitioner shall ... after due enquiry be judged ... to have been guilty of infamous conduct in any professional respect, the General Council may ... direct the registrar to erase the name of such medical practitioner from the register’. The Court of Appeal in *Allinson* held, without intending to be exhaustive, that:

If it is [shown] 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.⁴³

The formulation was expressed by Lopes LJ, with the other members of the court agreeing.⁴⁴ Lord Esher MR adopted it as ‘one kind of conduct amounting to “infamous conduct in a professional respect”’,⁴⁵ and added that the question was ‘not merely whether what a medical man has done would be an infamous thing for any one else to do, but whether it is infamous for a medical man to do’.⁴⁶ The test confines the misconduct to that in the course of practice, and which is condemned, in the terms used, by practitioners of good standing. It is ‘not particularly illuminating’,⁴⁷ it would seem, because it does not describe the nature of the conduct contemplated by the statutory expression by reference to the statutory context or its dictionary meaning or otherwise, but merely relies on (apparent) synonyms of ‘infamous’, ‘disgraceful’ or ‘dishonourable’ without distinguishing between them or describing the content or parameters of those words.⁴⁸ Also, one would expect that ‘professional brethren of good repute’ would

42 For a discussion of how the meaning of a statutory term of this nature may be interpreted by reference to the history of its use, see *Wong v Commonwealth* (2009) 236 CLR 573, 637–8.

43 [1894] 1 QB 750, 763 (Lopes LJ).

44 Ibid 760–1 (Lord Esher MR), 766 (Davey LJ).

45 Ibid 760.

46 Ibid 761.

47 *McEniff v General Dental Council* [1980] 1 All ER 461, 464.

48 In *Fidock v Legal Profession Complaints Committee* [2013] WASCA 108 (23 April 2013) [35], the Court, having cited *Allinson*, misdescribes the test as being ‘disgraceful and dishonourable’ (emphasis added). That slip seems likely to have arisen because in this passage the Court also refers to *Prothonotary of the Supreme Court of New South Wales v Costello* [1984] 3 NSWLR 201, 203, where the test is so misdescribed. That error in turn might have arisen because that is how the headnote in *Allinson* describes the test — ‘Held, further ...’: *Allinson* [1894] 1 QB 750, 751. That such a mistake might be made and periodically repeated may be attributed to the incantation of the (here misstated) *Allinson* formula.

necessarily be ‘competent’. They would presumably regard disgraceful conduct as part of a more serious category than dishonourable conduct.⁴⁹

The *Allinson* formulation was subsequently applied to professional misconduct on the part of a solicitor in *Re A Solicitor; Ex parte Law Society*,⁵⁰ where the statutory expression was ‘misconduct’ under the *Solicitors’ Act 1888*, 51 & 52 Vict, c 65. The *Allinson* test as applied to lawyers was also adopted as the test of professional misconduct where the inherent jurisdiction of a superior court was invoked to discipline lawyers admitted onto its roll. The authority usually cited in this respect is *Myers v Elman*, where Viscount Maugham said:

Apart from the statutory grounds ... a solicitor may be struck off the rolls or suspended on the ground of professional misconduct, words which have been properly defined as conduct which would reasonably be regarded as disgraceful or dishonourable by solicitors of good repute and competency.⁵¹

The *Allinson* test for professional misconduct of lawyers has generally been adopted in Australia,⁵² including in the High Court. Dixon J relied upon it in *Kennedy v Council of the Incorporated Law Institute of New South Wales*⁵³ on an appeal from the decision of a statutory committee. The reported summary of his judgment states:

[The practitioner’s] fitness to continue on the roll must be judged by his conduct and his conduct must be judged by the rules and standards of his

49 The fact that both words were employed suggests a gradation was intended and in ordinary language ‘disgraceful’ might be said to suggest greater opprobrium than ‘dishonourable’. That said, the Macquarie Dictionary defines each word by reference to the other, further diminishing their power to illume.

50 [1912] 1 KB 302. Darling J adopted the *Allinson* formulation without the need to ‘attempt to add anything to the definition’: at 311–12. Hamilton J concurred with what Darling J said but did not directly refer to *Allinson*. His Honour endorsed the self regulating nature of the test: ‘the conduct of a solicitor in his profession must be judged by the rules of his profession and by the standard which its members set up’: at 314.

51 [1940] AC 282, 288–9, citing *Re A Solicitor; Ex parte The Law Society* [1912] 1 KB 302. *Myers v Elman* actually concerned the court’s inherent jurisdiction to order a solicitor who had misconducted himself to pay costs, rather than professional misconduct as such.

52 The *Allinson* test was referred to in *Re R* [1927] SASR 58, 60 (discussed below) and adopted in *Re A Solicitor* [1960] VR 617, 620; *Re Veron; Ex parte Law Society of New South Wales* [1966] 1 NSWLR 511, 516–17; *Prothonotary of the Supreme Court of New South Wales v Costello* [1984] 3 NSWLR 201, 203 (but misquoting the test as being ‘disgraceful and dishonourable’); *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408, 439–40, 470; *Prothonotary of the Supreme Court of New South Wales v McCaffery* [2004] NSWCA 470 (17 December 2004) [46]–[47]; *Council of the New South Wales Bar Association v Sahade* [2007] NSWCA 145 (19 June 2007) [54]; *Fidock v Legal Profession Complaints Committee* [2013] WASCA 108 (23 April 2013) [35] (again misquoting the test), [105]–[106]; *Council of the New South Wales Bar Association v Costigan* [2013] NSWCA 407 (4 December 2013) [80], [88] (case under the court’s inherent jurisdiction); *Legal Practitioner v Council of the Law Society of The Australian Capital Territory* [2014] ACTSC 13 (21 February 2014) [77], [308]. The test in *Allinson* was also applied in the following cases discussed below: *Law Society of Tasmania v Turner* (2001) 11 Tas R 1, 17 [45], 21–3 [55]–[58]; *New South Wales Bar Association v Meakes* [2006] NSWCA 340 (6 December 2006) [24], [85], [118]; *Kyle v Legal Practitioners’ Complaints Committee* (1999) 21 WAR 56, 58 [6], 71–2 [61]; *Scroope v Legal Services Commissioner* [2013] NSWCA 178 (17 June 2013) [16]–[17]. As regards the medical profession, the *Allinson* test was applied from the outset (see, eg, *Re Kennelly* (1912) 12 SR (NSW) 319, 329–30). It was later said in *Hoile v Medical Board of South Australia* (1960) 104 CLR 157, 162 that the test was not originally proposed as exhaustive and what amounts to ‘infamous conduct’ is best represented by the words “shameful” or “disgraceful”.

53 (1939) 13 ALJ 563 (*Kennedy*).

profession; his unfitness appeared when he did what solicitors of good repute and competency would consider disgraceful or dishonourable.⁵⁴

The summary for Rich J is in more general terms:

a charge of misconduct as relating to a solicitor need not fall within any legal definition of wrong doing. It need not amount to an offence under the law. It was enough that it amounted to grave impropriety affecting [the practitioner's] professional character and was indicative of a failure either to understand or to practise the precepts of honesty or fair dealing in relation to the courts, [the practitioner's] clients or the public.⁵⁵

When the statutory expression 'unprofessional conduct' was introduced in the *Law Society Act 1915* (SA), the Supreme Court in *Re R* took the view that this undefined expression encompassed but was wider than 'professional misconduct',⁵⁶ the expression (said to have been) used in the English Act and considered in *Re A Solicitor; Ex parte Law Society*.⁵⁷ It held that 'unprofessional conduct' was 'not necessarily limited to conduct which was "disgraceful or dishonourable" in the ordinary sense of those terms',⁵⁸ but includes 'conduct which may reasonably be held to violate, or to fall short of, to a substantial degree, the standard of professional conduct observed or approved of by members of the profession of good repute and competency'.⁵⁹

That description was subsequently adopted in those states and territories where the relevant statutory expression under consideration was 'unprofessional conduct'.⁶⁰

In Western Australia the test in *Re R* was adopted and expanded by the Full Court in *Re a Practitioner*,⁶¹ in a passage later applied in *Kyle v Legal*

54 Ibid 564.

55 Ibid 563. McTiernan J also found that the practitioner's conduct, which he regarded as having a tendency to interfere with the course of justice, was professional misconduct: at 564.

56 [1927] SASR 58, 60–1.

57 [1912] 1 KB 302, 311–12. The Australian Court in *Re R* might have got its lead from *Allinson* where counsel for the Medical Council said '[u]nprofessional conduct is not necessarily infamous. A breach of a professional rule would not be enough': *Allinson* [1894] 1 QB 750, 757 (Reid QC) (during argument).

58 *Re R* [1927] SASR 58, 60–1. The reference to the ordinary sense of 'disgraceful or dishonourable conduct' reveals how far courts have drifted away from interpreting the statutory term (here 'unprofessional conduct') by reference to its ordinary meaning and in its statutory context. That is, a phrase ('disgraceful or dishonourable conduct') originally used in *Allinson* to describe a statutory expression ('infamous conduct') under an Act of 1858 with respect to medical practitioners — then adopted as applicable to a different statutory term ('conduct') in 1888 legislation in the UK governing solicitors — is now being considered by reference to its 'ordinary sense' in determining the meaning, as applied to legal practitioners in Australia, of a different statutory expression ('unprofessional conduct').

59 Ibid 61. It has not been necessary here to distinguish between 'violating' and 'falling short of to a substantial degree' the relevant standard.

60 For a summary of this development, see *De Pardo v Legal Practitioners Complaints Committee* (2000) 97 FCR 575, 590–1; *New South Wales Bar Association v Cummins* (2001) 52 NSWLR 279, 286–7; *A Solicitor v Council of the Law Society of New South Wales* (2004) 216 CLR 253, 264–5.

61 (Unreported, Supreme Court of Western Australia, Wallace, Brinsden and Smith JJ, 18 July 1983), cited in *Kyle v Legal Practitioners' Complaints Committee* (1999) 21 WAR 56, 71–2 [61].

