



Honourable Yvette D'Ath MP  
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6 JAN 2020

Mr Neil Laurie  
The Clerk of Parliament  
Parliament House  
George Street  
BRISBANE QLD 4000

Dear Mr Laurie *Neil*

I refer to e-Petition 3191-19, tabled in the Legislative Assembly on 26 November 2019, titled *Strip powers of complaint handling from the Qld Legal Services Commission*.

I note that the petitioners have raised concerns regarding the independence of the Legal Services Commission (LSC) and call for a separate independent commission to be established to handle complaints against members and employees of the legal profession.

The Legal Services Commissioner is an independent statutory officer responsible for dealing with complaints against lawyers. The LSC is staffed by public sector employees, some of whom are lawyers, and who are bound by the *Public Service Act 2008* and the *Public Sector Ethics Act 1994*. The *Public Sector Ethics Act 1994* lays down four ethical principles which are embedded in the Code of Conduct for the Queensland Public Service. The principles are: integrity and impartiality; promoting the public good; commitment to the system of government; and accountability and transparency.

Legal practitioners may be subject to disciplinary action under the *Legal Profession Act 2007* (LPA) for conduct that constitutes *unsatisfactory professional conduct* or *professional misconduct*:

***Unsatisfactory professional conduct*** includes conduct of an Australian legal practitioner happening 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.

***Professional misconduct*** includes—

- (a) unsatisfactory professional conduct of an Australian legal practitioner, if the conduct involves a substantial or consistent failure to reach or keep a reasonable standard of competence and diligence; and
- (b) conduct of an Australian legal practitioner, whether happening in connection with the practice of law or happening otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.

(2)

Section 420 of the LPA sets out conduct that is capable of constituting unsatisfactory professional conduct or misconduct which includes a contravention of the legal profession rules.

Under section 448 of the LPA, the Commissioner may dismiss a complaint if satisfied that it is in the public interest to do so. As explained in the LSC 2018-2019 Annual Report (page 10):

*“There are various reasons why the Commissioner might decide there is no public interest in initiating a disciplinary proceeding notwithstanding an investigation having found evidence of unsatisfactory professional conduct or professional misconduct. It may be, for example, that the conduct is of a minor kind only, that the lawyer has acknowledged his or her error, that there is no need to send a message to the profession about the issue and that the lawyer has corrected that error with the complainant and indeed may well have provided some appropriate redress such as a refund and/or apology”.*

The LSC has prepared a document detailing all the factors it takes into account in deciding whether to pursue a disciplinary proceeding (**attached**).

Where the LSC decides not to pursue a complaint, it must maintain records about its reasons and must notify the complainant. It would not be appropriate for all such decisions to be made public, given the need to protect the privacy of the parties to the complaint, particularly for complaints that are vexatious, misconceived, frivolous or lacking in substance. Making details of every complaint public, no matter how minor or ill-founded, would not be in the public interest.

I note that, while the LSC is the sole body empowered under the LPA to initiate and prosecute disciplinary proceedings against lawyers and law practice employees, complainants have other avenues available to them if their complaint to the LSC is not pursued. Complainants who are not satisfied with the LSC's handling of their complaints can take the matter up with the Office of the Queensland Ombudsman if they believe the LSC has made an administrative error of some kind. Complainants can also consider pursuing any civil remedies that may be available to them.

I also note that the LSC is not the sole regulatory body for the legal profession (as suggested by the petitioners) – the Queensland Law Society and the Bar Association of Queensland are the primary bodies which regulate the legal profession. They are responsible for monitoring and managing the conduct of the profession and managing professional standards. The Queensland Law Society is also responsible for overseeing solicitors' compliance with their trust account obligations. The Supreme Court of Queensland maintains its inherent jurisdiction over lawyers who are admitted.

I note that the petitioners have called for an independent commission to be established, similar to the Crime and Corruption Commission (CCC), to investigate complaints against legal practitioners. However, I do not believe it is necessary and do not expect it would produce different outcomes in practice to the current framework involving the LSC. For example, any such commission would need to exercise the same discretion as to whether to initiate proceedings. It is also not clear that the powers of the CCC for

(3)

investigating serious criminal activity and corruption would be warranted for investigating lawyer disciplinary complaints. I note that such investigations (and any disciplinary actions that flow from them) are not criminal in nature. Criminal behaviour by a lawyer is subject to investigation and prosecution by the Queensland Police Service or the CCC, in the same manner as any other person.

