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Misconduct & sexual misbehaviour: blurred lines?

In the age of #MeToo, what kind of misconduct could cross the line into the domain of a legal regulator? John Gould examines the role & limits of professional discipline

IN BRIEF

- It is not the proper function of legal regulators to cast themselves as instruments of social change, nor to police sexual morality or general bad behaviour.
- The key question is whether misconduct represents an ongoing risk that a person is not fit to practise.

`Sexual intercourse began
In nineteen sixty-three
(which was rather late for me)—
Between the end of the "Chatterley" ban
And the Beatles' first LP'

I have no reason to think—although I haven't checked—that Philip Larkin was ever a member of a disciplinary tribunal. Had he been forced to sit in judgement on the sexual conduct of other poets, he may have struggled to know where to start. He may have wondered whether the ethical standards of an artist were relevant to the quality of their art. He may have worried that the public expects artists to behave badly anyway—sending a bloody severed ear to a member of the opposite sex sounds like harassment to me. Most importantly, he would have known that sexual mores have never been fixed, vary significantly according to context, and, in the past, were rarely discussed in polite company.

In recent times, the veil has been lifted and many people's lives are more related to the scripts of *Love Island* than the writings of Jane Austen.

Over the last couple of years, the sexual misbehaviour of powerful men has received not only more attention but also more of the condemnation it deserves. Donald Trump, Harvey Weinstein and Kevin Spacey are only the symbols of a general and very longstanding problem. The issue overlaps with other 'old-fashioned' attitudes to gender and equality which are generally regarded as bad and sometimes reprehensible.

With this new awareness come new challenges for the regulators of professional conduct. How far should regulators aim to reinforce or accelerate social change? Does all behaviour which could be fairly criticised as morally flawed come under the scrutiny of those charged with maintaining professional ethical standards? Are lawyers to be investigated by sour-faced 21st century puritans opening windows into their souls?

Navigating the grey areas

It is not the proper function of legal regulators to cast themselves as instruments of social change. Their responsibility relates to the operation of the legal system, not the formulation and enforcement of their own paradigm of the enlightened lawyer.

The statutory objectives for regulators should lead seamlessly to the identification of conduct with which they ought to be concerned. The rule of law, access to justice, the consumer interest, competition and the adherence to professional principles—such as independence, integrity, confidentiality, clients' best interests and a duty to the court—are the benchmarks against which the relevance of conduct to practice should be judged.

A grey area arises because of two other objectives shared by legal regulators. One is a statutory objective and one is not. The statutory objective is to encourage an independent, strong, diverse and effective legal profession. The other is the objective of maintaining public confidence in lawyers.

Parliament has decided that using regulation to encourage more diversity is a good thing. It follows that anything which discourages entry into the profession so as to reduce diversity is a bad thing. It seems doubtful that there is any evidence that any individual professional misconduct has, to any material extent, discouraged entry into the profession so as to render it less diverse.

The objective of encouragement is perhaps more relevant to the training, policies and internal disciplinary processes of firms. Indeed, it is strongly arguable that a requirement that firms operate effective and robust disciplinary processes is of more practical significance than investigation and enforcement by regulators. Tough internal action in less serious cases, under the supervision of a regulator, is likely to be better for victims than public disciplinary proceedings and more likely to reduce under-reporting. It does have a presentational disadvantage for regulators because any case which does not involve a regulator's sanction or disciplinary proceedings is an opportunity lost to demonstrate the regulator's own credentials.

The second legitimate objective—of public confidence—is mostly a circular construct. There is no question of evidence being required showing that the confidence of the public is actually damaged by particular conduct, nor even that any member of the public is aware of the conduct in question. By a circular process, if the conduct of a lawyer is considered to be bad, bad conduct must damage public confidence in lawyers; if the conduct damages public confidence in lawyers, it must be bad. Somewhere into this circle game must intrude misconduct which is recognisable as such.

The boundaries of bad behaviour

The public's full access to the law relies on its ability to trust lawyers. Some misconduct is more serious because it makes the lawyer and therefore all lawyers less trustworthy. The question is: what kind of conduct could cross the line into the domain of a legal regulator?

A criminal conviction, whether in the course of practice or not, is clearly of regulatory concern. Lawyers are expected to comply with the law so as to show it respect and uphold its rule. The fitness of any lawyer to practise is called into question by a conviction for any serious criminal offence. Although sexual offences are less directly relevant to practice than, say, fraud, nevertheless a conviction has clear regulatory consequences. A reasonable and honest client would not fully trust a lawyer who was out committing crimes in his spare time.