Practitioners' Complaints Committee.⁶² In *Kyle* the Court expressed the meaning of 'unprofessional conduct' as

conduct that would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence, or that, to a substantial degree, fell short of the standard of professional conduct observed or approved by members of the profession of good repute and competence. The first limb of this summary includes, but is not confined to, conduct which occurs in the course of legal practice. The other limb necessarily relates to conduct in the course of legal practice because of the reference to 'professional conduct'. While the words should not be taken as necessarily an exhaustive or codified statement, the essence of the notion of unprofessional conduct is usefully revealed in these decisions.⁶³

The first limb associated with professional misconduct and based on *Allinson* is here summarised as '*disgraceful conduct*', and the second limb associated with unprofessional conduct and based on *Re R* is here summarised as '*conduct falling short*'.⁶⁴

The test in *Kyle*, although said to follow *Re R*, in fact expanded it by expressly including as the 'first limb' of unprofessional conduct, the notion of professional misconduct based on *Allinson*. That was not how the matter had been expressed in *Re R*. In that case, the reference was to 'unprofessional conduct' being wider than the term 'professional misconduct' as used in England, and not necessarily being limited to conduct which was disgraceful or dishonourable. Given that in both cases (*Re R* and *Kyle*) the only term under consideration was 'unprofessional conduct' and moreover in both cases it was accepted that the conduct in question was of the less serious nature, it was not necessary to make reference to the *Allinson* formulation of professional misconduct. Moreover, the distinction in *Kyle* between the two limbs based on the second limb necessarily having a connection with legal practice (because of the reference to 'professional conduct'), is not supportable. It exists only because the Full Court omitted from its first limb, that is disgraceful conduct, any reference to 'professional' conduct. However, in *Re R*, which the Full Court in *Kyle* purported to follow, the South Australian Court had made express reference to the 'criterion' for professional misconduct in England, including whether something had been done by the practitioner 'in the pursuit of his profession'⁶⁵ (and, according to the *Allinson* formula, 'with regard to it').⁶⁶

62 (1999) 21 WAR 56 ('*Kyle*'). The Court was concerned with the undefined term 'unprofessional conduct' under the *Legal Practitioners' Act 1893* (WA).

63 *Kyle* (1999) 21 WAR 56, 71–2. The test in *Kyle* was recently applied with respect to charges of unprofessional conduct in *Fidock v Legal Profession Complaints Committee* [2013] WASCA 108 (23 April 2013) [32]. For consideration of that Court's characterisation of the 'limbs' in relation to statutory professional misconduct, see below n 80.

64 This usage allows for a summary description of the two tests and, whilst adding to the thicket of statutory and common law definitions and descriptions, assists in distinguishing between the current statutory terms (professional misconduct, unsatisfactory professional conduct) and their common law 'counterparts' (professional misconduct, unprofessional conduct).

65 *Re R* [1927] SASR 58, 60.

66 *Allinson* [1894] 1 QB 750, 761.

Where the subject legislation in Australia has referred to both ‘professional misconduct’ and ‘unprofessional conduct’ or similar expressions, professional misconduct has generally been regarded as constituted by disgraceful conduct and unprofessional conduct as constituted by conduct falling short.⁶⁷ The description of unprofessional conduct from *Re R* (ie conduct falling short) has also been adopted in some cases where the statutory term under consideration was ‘professional misconduct’, leading to confusion of terminology.⁶⁸

IX CURRENT APPLICATION OF THE COMMON LAW TESTS

As the cases discussed in this section illustrate, when considering the meaning of the statutory term ‘professional misconduct’ including under legislation based on the *Model Bill*, courts and tribunals invariably invoke the common law test of disgraceful conduct. There have also been instances where the statutory term ‘unsatisfactory professional conduct’, or a statutory term containing the elements of that definition, has been overlaid with the common law test of conduct falling short.

In *Law Society of Tasmania v Turner*,⁶⁹ the Court considered the inclusive definitions of professional misconduct and unprofessional conduct (which included in substance incompetent conduct) under the (then) *Legal Profession Act 1993* (Tas). Crawford J said that statutory ‘professional misconduct’ (beyond the express statutory instances) consists in disgraceful conduct at common law, and that no further definition should be attempted.⁷⁰ Further, that statutory ‘unprofessional conduct’ consists in the extended statutory meanings but also conduct falling short under the ‘so called’ common law test. However, as regards incompetent conduct, the terms in which that provision was expressed should be taken literally, thereby extending the common law meaning of conduct

67 See, eg, *Law Society of Tasmania v Turner* (2001) 11 Tas R 1; *New South Wales Bar Association v Meakes* [2006] NSWCA 340 (6 December 2006). In *Ex parte A-G (Cth); Re A Barrister and Solicitor* (1972) 20 FLR 234 the Court was concerned with statutory ‘professional behaviour’ (dealt with by the tribunal) and statutory ‘conduct’ (dealt with by the court). It considered the terms required to be interpreted by reference to the common law: at 240. Without defining either term, it regarded ‘professional behaviour’, following *Re R*, as ‘including’ conduct falling short; and ‘conduct’ as including both disgraceful conduct (referring to *Allinson and Myers v Elman*) and conduct falling short: at 242–3. The Court held the subject conduct (acting in a conflict situation) was not disgraceful conduct but constituted conduct falling short: at 255. This analysis has been adopted in a number of subsequent cases, see, eg, *Chamberlain v Law Society of the Australian Capital Territory* (1993) 43 FCR 148, 153.

68 In *Adamson v Queensland Law Society Inc* [1990] 1 Qd R 498 the statutory provisions included both professional misconduct and unprofessional conduct. The Court described professional misconduct as conduct falling short: at 507. This formula was followed in *Legal Services Commissioner v Baker [No 2]* [2006] 2 Qd R 249, 267 [46]. The Court in *Clough v Queensland Law Society Inc* [2002] 1 Qd R 116, 135 [75], 138 [90] sought to answer a criticism of this position by David Searles, ‘Professional Misconduct — Unprofessional Conduct: Is There a Difference?’ (1992) 22 *Queensland Law Society Journal* 239. Without attempting a definition of either term, the Court somewhat grudgingly acknowledged that, consistently with *Ex parte A-G (Cth); Re A Barrister and Solicitor* (1972) 20 FLR 234 and the South Australian decisions, the test used in *Adamson v Queensland Law Society Inc* [1990] 1 Qd R 498 for professional misconduct (ie conduct falling short) ‘may be an appropriate test’ for ‘unprofessional conduct’: *Clough v Queensland Law Society Inc* [2002] 1 Qd R 116, 138 [90].

69 (2001) 11 Tas R 1 (‘*Turner*’).

70 Ibid 17.

falling short to that extent.⁷¹ His Honour held the subject conduct constituted unprofessional conduct upon the basis that it constituted conduct falling short (ie under the common law test).⁷² It was also unprofessional conduct as being incompetent conduct. But it did not constitute professional misconduct because it did not amount to disgraceful conduct. That application of the common law tests was approved in *A Legal Practitioner v Law Society of Tasmania*, where the Chief Justice added:

Such evaluation [whether neglect and delay constituted professional misconduct or unprofessional conduct] must be qualitative and quantitative and like all evaluations, must have a standard or standards against which the qualitative and quantitative measurements are made. That standard can only be that set by the common law, namely, the conduct observed or approved of by members of the legal profession of good repute and competency.⁷³

A more recent illustration is *New South Wales Bar Association v Meakes*,⁷⁴ where the issue was whether in the circumstances overcharging constituted statutory professional misconduct (defined to include seriously incompetent conduct) or unprofessional conduct (defined to include incompetent conduct). The Court held the conduct constituted professional misconduct on the basis that it was disgraceful or dishonourable conduct.⁷⁵ Tobias JA, with whom Bryson JA agreed, also considered that the overcharging constituted, at least, conduct falling short under the common law test and so unprofessional conduct, but as within the defined seriously incompetent conduct, it also constituted statutory professional misconduct on that ground.⁷⁶

In *Scroope v Legal Services Commissioner* the Court of Appeal considered whether instances of overcharging constituted professional misconduct under the *Legal Profession Act 2004* (NSW), as had been found by the Tribunal, or unsatisfactory professional conduct.⁷⁷ It recited the objects of the relevant part

⁷¹ Ibid 20. See above n 23.

⁷² Ibid 21–2.

⁷³ (2005) 13 Tas R 448, 454. It is here contended that, with respect to statutory misconduct under the legal profession legislation, in determining the appropriate standard reference ought first be made to the statutory language and policies of the legislation.

⁷⁴ [2006] NSWCA 340 (6 December 2006) (*‘Meakes’*).

⁷⁵ Ibid [85].

⁷⁶ Ibid [24], [86] (Tobias JA), [97] (Bryson JA). Basten JA regarded deliberate overcharging as not within the statutory terms relating to competence and diligence (which must be correct) but as professional misconduct as involving ‘a contravention of the high standards of honesty and integrity required in accordance with general law principles governing professional responsibility’: at [101]. A substantial fine rather than a reprimand was said to be required because ‘[t]o constitute professional misconduct under the general law standard, the conduct must be understood to be disgraceful or dishonourable in professional eyes’: at [118].

⁷⁷ [2013] NSWCA 178 (17 June 2013). In relation to the proposition for which this case is here cited, see also the earlier decision in *Howes v Law Society of the Australian Capital Territory* [1998] ACTSC 266 (23 July 1998), where the statutory definition of unsatisfactory professional conduct in substantially the same terms as under the legal profession legislation was described in terms of conduct falling short. This decision was relied upon in *PG v Law Society of the Australian Capital Territory* (2004) 155 ACTR 1 [22]. See also *Legal Services Commissioner v Bradshaw* [2008] QLPT 9 (10 July 2008) [37]. The approach in these cases may be contrasted with the statement in *Graham* [2005] NSWCA 127 (25 March 2005) [33] as to the need to focus on the words of the statute.

of the legislation and the statutory provisions defining these terms.⁷⁸ It then quoted as ‘well established’ and needing no ‘further elaboration’ the following proposition (amongst others) formulated by the Tribunal:

Unsatisfactory professional conduct was not limited to conduct that was ‘disgraceful or dishonourable’: see *Re R* ... Unsatisfactory professional conduct included conduct that may reasonably be held to violate or to fall short, to a substantial degree, of the standard of professional conduct observed or approved by members of the profession of good repute and competency: *De Pardo v Legal Practitioners Complaints Committee* ...⁷⁹

Although not always consistent in their treatment of the subject,⁸⁰ the authorities establish that when statutory professional misconduct is under consideration, the disgraceful test continues to apply. Further, in considering statutory unsatisfactory professional conduct, they suggest that the conduct falling short test may apply or provide assistance in determining the scope of that concept.