I am satisfied that Queensland has an appropriate framework for the regulation of legal practitioners and law practice employees, through the combination of:

- the Legal Services Commission;
- the *Legal Profession Act 2007*;
- the Australian Solicitors' Conduct Rules;
- the Barristers' Conduct Rules;
- the Queensland Law Society;
- the Bar Association of Queensland; and
- the criminal law, as enforced by the Queensland Police Service and the Crime and Corruption Commission.

This is broadly consistent with the position under corresponding legislation in other States and Territories and is a proportionate response.

I thank the petitioners for bringing their concerns to the attention of the House.

Yours sincerely



**YVETTE D'ATH MP**  
Attorney-General and Minister for Justice  
Leader of the House

# Discipline Applications

## Guidelines

Date: February 2012

Version 2

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# Content

Introduction .....	3
The key concepts .....	4
The statutory tests.....	6
The reasonable likelihood test .....	6
The public interest test.....	7
Cooperation policy .....	9
Conclusion .....	9

## Introduction

1. The practice of law in Queensland is regulated by the *Legal Profession Act 2007* (the Act). One of the main purposes of the Act is 'to provide for the protection of consumers of legal services and the public generally.'<sup>1</sup>
2. The Act establishes a system for dealing with complaints about the conduct of legal practitioners. The main purposes of the system are:
  - to provide for the discipline of the legal profession
  - to promote and enforce the professional standards, competence and honesty of the legal profession
  - to provide a means of redress for consumers of the services of the legal profession.<sup>2</sup>
3. The Act establishes the office of the Legal Services Commissioner (the Commissioner) as the sole body authorised to receive complaints. It requires the Commissioner to investigate complaints that allege unsatisfactory professional conduct or professional misconduct<sup>3</sup> and gives it discretion to commence investigations in the absence of complaint if it believes an investigation is warranted (investigation matters).<sup>4</sup> It gives the Commissioner power to investigate complaints or investigation matters itself or to refer them to the Queensland Law Society or Bar Association of Queensland for investigation but, if it refers them to the professional bodies, the investigations remain subject to the Commission's direction and control<sup>5</sup> and the professional bodies have recommendatory powers only. It obliges them to report their findings and recommendations to the Commissioner<sup>6</sup> and gives the Commissioner sole authority to decide what action, if any, to take on a complaint or investigation matter after the investigation is completed.
4. The Act gives the Commissioner wide discretion in the exercise of that authority. It says the Commissioner:
  - 'may start a proceeding before a disciplinary body' (make a discipline application) in relation to a complaint or investigation matter that has been or continues to be investigated 'as the Commissioner considers appropriate'<sup>7</sup>
  - 'may dismiss a complaint or investigation matter if [it] is satisfied that:
    - there is no reasonable likelihood of a finding by a disciplinary body of... either unsatisfactory professional conduct or professional misconduct (or for a law practice employee, misconduct), or
    - 'it is in the public interest to do so.'<sup>8</sup>

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<sup>1</sup> The *Legal Profession Act 2007*, section 3

<sup>2</sup> section 416

<sup>3</sup> sections 418-420

<sup>4</sup> section 435(1)(c)

<sup>5</sup> section 435(3)-(5)

<sup>6</sup> section 439

<sup>7</sup> section 447

5. These guidelines describe how the Commissioner will exercise that discretion. They:
- are intended to ensure that the staff of the Commission, legal practitioners and law practice employees, their advisors, legal consumers and members of the public alike understand how the Commission comes to a decision to make a discipline application
  - can be expected to evolve in the light of the Commission's experience and to be updated from time to time in the light of that experience
  - have the status only of guidelines, not prescriptive rules. They do not have the force of law.