Civil findings based on discrimination or harassment may also give rise to disciplinary action, depending on the facts found to support the finding. Discrimination (such as indirect discrimination) does not always involve culpability and may result from misjudgement or error. Nevertheless, the reputation of the profession may be damaged by the finding itself and it is the regulator's business to protect that reputation. Clients may well wish to be confident that their chosen lawyer has not previously been found by an employment tribunal to have unlawfully discriminated.

Unwelcome sexual advances to clients or other misbehaviour in the context of the solicitor/client relationship should be of regulatory interest. This is partly for the same reasons, as the law imposes a fiduciary duty on solicitors in their dealings with clients. Lawyers are in a position of trust of which they must not take advantage. Trust in a lawyer acting, for example, for a client who is vulnerable while undergoing a divorce would be significantly undermined if they used the opportunity for some sexual advantage.

The normal safeguards to prevent a fiduciary from abusing their position would be difficult to apply. It would be absurd for a client to be told to seek independent legal advice in order to be able to give informed consent to a sexual relationship with their own solicitor. Clients should be able to consult lawyers without having to deal with sexual advances. A complaint by a client to a regulator is likely to be taken very seriously.

Other conduct which many people might consider disreputable outside of practice is more problematic. Marital infidelity will often involve serial dishonesty and may cause great harm, for example, to children. If a lawyer is prepared to lie to the people closest to them such as a spouse or partner, why should a client trust them? There has, so far, been no suggestion that adultery should be any of a regulator's business. It does, however, illustrate the difficulty of setting the boundaries of a regulator's domain logically and consistently.

If the victims and witnesses of bad behaviour outside of practice do not know that the person involved is a lawyer, and there is neither publicity nor any criminal offence, it is difficult to see how professional conduct is engaged at all unless the specific behaviour suggests an unacceptable risk in the context of practice. It is doubtful whether the public expects lawyers to do much more than obey the law in situations unconnected with practice.

Sexual misbehaviour in the context of practice may be of regulatory interest whether it takes place in the office or elsewhere. Commonly, misbehaviour involves colleagues and takes place in the context of heavy drinking at firm-sponsored social events. Such conduct needs to be assessed on its specific facts. Exactly the same behaviour may lie at different ends of the scale of seriousness depending on the context. Leaving aside the criminal law, which is the proper province of the police, issues of consent, acquiescence or alleged encouragement commonly arise and are not dealt with easily within the regulatory system.

Misconduct is not, of course, confined to office parties, nor is it always undertaken by drunks. It may range from a sexual assault which is not prosecuted, such as grabbing a person's bottom, through to sending explicit photos of the sender to a victim, making offensive sexual comments on social media, persistent pressuring requests for a date, or sexually suggestive or explicit comments.

Misbehaviour may be more serious if it is witnessed by colleagues, clients or members of the public. A culture of 'banter' may marginally change what is acceptable, but also increases the risk of unacceptable behaviours if it makes boundaries less clear. Wholly inappropriate comments are often cloaked in a tone falsely suggesting humour.

Central to the consideration of seriousness is whether the conduct involves an abuse of power and whether it might reasonably have been expected to cause serious harm. The expectation of harm should be related to the characteristics of the victim. Experienced and mature individuals, particularly if they are qualified, should be expected to be robust and able to deal with challenging situations. They are, however, entitled to proper respect and can be expected to experience anger and distress if demeaned by another's conduct.

The regulator's interest ought to be more focused than simply trying to improve behaviours for the purpose of advancing social change. It should be concerned with behaviours which are clearly connected with the practice of law. A lawyer who abuses a position of power over a junior colleague may be the kind of person who is prepared to exploit the trust of a client. A person who is prepared to objectify or demean others may be ill-suited to show the respect necessary to act in the best interests of all clients.

Morality police

It is not the business of regulators or disciplinary tribunals to determine whether conduct is or is not criminal or amounts to unlawful discrimination. They must assess specific conduct in the context of professional standards, its direct relevance to practice, and legitimate regulatory objectives. A key question is whether the conduct represents an ongoing risk that a person is not fit to practise or will repeat behaviour in the course of delivering legal services. It is not the regulator's business to police sexual morality or generalised bad behaviour.

All but the most serious matters should be dealt with by firms through proper policies, training and disciplinary procedures. If firms do not operate on that basis, their failure is likely to be a more serious breach of standards than the misconduct itself. It is the responsibility of firms to prevent the poisonous work environments which can blight lives and damage the effective delivery of legal services. It is in their interest to do so.

The appropriate area of responsibility for regulators lies between the domains of the police, the employment tribunal and authorised firms. It should be a narrow area. **NLJ**

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