X DEVELOPMENTS IN THE CONCEPT OF PROFESSIONAL MISCONDUCT IN OTHER CONTEXTS

Whilst the statutory term ‘professional misconduct’, as applied to lawyers, continues to depend upon satisfaction of the test in *Allinson* with its (rather Victorian era) requirement of ‘disgraceful’ or ‘dishonourable’ or ‘shameful’ conduct, the test has elsewhere been abandoned.

In England in 1930, as concerns the medical profession, the concept of ‘infamous or disgraceful’ conduct as articulated in *Allinson* and subsequent cases was discarded. In *R v General Council of Medical Education and Registration of the United Kingdom* Scrutton LJ said:

78 *Scroope v Legal Services Commissioner* [2013] NSWCA 178 (17 June 2013) [12]–[15].

79 Ibid [16]–[17] (citations omitted). Note that *De Pardo v Legal Practitioners Complaints Committee* (2000) 97 FCR 575 was concerned with statutory unprofessional conduct. Notwithstanding the approval of this proposition, the Court of Appeal in *Scroope v Legal Services Commissioner* [2013] NSWCA 178 (17 June 2013) did not rely upon the common law test but rather on the statutory definitions. The Tribunal had determined that the practitioner’s conduct constituted seriously incompetent conduct and therefore professional misconduct. In allowing the appeal the Court held that the conduct was incompetent conduct and so unsatisfactory professional conduct but was not a substantial or consistent failure of competence so as to be characterised as professional misconduct: at [49]–[51]. That suggests the Court did not import the common law notion of falling short ‘to a substantial degree’ into the statutory definition of unsatisfactory professional conduct insofar as it is based on incompetent conduct.

80 See above n 68. The Court of Appeal in *Fidock v Legal Profession Complaints Committee* [2013] WASCA 108 (23 April 2013) [36] regarded the ‘*Allinson* formulation’ as ‘not dissimilar to the first limb of the test of “unprofessional conduct” in *Kyle*’, and that *Kyle*’s second limb was ‘not dissimilar to the definition of professional misconduct found in s 403(1)(a) of the [*Legal Profession Act 2008* (WA)]’ (seriously incompetent conduct). Seen in the context of the development of the concepts of professional misconduct and unprofessional conduct outlined above, the first limb of *Kyle* is the *Allinson* test; and the second limb of *Kyle* is directed to conduct less serious than professional misconduct, is not confined to conduct relating to a lack of competence and diligence, and determines the standard from the viewpoint of the profession not, as for seriously incompetent conduct, of the public.

[The conduct in question] is serious misconduct in a professional respect and that is all that is meant by the phrase ‘infamous conduct’; it means no more than serious misconduct judged according to rules written or unwritten governing the profession.⁸¹

In Australia, courts in New South Wales hearing appeals from medical tribunals have referred to this approach. In 1965 in *Ex parte Meehan; Re Medical Practitioners Act*,⁸² the statutory expression under consideration was still ‘infamous conduct in a professional respect’. However, the Court pointed out that the Act provided, in addition to removal from the register (as in *Allinson*), for suspension, reprimand and caution. Moreover, the subject Act provided for circumstances of infamous conduct which suggested that they did not necessarily involve ‘disgraceful’ or ‘dishonourable’ or ‘shameful’ behaviour or any appeal to a moral standard. The Court examined *Allinson* and related English decisions and quoted the statement of Scrutton LJ above. On the basis of the cases considered and the provisions of the local Act, Sugerman J said that the only generalisation which might be made as to the statutory expression was ‘that it refers to conduct which, being sufficiently related to the pursuit of the profession, is such as would reasonably incur the strong reprobation of professional brethren of good repute and competence’.⁸³

The New South Wales Court of Appeal in *Qidwai v Brown* referred to the statements of both Scrutton LJ and Sugerman J.⁸⁴ It said ‘infamous conduct’ had been construed to mean ‘whether the practitioner was in such breach of the written or unwritten rules of the profession as would reasonably incur the strong reprobation of professional brethren of good repute and competence’.⁸⁵ That description was said to apply equally to the statutory wording under consideration ‘misconduct in a professional respect’.⁸⁶ On the facts of the case that meant asking ‘whether it was in such breach of standards accepted by the medical profession in this State as would reasonably incur strong reprobation of fellow practitioners of good repute and competence’.⁸⁷ More recently it has been suggested that peers express themselves in terms of ‘strong criticism, rather than “strong reprobation”’.⁸⁸

The Judicial Committee of the Privy Council (as the then final appeal tribunal from disciplinary decisions of the UK General Medical Council and General Dentist Council) has subsequently gone further and abandoned altogether the

81 [1930] 1 KB 562, 569.

82 [1965] NSW 30. The leading judgment in this case was given by Sugerman J. Notwithstanding, in the following year as part of the court in *Re Veron; Ex parte Law Society of New South Wales* [1966] 1 NSW 511, 516–17, Sugerman JA described professional misconduct in relation to a lawyer, both under statute and under the court’s inherent jurisdiction, as governed by the *Allinson* formulation.

83 *Ex parte Meehan; Re Medical Practitioners Act* [1965] NSW 30, 35.

84 [1984] 1 NSWLR 100, 105, citing *Ex parte Meehan; Re Medical Practitioners Act* [1965] NSW 30, 35 (Sugerman J); *R v General Medical Council* [1930] 1 KB 562, 569 (Scrutton LJ).

85 *Ibid* 105, quoted with approval in *Wong v Commonwealth* (2009) 236 CLR 573, 594.

86 *Qidwai v Brown* [1984] 1 NSWLR 100, 105.

87 *Ibid* 102. Some of these NSW medical cases have been analysed in an article by Christopher J Whitelaw, ‘Proving Professional Misconduct in the Practice of Medicine or Law: Does the Common Law Test Still Apply?’ (1995) 13 *Australian Bar Review* 65. See below n 102.

88 *Lucire v Health Care Complaints Commission* [2011] NSWCA 99 (20 April 2011) [84].

language of *Allinson* and the ‘older cases’ following it. In *Doughty v General Dental Council*, the Privy Council considered that Parliament intended by the change in wording from ‘infamous conduct in a professional respect’ to ‘serious professional misconduct’ to effect ‘a change in substance’.⁸⁹ It drew attention to the change in the nature of the penalties and to the objects of the new Act, including the object of promoting high standards of education and professional conduct. On this basis it considered the requirement that the conduct complained of be categorised as infamous or disgraceful as no longer applicable.⁹⁰ It formulated the test of ‘serious professional misconduct’ as, in effect, whether the conduct, connected with the respondent’s profession, has seriously fallen short of the standards of conduct expected among other such professionals.⁹¹

In *McCandless v General Medical Council* reference was again made to the change in statutory language and to the passage, above, from Scrutton LJ, for the proposition that the test of professional misconduct was an objective one, did not necessarily involve a moral breach and included seriously negligent treatment.⁹² The Privy Council said that the authorities on the old wording (‘infamous conduct’) were not consistent with each other and were ‘of little assistance in the interpretation of the new’ (‘serious professional misconduct’).⁹³ It also made reference to the changes made to the statutory penalty and added a further factor: ‘the public has higher expectations of doctors and members of other self-governing professions. Their governing bodies are under a corresponding duty to protect the public against the genially incompetent as well as the deliberate wrongdoers’.⁹⁴ Finally, it referred to the objective test in *Doughty v General Dental Council* (‘treatments that no dentist of reasonable skill exercising reasonable care would carry out’)⁹⁵ as making it ‘unnecessary in the future to revisit ... any of the other earlier authorities’.⁹⁶

The formulation of the test in *Doughty v General Dental Council* was also approved in *Roylance v General Medical Council [No 2]*.⁹⁷ The statutory phrase ‘serious professional misconduct’ was further analysed in these terms:

Analysis of what is essentially a single concept requires to be undertaken with caution, but it may be useful at least to recognise the elements which the respective words contribute to it. Misconduct is a word of general

89 [1988] AC 164, 172–3. Although in *Roylance v General Medical Council [No 2]* [2000] 1 AC 311, 330 it was said that ‘it was not suggested [by counsel] that any real difference of meaning [was] intended’ by this change of statutory language.

90 *Doughty v General Dental Council* [1988] AC 164, 173.

91 Ibid: ‘the General Dental Council should establish conduct connected with his profession in which the dentist concerned has fallen short, by omission or commission, of the standards of conduct expected among dentists and that such falling short as is established should be serious’. The test in the language of *Allinson* has in effect been replaced by a test closer to the language of *Re R*.

92 [1996] 1 WLR 167, 169.

93 Ibid.

94 Ibid, quoted in *Wong v Commonwealth* (2009) 236 CLR 573, 638 (with approval).

95 [1988] AC 164, 173, quoted in *McCandless v General Medical Council* [1996] 1 WLR 167, 169.

96 *McCandless v General Medical Council* [1996] 1 WLR 167, 169.

97 *Roylance v General Medical Council [No 2]* [2000] 1 AC 311, 331 (‘*Roylance*’). The test in *Allinson* was also referred to with the comment that it was not intended to be exhaustive or comprehensive: at 331–2.

effect, involving some act or omission which falls short of what would be proper in the circumstances. The standard of propriety may often be found by reference to the rules and standards ordinarily required to be followed by a medical practitioner in the particular circumstances.⁹⁸

These decisions of the Privy Council have also made clear that professional misconduct need not (as in *Allinson*) be in the pursuit of the (medical) profession but may occur outside it. (The position also adopted in Australia in relation to lawyers where the inherent jurisdiction of the court is invoked — see below.) And moreover, in this respect, it is not necessary that the conduct be such as to provoke moral outrage or be of a nature as to bring the profession into disrepute.⁹⁹

With respect to the discipline of lawyers in the UK, which has undergone significant change in the past few years, there is now almost no reference to the *Allinson* test. Solicitors and entities providing legal services are regulated by the Solicitors Regulation Authority (SRA), an independent regulatory body of the Law Society of England and Wales. The SRA Handbook provides for ten mandatory SRA Principles expressed in general terms. However, rather than compliance with prescriptive rules, the focus is on solicitors achieving the required outcomes expressed in the SRA Code of Conduct 2011, comprising both mandatory and non-mandatory rules. Cases of ‘misconduct’, a term which is not substantively defined, are determined by the SRA or, where serious, are brought by the SRA before the Solicitors Disciplinary Tribunal. This statutory Tribunal is constituted for the purposes of a disciplinary hearing by two solicitors and one lay member. In relation to penalty it may make such order as it thinks fit. Statutory misconduct comprises principally non-compliance with statutory rules and regulations, including the SRA Principles, the SRA Code of Conduct 2011 and where still applicable the Solicitors Code of Conduct 2007, and the SRA Accounts Rules. Where the conduct is not the subject of a specific rule, professional misconduct is described (in somewhat military terms) as ‘conduct unbefitting a solicitor’. In this respect: ‘Non-statutory misconduct is, in short, that which the Disciplinary Tribunal, representing the views of the profession, and the judges, regard it to be’.¹⁰⁰ This encompasses but is not limited to cases of ‘disgraceful or dishonourable conduct’.¹⁰¹ For their part, barristers are subject to the Code of Conduct of the Bar of England and Wales. Serious disciplinary cases involving charges of ‘professional misconduct’, largely defined by reference to a

98 Ibid 331.

99 Ibid 332–3. It was enough in that case that the practitioner owed and breached duties of care as a professional notwithstanding his role as chief executive of the hospital where the harm occurred. Appeals to the Privy Council in this area have since 2003 been transferred to the High Court, which has continued to rely on the more recent jurisprudence: See, eg, *R (On the Application of Remedy UK Ltd) v General Medical Council* [2010] EWHC 1245 [37].