### The key concepts

6. The system for dealing with complaints and discipline in Queensland as elsewhere has drawn traditionally on two key concepts - the concepts of unprofessional conduct and professional misconduct.
7. The *Queensland Law Society Act 1952* defined unprofessional conduct to mean 'serious neglect or undue delay or the charging of excessive fees or costs or the failure to maintain reasonable standards of competence or diligence.' It added that the definition 'does not limit the type of conduct or practice that may be regarded as unprofessional.'<sup>9</sup>
8. The concept of professional misconduct has a well established meaning at common law. It means conduct that:
- 'would be reasonably regarded as disgraceful or dishonourable by [a practitioner's] professional brethren of good repute and competency'<sup>10</sup> or
  - '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.'<sup>11</sup>
9. The Act replaces the concept of unprofessional conduct with the concept of unsatisfactory professional conduct and gives further meaning to the concept of professional misconduct.
10. The Act says at section 418 that 'unsatisfactory professional conduct includes conduct of an Australian legal practitioner happening 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.'

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<sup>8</sup> section 448

<sup>9</sup> *Queensland Law Society Act 1952* at section 3B

<sup>10</sup> Lopes LJ in *Allinson v General Council of Medical Education and Registration (1894)* QBD 750 at 768. See also *Re Hodgekiss [1962] SR (NSW) 340 at 251*; *Kennedy v The Council of the Incorporated Law Institute of NSW (1940)* 13 ALJ 563

<sup>11</sup> *Adamson v Queensland Law Society Inc (1990)* 1 Qd R 498 at 507

11. The Act says at section 419(1) that 'professional misconduct includes:

- unsatisfactory professional conduct of an Australian legal practitioner, if the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence
- conduct of an Australian legal practitioner, whether happening in connection with the practice of law or happening otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.'

12. The Act goes on to say at section 419(2) that:

- 'for finding that an Australian legal practitioner is not a fit and proper person to engage in legal practice... regard may be had to the suitability matters that would be considered if the practitioner were an applicant for admission or for the grant or renewal of a local practising certificate'

and at section 420 that:

- the following conduct is capable of constituting unsatisfactory professional conduct or professional misconduct:
  - a) conduct consisting of a contravention of a relevant law
  - b) charging of excessive legal costs in connection with the practice of law
  - c) conduct for which a court has convicted an Australian lawyer of
    - (i) a serious offence, or
    - (ii) a tax offence, or
    - (iii) an offence involving dishonesty
  - d) conduct of an Australian legal practitioner as or in becoming an insolvent under administration
  - e) conduct of an Australian legal practitioner in becoming disqualified from managing or being involved in the management of any corporation under the Corporations Act'
  - f) conduct of an Australian legal practitioner in failing to comply with an order of a disciplinary body
  - g) conduct of an Australian legal practitioner in failing to comply with a compensation order.

13. The Commissioner notes that the concept of unsatisfactory professional conduct (and hence the concept of professional misconduct also) introduces a new benchmark to the regulation of the legal profession in Queensland – a legal practitioner's conduct is no longer to be assessed by reference only to the standard 'members of the profession of good repute and competency' are



entitled to expect of their fellow practitioners but by reference also to the standard 'a member of the public' is entitled to expect.

14. The Commissioner believes accordingly that the concept of unsatisfactory professional conduct applies to a range of conduct that most people, practitioners included, would regard as unsatisfactory in any ordinary sense of the word but which would not previously have been regarded as 'unprofessional'. The Commissioner believes it goes beyond unethical or improper conduct to include, depending on the circumstances, the sorts of honest mistakes, errors of judgement and poor standards of client service that give rise to legitimate consumer grievance.

### **The statutory tests**

15. The Commission will not make a discipline application to a disciplinary body unless it is satisfied that the evidence after investigation establishes both that:
  - there is a reasonable likelihood of a finding by the disciplinary body of unsatisfactory professional conduct or professional misconduct (or in the case of law practice employees, misconduct) - the reasonable likelihood test
  - it is in the public interest to make a discipline application - the public interest test.