100 LexisNexis Butterworths, *Cordery on Legal Services* (at Issue 72) [358].

101 Ibid E-353 [356]:

Conduct does not have to be ‘regarded as disgraceful or dishonourable by his professional brethren of good repute and competency’ to amount to professional misconduct as even negligence may be misconduct if it is sufficiently reprehensible or inexcusable and such as to be regarded as deplorable by his fellows in the profession.

The authors cite *Re A Solicitor* [1972] 2 All ER 811, 815. The American Bar Association, *Model Rules of Professional Conduct* r 8.4 defines ‘professional misconduct’ by reference to the Rules and to conduct such as that involving dishonesty etc. See also the explanation in the ‘Comment’ to that rule.

breach of provisions of the Code, are brought before disciplinary tribunals, the panels of which include a lay member.

XI THE CONTINUED RELEVANCE OF *ALLINSON* AND *RE R*

It is apparent that the statutory provisions on which the *Allinson* test was formulated have undergone considerable change. That extends to the statutory language describing the misconduct, the incidents of conduct falling within the term, the penalties provided for and the objects of the legislation.¹⁰²

There have been other changes of equal significance. It seems likely that evidence of the opinion of fellow professionals of ‘good repute and competency’ was originally considered necessary, at least in part, to ensure the standard was seen as an objective one rather than the individual view of the professional disciplinary authority.¹⁰³ Today in relation to lawyers, there is a considerable (and growing) body of jurisprudence built around professional conduct. There are a large number of reported decisions of courts and tribunals on the subject. There are comprehensive professional conduct rules in each Australian jurisdiction and at a national level covering every aspect of legal practice, some having accompanying illustrations and rulings. There are a number of authoritative textbooks and academic articles on professional responsibility.¹⁰⁴ These sources in effect describe what competent and conscientious practitioners would do, or not do, in particular circumstances. Moreover, disciplinary authorities now are staffed by judges and senior professionals and lay members with appropriate experience, to reflect the views of the profession and the public.

Further, the courts have made clear that they are the final arbiters of proper conduct, such that the existence of a practice amongst lawyers (including those of good repute and competency), even relatively widespread, will not be decisive.¹⁰⁵ In the exercise of the courts’ inherent jurisdiction, the court forms a judgment whether the practitioner is a fit and proper person to remain on the rolls without necessarily making a finding of professional misconduct or referring to the views of senior practitioners. Significantly, in *Kennedy*, the description of professional misconduct by Rich J (quoted above, and also that of McTiernan J) was stated

102 These statutory changes, together with a number of medical decisions in NSW considering them, are discussed in Whitelaw, above n 87. The author argues that whilst the continuation of the common law principles in the application of the statutory test is appropriate, given the new statutory definition of professional misconduct under the *Legal Profession Act 1987* (NSW) and the test from *Pillai v Messiter [No 2]* (1989) 16 NSWLR 197 (as to when incompetence will be treated as misconduct), it is unnecessary to continue with that aspect of the common law test requiring evidence of ‘strong reprobation’ by fellow practitioners, at least in competence based claims: Whitelaw, above n 87, 71. The tribunal, based on expert evidence from lawyers as to the appropriate standard of conduct in the particular circumstances (but not of reprobation), will itself determine whether the case is one of professional misconduct, in the manner the court determines professional negligence actions: at 82.

103 See, eg, *Ex parte A-G (Cth); Re A Barrister and Solicitor* (1972) 20 FLR 234, 242.

104 See, eg, D A Ipp, ‘Lawyers’ Duties to the Court’ (1998) 114 *Law Quarterly Review* 63.

105 *Re Veron; Ex parte Law Society of New South Wales* [1966] 1 NSWLR 511, 516, 523; *Turner* (2001) 11 Tas R 1, 18 (‘what a reputable and competent practitioner might reasonably think’) (emphasis added). Cf *Law Society of New South Wales v Moulton* [1981] 2 NSWLR 736, 756–7 (wrong advice from the Law Society may provide a defence).

without reference to *Allinson* or to the views of members of the profession.¹⁰⁶ In *Wong v Commonwealth*, the Court emphasised that the test in *Allinson* ‘identified one form of conduct amounting to “infamous conduct”’.¹⁰⁷ The tests formulated by Scrutton LJ and the Privy Council in relation to medical and dental practitioners were also made without reference to the language of disgraceful or dishonourable conduct or requiring evidence of the opinion of fellow practitioners. If that is the case for the medical profession, the argument is all the stronger for adopting a similar approach for the legal profession, given the presence of judicial and legally qualified members on disciplinary bodies who may be expected to be familiar with legal (as opposed to medical) practice.¹⁰⁸

In the context of the superior courts’ inherent disciplinary jurisdiction over its officers, the notion of professional misconduct now includes conduct outside professional practice. In *A Solicitor v Council of the Law Society of New South Wales*, the High Court held: ‘even though conduct is not engaged in directly in the course of professional practice, it may be so connected to such practice as to amount to professional misconduct’.¹⁰⁹ Thus, professional misconduct ‘may extend beyond acts closely connected with actual practice, even though not occurring in the course of such practice, to conduct outside the course of practice which manifests the presence or absence of qualities which are incompatible with, or essential for, the conduct of practice’.¹¹⁰ There remains, however, a separation between ‘private’ conduct and ‘professional’ conduct. Professional misconduct is not simply misconduct by a professional. The circumstances of the conduct may (as found, controversially, on the facts of that case) be so remote from professional practice that its characterisation as professional misconduct cannot be sustained. On the other side of this (unclear) line, conduct sufficiently connected to legal practice to constitute professional misconduct may include statements made by a practitioner in correspondence relating to his profession, compliance with revenue laws and statements made or evidence given by a practitioner when acting in personal litigation.¹¹¹

These developments raise the question whether the concepts of professional misconduct and unprofessional conduct at general law, both in relation to the

106 *Kennedy* (1939) 13 ALJ 563, 563–4. The passage from the judgment of Rich J is sometimes cited by courts and tribunals in lawyers’ disciplinary cases, but invariably together with a reference to *Allinson*. What is required is a considered abandonment of the test in *Allinson* in favour of reference to the statutory text and where appropriate to more meaningful descriptions of professional misconduct as it relates to the particular case. Illustrations of such descriptions are given below.

107 *Wong v Commonwealth* (2009) 236 CLR 573, 637 (emphasis in original).

108 *Turner* (2001) 11 Tas R 1, 18.

109 (2004) 216 CLR 253, 267 [20] (citations omitted).

110 *Ibid* 273, quoting *Council of the Law Society of New South Wales v A Solicitor* [2002] NSWCA 62 [80] (Sheller JA), the decision under appeal.

111 See *A Solicitor v Council of the Law Society of New South Wales* (2004) 216 CLR 253, 272–3 (non-disclosure of convictions in correspondence with Law Society); *Weaver v Law Society of New South Wales* (1979) 142 CLR 201 (solicitor giving false evidence in disciplinary proceedings); *New South Wales Bar Association v Cummins* (2001) 52 NSWLR 279 (failure to lodge tax returns); *Law Society of Tasmania v Matthews* [2010] TASSC 60 (15 December 2010) (making a false statement for personal gain). For cases concerning conduct in personal litigation, see *Re Thom; Ex parte The Prothonotary* (1964) 80 WN (NSW) 968; *New South Wales Bar Association v Maddocks* [1988] NSWCA 102 (23 August 1988); *Coe v New South Wales Bar Association* [2000] NSWCA 13 (29 February 2000); *Legal Practitioners Complaints Committee v Dixon* [2006] WASCA 27 (15 December 2005).

language in which the tests are expressed and their references to the opinions of ‘competent and reputable’ members of the profession, continue to be the appropriate criterion for judging statutory misconduct under the legal profession legislation. That is not to say that the common law cases instancing professional misconduct and unprofessional conduct do not remain important. It is rather to suggest that in determining statutory misconduct, the tests in *Allinson* and *Re R* are no longer meaningful or appropriate. Their recital as a condition for establishing statutory misconduct suggests adherence to a ‘ritualistic formula’, that is, the substitution of a formularised criterion of liability for the language of the legislation.

XII ADVERSE CONSEQUENCES OF APPLYING THE COMMON LAW TESTS

To the extent the disciplinary provisions of the legal profession legislation have widened the common law concepts of professional misconduct and unprofessional conduct, both as to their content and the standpoint from which they are to be judged (as detailed in the following section), continued adherence to the common law tests may unintentionally operate to frustrate the legislature’s objectives with respect to the new legislation. A recent academic study of Queensland cases in this area suggests that the application of the common law tests has had this effect: ‘common law or statutory discipline which defines professional misconduct according to what the legal profession may consider “dishonourable or disgraceful” necessarily limits its potential to protect’.¹¹² The author seeks to ‘demonstrate how the [Queensland] Supreme Court continued to overlook or ignore Parliament’s intention that statutory discipline break away from the “disgrace and dishonour” mould and take a broader view of public protection’.¹¹³

Re A Solicitor provides an example of a possibly restrictive reading of new legislation in this context.¹¹⁴ The Victorian statute at issue in the case extended the

112 Linda Ruth Haller, *Discipline of the Queensland Legal Profession* (PhD Thesis, University of Queensland, 2006) 46.

113 Ibid. This thesis includes an examination as to why the common law notions of misconduct have prevailed notwithstanding that over many years Queensland (and other state and territory) legislation has sought to expand the concepts of misconduct. The suggested reasons include a general reluctance to initiate prosecutions of new definitions, especially where the legislative changes have weakened the need to find culpability (ie disgraceful conduct); the time lag during which the profession comes to internalise the ‘dishonour and disgrace’ of the newly prescribed conduct; the selection of cases for prosecution based on the common law tests so misconduct is readily established and the courts have limited opportunity to deal with the new provisions; the preference of tribunals and courts for the testimonials of other lawyers over lay opinions; the continuation of the same personnel in enforcing the old and the new legislation; and the selection of judges drawn from barristers familiar with the traditional tests: at 45–55, 339–42. (The author is grateful to the anonymous referee who referred him to this source.) A more general examination of the manner in which in Australia the common law responds to the manifest policies and purposes of contemporary statutes is provided by Paul Finn, ‘Statutes and the Common Law’ (1992) 22 *Western Australian Law Review* 7.

114 [1960] VR 617. The case is repeatedly referred to in Victoria as establishing the *Allinson* test as a condition of professional misconduct. The reasoning now appears inconsistent with later cases such as *Re Mayes and the Legal Practitioners Act* [1974] 1 NSWLR 19 and cases following, establishing that negligence in the practitioner’s supervision of trust funds may, where the charge is suitably framed, constitute professional misconduct.

definition of misconduct to include the situation where money paid to a solicitor was not directly paid into trust, with the apparent intention of enlarging the scope of misconduct in this respect. Dean J said that whilst the effect of these provisions was to include the failure to account as constituting statutory misconduct, it left ‘untouched the principle that before a solicitor can be found guilty of [statutory] misconduct by reason of such acts or defaults they must be acts or defaults involving him in dishonest or disgraceful conduct, and unfitting him to remain on the rolls’.¹¹⁵ An example as to the restrictive interpretation given to the term ‘unsatisfactory professional conduct’ is provided by *PG v Law Society of the Australian Capital Territory*.¹¹⁶ The definition of that concept was substantially in the terms provided under the legal profession legislation. The Court referred to earlier authority to the effect that the definition was ‘apt to describe conduct which while falling short of professional misconduct nonetheless involves a significant departure from the standards expected of legal practitioners of good repute’¹¹⁷ (the ‘conduct falling short’ test). Further, in allowing the appeal, it placed weight upon the opinions of solicitors expert in the field, who had given evidence that the subject conduct did not constitute unsatisfactory professional conduct.¹¹⁸ As examined below, the definition of unsatisfactory professional conduct does not require a ‘significant departure’ from the relevant standard. Moreover, at least to the extent the Court’s decision was based on incompetent conduct, the standard is to be judged from the standpoint of the public, not based on opinion evidence from the profession on the ultimate issue.

In another respect, application of the common law tests may lead to a manipulation of the tribunal’s reasoning process. In practice today it may be suggested that disciplinary tribunals, having made the appropriate findings of fact, then make the necessary judgment as to misconduct by reference to the relevant statutory provision or conduct rule or principle. Where misconduct is made out, they then dutifully recite the appropriate common law test rather than using the test to arrive at that judgment. In some circumstances, this may result in the authority appropriately identifying the subject conduct as professional misconduct or unsatisfactory professional conduct within the meaning of the legislation, but then contriving to describe the conduct within the language of disgraceful conduct or conduct falling short.

In terms of statutory construction or the development of the common law, it may be argued that the *Model Bill* and the legislation based on it ‘has created an entirely new setting to which the common law must now adapt itself’.¹¹⁹ There is

115 *Re A Solicitor* [1960] VR 617, 622.

116 (2004) 155 ACTR 1. The case is referred to by Haller, *Discipline of the Queensland Legal Profession*, above n 112, 53 n 163. See also the ‘proposition’ accepted in *Scroope v Legal Services Commissioner* [2013] NSWCA 178 (17 June 2013) [16]. See above n 79 and accompanying text.

117 *PG v Law Society of the Australian Capital Territory* (2004) 155 ACTR 1, 5 [22], quoting *Howes v Law Society (ACT)* (Unreported, Supreme Court of the Australian Capital Territory, Full Court, Gallop ACJ, Higgins and Crispin JJ, 23 July 1998) [10].

118 *PG v Law Society of the Australian Capital Territory* (2004) 155 ACTR 1, 3 [8].

119 *Adelaide Steamship Co Ltd v Spalvins* (1998) 81 FCR 360, 373, quoted in *Esso* (1999) 201 CLR 49, 61 [22].

evidence of a legislative view of what the public interest demands in relation to the discipline of the legal profession (as discussed in the following sections) such that ‘the common law ... ought to proceed upon a parallel ... course’.¹²⁰

XIII A TEXTUAL ANALYSIS OF STATUTORY MISCONDUCT UNDER THE LEGAL PROFESSION LEGISLATION

There are several elements involved in the approach to and the task of ‘unpacking’¹²¹ the statutory text in order to determine what conduct properly falls within the concepts of ‘professional misconduct’ and ‘unsatisfactory professional conduct’ and the relevance to that of the existing common law tests.

A Focus on the Words of the Statute

There is strong authority that the courts should in the first instance consider the text of an Act rather than judicial interpretations of it or similar terms used in earlier or other legislation: ‘Its meaning therefore is to be ascertained in the first instance from its language and the natural meaning of that language is not to be qualified by considerations deriving from the antecedent law’.¹²² In particular, ‘[w]here it [the statutory language] is not [ambiguous], the courts should not encrust the statute with subtle notions of the common law, at least where those notions involve imposing meanings which are unnatural, artificial or exceptional’.¹²³ With respect to the introduction (under earlier legislation) of the statutory term ‘unsatisfactory professional conduct’ the Court has said that it ‘is a concept which

120 *Warnink v J Townend & Sons* [1979] AC 731, 743, quoted in *Esso* (1999) 201 CLR 49, 62 [24]. See also the discussion in *Esso* at 59–63. The starting point in determining a common law of Australia on statutory misconduct is dependent on South Australia adopting the relevant provisions. Even then, continued differences in other areas of the legal profession legislation may preclude this (and Victoria and New South Wales will shortly instigate new regimes based on the *Uniform Law*). These differences may in part explain why, notwithstanding that prior to the *Model Bill* statutory regimes throughout Australia incorporated common expressions, including professional misconduct and unsatisfactory professional conduct, there was relatively little reference by one Supreme Court or disciplinary tribunal to decisions from other states or territories. That remains the position today, notwithstanding the adoption of common provisions based on the *Model Bill*.

121 In the jargon of the post-modern literary critic, the task is to ‘unpack’ (take apart and examine each constituent element of) the manuscript and ‘drill down’ into the underlying purposes, undistracted by the accompanying judicial baggage and its conventional formulae.

122 *Sungravure Pty Ltd v Middle East Airlines Airliban SAL* (1975) 134 CLR 1, 22 (Mason J) (citations omitted). See also *Alcan (NT) Alumina Pty Ltd v Commission of Territory Revenue (NT)* (2009) 239 CLR 27, 47; *Marshall v Director General, Department of Transport* (2001) 205 CLR 603, 632–3 (McHugh J), cited and applied in relation to statutory misconduct of nurses in *Graham v Queensland Nursing Council* [2010] 2 Qd R 157, 188–92.

123 *Gamer’s Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd* (1985) 3 NSWLR 475, 479 (Kirby J, dissenting). The judgment of Deane J in *Street v Queensland Bar Association* (1989) 168 CLR 461, 521–34, provides further descriptions of the error of substituting a court’s verbal formula in place of an analysis of the language of the statute in its context. The case against continuing to appeal to such formula is made stronger where, as here, the relevant statutory provisions have undergone revision and expansion. In biblical terms, ‘thou shalt not put new wine into old flasks’.

does not exist at common law and the statute, while not an exclusive one, provides the principal guidance as to the scope of the statutory norm'.¹²⁴

The starting point in the process of statutory interpretation therefore is reference to the natural and ordinary meaning of the words used describing statutory misconduct.¹²⁵ According to the Macquarie Dictionary, 'professional' relevantly means 'relating or appropriate to a profession' (law); 'misconduct' relevantly means 'improper conduct; wrong behaviour'. And 'unsatisfactory' relevantly means 'not satisfying specified ... requirements; inadequate'. That would suggest that professional misconduct, including by reference to unfitness conduct, is directed more to the propriety of the conduct; and unsatisfactory professional conduct, including reading in incompetent conduct, is directed more towards the adequacy of the services.¹²⁶

B Division between the Forms of Statutory Misconduct

The statutory scheme under the legal profession legislation divides misconduct into two kinds each reflecting a different level of seriousness and a different scope. Professional misconduct is the more serious and, at least in relation to unfitness conduct, need not be in connection with legal practice. Unsatisfactory professional conduct is the less serious and (arguably) is confined to misconduct connected with legal practice. The division allows (where the statute so provides) for regulatory authorities to determine less serious matters on a summary basis and in private. However, the statutory instances of misconduct and the penalties provided for do not distinguish between these forms of misconduct. That might be said to recognise the variety of circumstances constituting misconduct. For instance, an isolated incident of serious misconduct is to be judged alongside a protracted course of minor misconduct. A deliberate breach of a 'formal' professional conduct rule (communicating with the opposing client) may be compared with an inadvertent breach of a substantive rule (withdrawal of trust

124 *Graham* [2005] NSWCA 127 (25 March 2005) [33] in relation to the statutory term in the then *Legal Profession Act 1987* (NSW). However, with respect to statutory 'professional misconduct' under that Act, the Court referred without comment to the Tribunal's reliance on the test in *Allinson* and the statement (above) of Rich J in *Kennedy* (1939) 13 ALJ 563: *Graham* [2005] NSWCA 127 (25 March 2005) [31], [48]. In a related context, in *New South Wales Bar Association v Murphy* (2002) 55 NSWLR 23, 50 [105], the Court disapproved of the reasoning of the decision under appeal to the extent it imported the concept of dishonesty into statutory unfitness to hold a practising certificate based on acts of bankruptcy:

But dishonesty even on a broad notion departs from the words of the Act, and I do not exclude that a legal practitioner who acted honestly according to an ample understanding of the word may be found to have committed an act of bankruptcy in circumstances showing that the legal practitioner is not a fit and proper person to hold a practising certificate. A Council [of the Law Society], and this Court, must apply the words of the Act, and not replace them by a possibility restrictive exegesis.

125 Recognising that '[t]he literal meaning of the legislative text is the beginning, not the end, of the search for the [legislature's] intention': *Kelly v The Queen* (2004) 218 CLR 216, 251. And that there are limits in taking the individual words of a statutory phrase and separately determining the meaning of each: *Roylance* [2000] 1 AC 311, 331.

126 Seriously incompetent conduct may be said to involve such a degree of incompetence and/or such lack of diligence as to encroach into the realm of impropriety.

money without express authority). Within these broad categories, the degree of seriousness of the misconduct will be reflected in the views expressed by the disciplinary authority, the form of misconduct found and the penalty imposed.

C Protection of Clients, the Public

The purposive approach to statutory interpretation requires that a court consider the purpose and object underlying the legislation as revealed by the language used and permissible extrinsic aids. The expressed objects of the disciplinary provisions include to protect the interests of consumers of legal services and the public generally.¹²⁷ This is reflected in instances of statutory misconduct such as overcharging, or a conviction for tax offences, or bankruptcy, which have a strong public interest element. The *Model Bill*, the legal profession legislation, the *Legal Profession National Law* and the *Uniform Law* provide, in the context of complaints and discipline, for compensation orders in favour of clients.¹²⁸

The need to consider the interests of the public and legal consumers is reflected also in the statutory requirement that lay members sit on the relevant regulatory bodies¹²⁹ and on the independent disciplinary tribunals.¹³⁰ That the state and

127 See above n 17. Protection of the public, rather than punishing the individual lawyer, is repeatedly said to be the main object of disciplinary proceedings. The better view may be that there is no clear demarcation between the objects of protection and punishment: *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129, 146, 148–9, cited in this context in *Health Care Complaints Commission v Waddell* [No 2] [2013] NSWMT 2 (27 March 2013) [108].

128 *Model Bill* pt 4.10 (a non-core provision); *Legal Profession Act 2004* (NSW) pt 4.9; *Legal Profession Act 2004* (Vic) s 4.2.14; *Legal Profession Act 2006* (ACT) pt 4.8; *Legal Profession Act 2006* (NT) pt 4.12; *Legal Profession Act 2007* (Qld) pt 4.10; *Legal Profession Act 2007* (Tas) s 491; *Legal Profession Act 2008* (WA) s 448. See also *Legal Profession National Law* pt 5.5; *Uniform Law* pt 5.5.

129 *Model Bill* s 4.1.1(d); *Legal Profession Act 2004* (NSW) ss 494(1)(d), 695, 698 (councils); *Legal Profession Act 2007* (Tas) s 590(1)(d), sch 3 cl 4 (Legal Profession Board); *Legal Profession Act 2008* (WA) s 566(1)(b) (Complaints Committee). In the Territories, the regulatory authority is the Law Society Council and also (ACT) the Bar Council. Both Territory jurisdictions recognise the interests of the public in complaints and disciplinary processes: *Legal Profession Act 2006* (NT) s 461(1)(d); *Legal Profession Act 2006* (ACT) s 384(d). In New South Wales, Victoria and Queensland, complaints are generally made to the statutory Legal Services Commissioner, who need not be a lawyer but must be familiar with the nature of legal practice and who may require the matter be investigated by the respective law society council or bar council. The Commissioner or council either makes a determination or refers the matter to the appropriate disciplinary tribunal. Under the *Legal Profession National Law* s 5.2.3, complaints are made to the National Legal Services Commissioner. The Commissioner may make a finding of unsatisfactory professional conduct or refer the matter to a designated disciplinary tribunal: at pt 5.4. Under the *Uniform Law* pt 5.4, complaints are initially dealt with by the ‘local regulatory authority’ (in Victoria and New South Wales, the respective Legal Services Commissioner or the professional body as the Commissioner’s delegate), who, if the matter is serious, may refer it to the ‘designated tribunal’ (the respective Civil and Administrative Tribunal).

130 *Civil and Administrative Tribunal Act 2013* (NSW) s 13(6), sch 5 div 4 cl 18 (Civil and Administrative Tribunal); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 1 pt 13A cl 46C (the Victorian Civil and Administrative Tribunal as constituted for a re-hearing of its disciplinary order); *Legal Profession Act 2006* (NT) s 674(2)(b)(i) (Disciplinary Tribunal); *Legal Profession Act 2007* (Qld) ss 598–9 (Civil and Administrative Tribunal), 639(2)(c) (Legal Practice Committee); *Legal Profession Act 2007* (Tas) s 611(1)(c) (Disciplinary Tribunal); *Legal Profession Act 2008* (WA) s 437 (State Administrative Tribunal). In New South Wales, Queensland, Western Australia, Victoria and the Australian Capital Territory (ACT Civil and Administrative Tribunal), serious disciplinary matters or appeals are heard by those tribunals which determine general administrative matters, but constituted as provided by this legislation.

territory Parliaments have acted to include non-lawyers on disciplinary authorities is significant in relation to the application of the common law tests. It can hardly have been the intention that, in determining whether in a particular case statutory misconduct has been established, the question for lay members is whether senior members of the legal profession would reasonably regard the conduct as disgraceful or dishonourable or as substantially falling short of professional standards. They could add nothing to such an enquiry and their inclusion under such circumstances would be tokenistic.¹³¹ They could, as persons familiar with the interests of clients, contribute to an enquiry as to whether the conduct constituted a departure from what a client could reasonably expect of a lawyer and as to its conformity to generally accepted community standards.

The statutory object of protecting the interests of consumers is again directly revealed in the legislature fixing the standard of competence and diligence from the standpoint of a member of the public, the breach of which may lead to a charge of unsatisfactory professional conduct or (if sufficiently serious) a charge of professional misconduct. However, it is apparent from the legislation that it was not intended to subsume all other forms of misconduct into a lack of competence and diligence (and unfitness conduct) — as a form of ‘professional incompetence’. This is clear from the ordinary meaning of ‘competence’ and ‘diligence’ which do not encompass, for instance, dishonesty or a deliberate breach of duty. It is also clear in that the definitions of both professional misconduct and unsatisfactory professional conduct are inclusory only. That other forms of misconduct continue is also plain in that the legal profession legislation identifies as an object of the disciplinary provisions, to promote and enforce ‘professional standards, competence and honesty’ and in that the listed instances of statutory misconduct are not all related to competence and diligence.¹³² It follows that complaints which concern, for instance, a lawyer deliberately misleading the court or knowingly acting while having a conflict of interests or overcharging, are not properly the subject of a charge of failing to meet reasonable standards of competence and diligence.¹³³

The introduction of this public interest element might suggest a further division (beyond seriousness and scope) across both forms of statutory misconduct. That

131 In *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408, 439–40, Mahoney JA raised the issue of whether the Court could give weight to the tribunal’s finding of professional misconduct under the *Allinson* test, where the Tribunal included lay members. Given Parliament’s position on the inclusion of community members under the legal profession legislation, it might be thought the material issue is not the extent of the court’s reliance on the tribunal’s judgment (on the rare occasions where the matter goes on appeal), but the continued application of *Allinson*.

132 As to the objects of disciplinary proceedings and instances of statutory misconduct, see above nn 17, 20 respectively.

133 However, it would appear that the need to distinguish conduct which has to do with competence and diligence, as opposed to other forms of misconduct, eg deliberate overcharging, is not always observed. See *Meakes* [2006] NSWCA 340 (6 December 2006) [24], [86] (Tobias JA). Cf [101] (Basten JA). The statements in *Fidock v Legal Profession Complaints Committee* [2013] WASCA 108 (23 April 2013) [105]–[106] that the practitioner’s dishonest conduct could also be characterised as seriously incompetent conduct (or as disgraceful conduct) seem unconvincing. In this context, dishonesty as found in the form of deliberately failing to ascertain the true position in order to advance a conflicting personal interest and making a statement in an affidavit without caring whether it was true or false, seems different in nature from, and more serious than, a failure to reach the requisite standard of ‘competence and diligence’; that is, to exercise reasonable skill and care in each instance to ascertain the true position.

is, between conduct directly impacting on the practitioner and client relationship (incompetence, overcharging, misuse of trust funds, failing to account) and conduct more related to a practitioner's role in the administration of justice (duties to the court and to fellow practitioners).¹³⁴ If the conduct relates to the practitioner–client relationship, the interests of the client will be more material than in relation to matters such as the practitioner's duty to not mislead the court. Some forms of misconduct (an excessively adversarial approach) may fall within both categories. An 'outcomes based' approach, directed to ensuring that the client is satisfied that the complaint has been heard and appropriate remedial action taken rather than focusing on punishing the practitioner, will likely be more prominent in complaints concerning the client relationship.

The instances of professional misconduct and unsatisfactory professional conduct include a contravention of the legal profession legislation and the professional conduct rules. As to the former, the legislature has singled out matters of importance in determining what constitutes misconduct. Parliament has to this extent bypassed the body of reputable and competent practitioners. In regard to the professional conduct rules, a range of duties are prescribed, reflecting the views of 'members of the profession of good repute and competence'.¹³⁵ Where conduct is in breach of the legislation or the rules, or has been the subject of a determination under the general law, or is analogous to conduct within these categories (which together will cover the great majority of cases of misconduct), the conduct and views of competent and reputable practitioners has, to the extent relevant, been resolved and the focus is likely to be on proof of the misconduct, its circumstances and its seriousness.

These various aspects of the involvement by, and consideration of, the public in lawyers' disciplinary matters suggest that a test based on how the profession might regard the practitioner's conduct (as each of the common law tests provides), is no longer suitable. It has been authoritatively said in relation to the standards of both the legal profession and the judiciary that the *Allinson* test is no longer appropriate and that a peer group test without reference to the expectations of the public is no longer sufficient.¹³⁶

D Expansion of Common Law Concepts of Misconduct

The continued use of the term 'professional misconduct' and the lack of a comprehensive definition for it, suggests that specific instances of misconduct which at common law, including under the court's inherent jurisdiction, were

134 Christine Parker et al, 'The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour' (2008) 31 *University of New South Wales Law Journal* 158, 161 suggest lawyers' 'unethical behaviour falls into two main categories'. First, 'where lawyers ... breach their ethical and legal obligations to their own clients': at 161 (emphasis altered). Second, where lawyers breach their 'legal and ethical obligations to the courts, the fair operation of the legal system and the public': at 162 (emphasis altered).

135 *Archer v Howell [No 2]* (1992) 10 WAR 33, 47.

136 James Thomas, *Judicial Ethics in Australia* (LexisNexis Butterworths, 3rd ed, 2009) 13–14 notes that whereas in the first edition of his book the *Allinson* test was regarded as the appropriate test, it is no longer the appropriate 'touchstone for the profession or the ... judges. A simple peer group test' without reference to the needs of the community is not sufficient.

treated as professional misconduct will, where otherwise consistent with the terms of the legal profession legislation, be treated as within the (undefined) statutory description.¹³⁷ So much does not however resolve the argument whether, as courts and disciplinary tribunals in effect maintain, satisfaction of the common law test for professional misconduct, that is a finding of disgraceful or dishonourable conduct based upon standards of the profession, is imported into the definition as a necessary criterion.¹³⁸ Conversely, the fact that the legislature has introduced the term ‘unsatisfactory professional conduct’ rather than using, for instance, ‘unprofessional conduct’, suggests that a change in the scope of less serious misconduct as exists at common law (including by reference to the test of conduct falling short) was intended.

Moreover, there are several respects (as detailed in the following paragraphs) in which statutory misconduct as defined departs from the common law concepts of professional misconduct and unprofessional conduct. The introduction in 1987 of legislation in New South Wales providing for ‘professional misconduct’ and additionally ‘unsatisfactory professional conduct’ in the terms defined was expressly designed to meet the public’s claim that disciplinary bodies tended to be overly lenient in judging standards of competence and diligence.¹³⁹

In relation to ‘unsatisfactory professional conduct’ as defined, where the conduct in question concerns a lack of competence and diligence the statutory definition encompasses conduct which would not be regarded as within the common law notion of unprofessional conduct. Conduct which ‘falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner’ might not be regarded (within the test in *Re R*) as falling short to a *substantial degree* of the standard of professional conduct *observed or approved by members of the profession*

137 In *Bechara v Legal Services Commissioner* (2010) 79 NSWLR 763, 778 [44] the following examples of professional misconduct (with supporting authorities) are given (citations omitted):

willfully misleading the court ... removing documents in contravention of a court order ... permitting conflicts of interest to arise ... failing to account for money received ... misleading a client ... gross neglect and delay[s] ... failing to adequately supervise an unqualified clerk ... breaching an undertaking given to another lawyer ... and, in certain situations, criminal and/or personal misconduct.

138 For the reasons set out, it is here contended that the disgraceful test is not to be treated as an aspect of the statutory concept. It is acknowledged that the expression ‘professional misconduct’ was used in some earlier state and territory legislation and has since been repeated in legislation based on the *Model Bill* and the *Legal Profession National Law*. However, there is some dispute as to the extent to which a Parliament which repeats words which have been judicially construed is to be taken to have intended the words to bear the meaning judicially attributed to them. See the discussion and cases cited in *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96, 106. Moreover, where the statutory context for those words has changed (as in the legislation based on the *Model Bill*, eg in the introduction of the objects of the disciplinary provisions) the ‘presumption’ (if it may be dignified as such) loses much of its force.

139 New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 November 1987, 16 275–6, (Terence Sheahan, Attorney General), cited in *New South Wales Bar Association v Bland* [2010] NSWADT 34 (4 February 2010) [187], where the Tribunal referred to the explanation along these lines given in Parliament for the new expression. The High Court in *Walsh v Law Society of New South Wales* (1999) 198 CLR 73, 94, referring to the differentiation between professional misconduct and unsatisfactory professional conduct in the context of the then NSW Act said:

Clearly, this distinction was designed to meet dissatisfaction with the response of those charged with deciding the complaints of users of legal services and the suggestion that they sometimes tended to neglect conduct falling short of proper standards of competence and diligence.

of good repute and competence. Where the departure from the reasonable standard of competence and diligence is ‘substantial’, the legislation stipulates that the conduct be considered as professional misconduct. Moreover, whilst the notions of ‘mere’ (as opposed to ‘gross’) negligence,¹⁴⁰ and ‘mere professional incompetence’,¹⁴¹ or an ‘error of judgment’,¹⁴² have not historically been regarded in the general law as professional misconduct or unprofessional conduct in the absence of other factors, they may well constitute conduct falling short of the standard of competence a member of the public is entitled to expect.

In the common law test under *Re R*, ‘substantial’ qualifies the necessary degree of departure from the standard rather than directing attention to the nature of the conduct. If in relation to incompetent conduct the statutory standard in effect eliminates the requirement of falling short ‘to a substantial degree’, it is difficult to understand upon what basis that qualification should continue to apply for a breach of the other duties required of a practitioner. In the context of the provision of legal services, ‘in practice, the client must depend upon the standards as well as the skill of his professional adviser’.¹⁴³ There would surely be no lesser standard required, for instance, as regards a practitioner’s duty of disclosure to the client or accounting for trust funds (and of course honesty and integrity) than for her or his competence and diligence. It is the fact that ‘competence and diligence’ was singled out by the legislature in the definition section in this respect. However, given the declared objects of the disciplinary provisions of the legal profession legislation (above) and the equally important nature of such other obligations that could hardly be regarded as a sufficient ground for tolerating a higher threshold in other categories of misconduct. Moreover, the use of the term ‘unsatisfactory’ professional conduct as opposed to ‘unprofessional conduct’ suggests a general broadening of the category of less serious matters and less reliance upon the standards of senior practitioners.

140 *Myers v Elman* [1940] AC 282, 289: ‘Mere negligence, even of a serious character, will not suffice’ to constitute professional misconduct. Cf *Re Mayes and the Legal Practitioners Act* [1974] 1 NSWLR 19, 25. The difference between negligence and ‘gross’ negligence (beyond simply the addition of a ‘vituperative epithet’) might be expressed this way. If a driver were to ask the distance from Perth to Alice Springs in order to calculate the petrol required and was given a distance less than the actual, that advice might be seen as negligent. The negligence might however be described as gross, if the enquirer was a pilot.

141 *Pillai v Messiter* [No 2] (1989) 16 NSWLR 197, 200, in relation to the statutory term ‘misconduct in a professional respect (citations omitted):

Departures from elementary and generally accepted standards, of which a medical practitioner could scarcely be heard to say that he or she was ignorant could amount to such professional misconduct ... But the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse of the privileges which accompany registration as a medical practitioner.

142 In *Daskalopoulos v Health Care Complaints Commission* [2002] NSWCA 200 (2 July 2002) [59], it was said that the conduct under consideration constituted an ‘error of judgment’ but did not of itself demonstrate ‘a lack of adequate ... judgment’ so as to constitute unsatisfactory professional conduct as defined. Generally speaking however, what might be described as an error of judgment will often constitute statutory misconduct.

143 *New South Wales Bar Association v Evatt* (1968) 117 CLR 177, 184. The statement was made in the context of the practitioner’s failure to understand that his conduct was improper, which of itself was said to indicate unfitness.

Clearly, incompetent conduct (and consequently seriously incompetent conduct) must be 'in connection with the practice of law'.¹⁴⁴ With respect to other instances of unsatisfactory professional conduct, the notion of the adequacy of the services provided (ie the dictionary meaning of 'unsatisfactory'), the inclusion of the word 'professional' in the statutory description and the absence of any extension of unsatisfactory professional conduct to matters *not* occurring in connection with the practice of the law (in contrast with unfitness conduct), would suggest that such conduct must be in the course of legal practice. As against this, the statutory instances of conduct which may constitute unsatisfactory professional conduct (or professional misconduct) include conduct leading to the lawyer becoming bankrupt or becoming disqualified from managing a company.¹⁴⁵ This provision implies that in some circumstances the conduct to be judged 'unsatisfactory' need not be in the course of legal practice. It seems likely that the common law concept of the relevant conduct being at least 'connected' with legal practice would still be necessary.¹⁴⁶

At common law as it developed both with respect to the statutory jurisdiction and the inherent jurisdiction, professional misconduct required some connection with legal practice. Again, the statutory instances of professional misconduct include conduct which may be unrelated to professional practice. Moreover, as regards professional misconduct as defined by reference to unfitness conduct, the limited common law requirement no longer applies. If the personal conduct is such that in the tribunal's judgment the practitioner demonstrates unfitness to practice, then this will ground a charge of *professional* misconduct.¹⁴⁷ However, insofar as the issue is unfitness to practice law, it is difficult to imagine how this might be found where the private conduct was not connected to legal practice in the sense of, for example, the private conduct exhibiting the presence of qualities incompatible with the practice of law.

E Threshold for Statutory Misconduct

Finally, in terms of disciplinary proceedings (as opposed to consumer disputes,¹⁴⁸ or the exercise of a discretion in relation to the issue or renewal of a practising certificate), the scheme of the legal profession legislation reveals that unless the conduct is found to constitute at least unsatisfactory professional conduct, the

144 For definitions of unsatisfactory professional conduct, see above n 18.

145 It is the conduct leading to the bankruptcy etc rather than the fact of it, which is relevant: *New South Wales Bar Association v Murphy* (2002) 55 NSWLR 23, 50–1.

146 *A Solicitor v Council of the Law Society of New South Wales* (2004) 216 CLR 253, 267.

147 This is not self evident. As McHugh J drily observed in Transcript of Proceedings, *A Solicitor v Council of the Law Society of New South Wales* [2003] HCATrans 453 (11 November 2003): 'A solicitor who engages in bank robberies is obviously not a fit and proper person to be on the rolls as a solicitor. You would hardly say he was guilty of professional misconduct'.

148 'Consumer Complaints' or similar, providing for matters such as mediation and special orders in favour of clients without the necessity for a finding of misconduct, are provided for under the *Model Bill* pt 4.5; *Legal Profession Act 2004* (NSW) pt 4.3; *Legal Profession Act 2004* (Vic) pt 4.3; *Legal Profession Act 2006* (NT) pt 4.5; *Legal Profession Act 2007* (Qld) pt 4.5; *Legal Profession Act 2008* (WA) pt 13. See also *Legal Profession National Law* pt 5.3; *Uniform Law* pt 5.3.

complaint must be dismissed. The minimal level of ‘satisfactory’ conduct might be judged bearing this in mind.

XIV THE CHARACTERISATION OF STATUTORY MISCONDUCT

Against this background, the following matters might be regarded as relevant to the treatment of misconduct under the legal profession legislation.

1. Misconduct as a lawyer may be regarded as extending in a continuum of increasing seriousness. At two points on this continuum the law determines that the conduct has reached the statutory threshold of first, unsatisfactory professional conduct and second, professional misconduct. At the lower end of this statutory range are minor transgressions, such as a failure to keep the client informed of progress in a matter, which reflects a deficiency in the services provided but is remediable. The services might be described as unsatisfactory or inadequate and as falling short of the expected standard. It is one for which the relevant regulatory body may seek a mediated settlement or in its summary jurisdiction might impose a nominal fine or issue a private reprimand. The continuum extends to the point at which the conduct is serious enough to constitute professional misconduct. This may be in connection with legal practice and at its most serious involve for instance dishonesty leading to a miscarriage of justice or to a significant financial loss to the client. It may alternatively lie outside the course of legal practice but involve serious criminal conduct reflecting on the practitioner’s character and suitability to continue to practice. In both latter classes of conduct, the penalty will likely involve the practitioner being struck off the rolls, or the practitioner’s suspension from practice.¹⁴⁹
2. Most forms of statutory misconduct may be identified within several well known and overlapping categories. Within the course of practice the classification includes fraudulent conduct, dishonest conduct, conflicts of interest, breach of confidentiality, incompetence and discourtesy. Outside professional practice the types of misconduct include dishonest conduct, a serious conviction and tax evasion. The designation of the conduct within these classes will often indicate its level of seriousness. Beyond this, the circumstances and nature of misconduct of the most serious kind might be described as disgraceful or most improper or very serious or reprehensible

¹⁴⁹ A suspension is only appropriate in circumstances where the court or tribunal is in a position to say that at the expiry of the period, the practitioner is likely to resume as a fit and proper person: Linda Haller, “‘Waiting in the Wings’: The Suspension of Queensland Lawyers” (2003) 3 *Queensland University of Technology Law and Justice Journal* 397, 401, citing *Law Society of New South Wales v McNamara* (1980) 47 NSWLR 72, 76; *Mellifont v Queensland Law Society Inc* [1981] Qd R 17, 31.

and qualify as professional misconduct attracting the most severe penalty.¹⁵⁰ Conduct of a somewhat less serious nature may however, either by reason of its nature (for instance involving a fiduciary duty) or its circumstances (keeping matters hidden from the client), be described as serious misconduct or improper behaviour and also be judged professional misconduct.

3. In weighing the seriousness of the conduct the disciplinary authority will take into account a range of matters, including the existence of any relevant statutory provision or professional conduct rule or common law duty and the impact of the conduct on the public and on the administration of justice.¹⁵¹ Having made the necessary findings of fact and adverted to such matters, it is suggested that, rather than invoking the common law tests, the reasons include appropriate reference to the factors regarded as determinative in concluding that, in the judgment of the authority, the particular conduct is of sufficient seriousness as to warrant a finding of professional misconduct or unsatisfactory professional conduct.
4. Summary formulations of factors of this nature from the cases here referred to, include: '[the conduct] amounted to grave impropriety affecting [the practitioner's] professional character and was indicative of a failure either to understand or to practise the precepts of honesty or fair dealing in relation to the courts, his clients or the public';¹⁵² 'the extent of ... [the practitioner's] failure to observe his legal obligations and civic responsibilities by such a systematic course of improper conduct over such a long period of time is of such gravity as to constitute professional misconduct';¹⁵³ '[the practitioner's] conduct is inimical to the principled behaviour and scrupulous honesty required of a legal practitioner when discharging his or her obligations as a legal practitioner';¹⁵⁴ and '[t]he ... misconduct involved a contravention of the high standards of honesty and integrity required in accordance with general law principles governing professional responsibility'.¹⁵⁵

150 There may be occasions when use of the term 'disgraceful' is appropriate. But otherwise, even for conduct of the type described, it seems doubtful that the terms 'dishonourable' or 'scandalous' or 'shameful' would ordinarily be used at all, or in relation to the opinion of senior practitioners, except to the extent that satisfaction of the *Allinson* test (or as being shameful 'according to *Hoile*') was treated as necessary. In short, *Allinson* may not need to be put down, but confined, perhaps in a secure aged care facility with rare and supervised outings.

151 But the categories of misconduct are not closed. That is, it is not necessary that the authority find that the charge fall within an existing instance of misconduct. The statutory concepts must be flexible enough to cover the evolving nature of legal practice. So, for example, for an earlier generation of solicitors, it was common to mix client's funds with that of the firm, but unthinkable to advertise the firm's specialities.

152 *Kennedy* (1939) 13 ALJ 563, 563 (Rich J).

153 *New South Wales Bar Association v Cummins* (2001) 52 NSWLR 279, 291 [67] (Spigelman CJ). See also the articulation of misconduct from the cases referred to by the Chief Justice: at 289–91.

154 *Prothonotary of the Supreme Court of New South Wales v Da Rocha* [2013] NSWCA 151 (31 May 2013) [16].

155 *Meakes* [2006] NSWCA 340 (6 December 2006) [101] (Basten JA). Basten JA goes on to state that '[t]o constitute professional misconduct under the general law standard, the conduct must be understood to be disgraceful or dishonourable in professional eyes': at [118]. This might be regarded as unnecessarily appealing to the disgraceful conduct test. The Court noted the effect of it deciding to publicly record a finding of professional misconduct in place of unsatisfactory professional conduct: at [93]–[94].

5. There is no single test which in every circumstance may be invoked to satisfy the description of unsatisfactory professional conduct or professional misconduct. They are terms covering such a range of circumstances that they are better described than defined by the application of a test using words outside the statutory language. Professional misconduct will often involve impropriety and constitute a deliberate or reckless disregard of the relevant Act, professional conduct rule or interests of the client and with serious consequences for the client and the administration of justice; unsatisfactory professional conduct will often involve services which are inadequate and constitute an inadvertent or minor departure from the Act, rules or interests of the client and without such consequences.

It is suggested that a close examination by courts and disciplinary authorities of the text of the legislation read with relevant extrinsic aids and considerations of the nature here outlined rather than resorting to the *Allinson* test or the *Re R* test would better give effect to the objects of the legal profession legislation. For example, the practitioner's failure to keep money of a client separate might be sufficiently serious for the disciplinary body to judge this as professional misconduct. It may be found to constitute a serious breach of a professional conduct rule, perhaps warranting a fine. It seems inappropriate and unnecessary to require that such conduct be determined as 'disgraceful or dishonourable' or 'shameful', or as being perceived as such in the opinion of senior practitioners.¹⁵⁶ Again, some instances of professional misconduct, such as conduct leading to bankruptcy, or inability to carry out the requirements of practice, or even negligence in the course of practice, may carry little connotation of moral blameworthiness, such that a description in terms of disgrace or dishonour is inapt. In other circumstances, a disclosure of the client's confidential matters might constitute an infraction of professional conduct rules, be judged as unsatisfactory and warrant a reprimand. It again seems inappropriate and unnecessary to require that it constitute conduct violating or falling short of to a substantial degree (and it may not) the standard of professional conduct observed or approved by members of the profession of good repute and competence.

XV MISCONDUCT UNDER THE LEGAL PROFESSION LEGISLATION — A NEW PARADIGM

Under legislation adopting the relevant provisions of the *Model Bill* and of the *Legal Profession National Law* (or which in the future may adopt the provisions of the *Legal Profession National Law*), statutory misconduct is described as professional misconduct and unsatisfactory professional conduct, certain conduct is included within the 'definitions' of statutory misconduct and instances of what constitutes professional misconduct and unsatisfactory professional conduct

¹⁵⁶ In the context of this article, it is significant that the legal profession legislation defines seriously incompetent conduct as an instance of professional misconduct, without reference to the language or concepts of disgraceful conduct.

are provided. Provisions set out the objects of the disciplinary provisions and include reference to the protection of legal consumers and the public generally. Associated with this legislation, comprehensive new professional conduct rules have been made invoking the expressions used in the legislation and identifying behaviour appropriate for a lawyer. In determining whether particular conduct falls within the statutory descriptions, disciplinary authorities are aided by a body of Australian case law and academic texts which illustrate what is and is not acceptable professional misconduct.

The common law test for professional misconduct is that derived from *Allinson* — conduct which would reasonably be regarded as disgraceful or dishonourable by senior practitioners. Notwithstanding the significant and ongoing reforms to the structure and regulation of the legal profession (most recently the *Uniform Law*), and notwithstanding also that in *Allinson* itself and many times thereafter (including in the High Court) the test has been expressed as *one* form only of satisfying the statutory description of professional misconduct, Australian courts and tribunals invariably invoke the language of *Allinson*. This reliance is not because of the value of the test in advancing or protecting some common law right or principle or because the language is illuminating and remains apposite to the new statutory regime, but (arguably) because of a concern to stay within an established formula. In other disciplinary jurisdictions where statutory professional misconduct has been under consideration, there has been a principled move away from the test of disgraceful conduct to an approach better matching the legislative language and the contemporary values it evinces.

It is suggested that in interpreting and applying the concepts of statutory misconduct under the current and proposed legislation, the *Allinson* test is not an appropriate or adequate guide. As regards unsatisfactory professional conduct, the more recent test in *Re R*, that is, conduct which violates or to a substantial degree falls short of the standard observed by senior practitioners, is again not an appropriate test to apply to a statutory standard which includes the reasonable expectations of the client. In both instances, adherence to the tests may, at worst, frustrate the intention of Parliament revealed in this legislation, or otherwise undermine the authority's reasoning in an attempt to show compliance with the tests. Moreover, the application of these tests, both of which are based on the judgment of senior practitioners, effectively negates the statutory requirement for the inclusion of lay opinion in judging disciplinary matters.

As courts and tribunals consider cases arising under the legal profession legislation and, where adopted, the *Legal Profession National Law*, it is suggested that a new approach to determining what constitutes statutory misconduct ought to be developed in place of the tests in *Allinson* and *Re R*, which better gives effect to the language of, and policies underlying, this legislation.