### **The reasonable likelihood test**

16. The Act requires the disciplinary bodies to be satisfied, before making a finding of unsatisfactory professional conduct or professional misconduct against a legal practitioner (or of misconduct against a law practice employee), that the Commission has proved the allegations in the discipline application on 'the balance of probabilities'. The disciplinary bodies must be satisfied to a higher degree of satisfaction the more grave the consequences for the legal practitioner or law practice employee of a finding that the allegations are proved<sup>12</sup>.
17. Accordingly, the reasonable likelihood test requires the Commissioner not to make a discipline application unless there is reliable evidence capable of supporting a finding on the balance of probabilities that a legal practitioner's conduct amounts to unsatisfactory professional conduct or professional misconduct (or that a law practice employee's conduct amounts to misconduct).
18. The Commissioner will assess the evidence in its totality having regard to:
  - whether the evidence - given previous findings by courts and disciplinary bodies in relation to the same or similar facts - establishes a reasonable prospect of a finding by a disciplinary body that the practitioner's conduct falls within the definitions of unsatisfactory professional conduct or professional misconduct

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<sup>12</sup> section 649, and see also Briginshaw v Briginshaw (1938) 60 CLR 336 and NSW Bar Association v Livesey [1982] 2 NSWLR 231 at 238

- the strength of the evidence and whether it establishes a reasonable prospect of a successful prosecution - or whether there are competing versions of events such that the decision 'could go either way'
- whether some evidence might be excluded bearing in mind the principles of admissibility at common law and under the Act
- whether there are lines of defense that have been indicated by or are plainly open to the respondent practitioner
- whether witnesses are willing and available to give evidence
- whether witnesses are likely to make a good impression; whether there are matters that might properly be put to them by the respondent to attack their credibility; and how they are likely to stand up to cross examination
- the possibility that witnesses might have a faulty memory or be exaggerating or have a motivation to tell less than the whole truth or otherwise be unreliable
- any other factors the Commissioner believes in all the circumstances might impact the likelihood of a finding by a disciplinary body of unsatisfactory professional conduct or professional misconduct.

19. The Commissioner wants it to be understood that:

- even if it is confident of the likelihood of a finding by a disciplinary body of unsatisfactory professional conduct or professional misconduct, it is in no position except in uncontested matters to assure complainants or other interested parties that a discipline application will succeed
- a decision not to make a discipline application in circumstances where it is 'one person's word against another's' does not mean that the Commissioner believes one person and not the other - just that the evidence in its totality is not sufficient to support a reasonable likelihood that a disciplinary body will find one person's version of events to be proved and not the other's.

### **The public interest test**

20. The Commissioner does not believe the public interest requires that a discipline application be made whenever the reasonable likelihood test is satisfied.
21. It is well established in law that 'the object of disciplinary action against legal practitioners is not to exact retribution: it is to protect the public and the reputation of the profession.'<sup>13</sup> The Commission recognises that there are sometimes equally effective but more cost-efficient ways to protect the interests of the public and the reputation of the profession than by disciplining an errant practitioner in the expectation the practitioner will be punished for his or her conduct.

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<sup>13</sup> Legal Services Commissioner v Baker [2005] QCA 482

22. The Commissioner will exercise the public interest discretion to make a discipline application or otherwise having regard to:<sup>14</sup>
- the seriousness of the alleged unsatisfactory professional conduct or professional misconduct, and the need to protect the public from the respondent legal practitioner or law practice employee
  - the likely prejudice to public confidence in the integrity of the disciplinary process and to the reputation of the profession if the Commissioner exercises the discretion not to make a discipline application
  - the apparent prevalence of the conduct, and the need to 'send a message' to deter other legal practitioners or law practice employees from engaging in such conduct
  - whether the conduct raises a matter of law or professional practice of general importance
  - whether the conduct involved dishonesty or taking advantage of vulnerable clients or third parties or was pre-meditated
  - whether the conduct was a genuine mistake or misunderstanding and is unlikely to be repeated
  - whether the respondent acknowledges his or her error, or has shown remorse or apologized or made good any loss or harm his or her conduct has caused to others
  - whether the respondent co-operated fully and frankly during the investigation into his or her conduct
  - whether a finding of unsatisfactory professional conduct or professional misconduct would entitle the complainant or others who may have been adversely effected by the conduct to compensation
  - the respondent's age, health or infirmity
  - whether there have been any previous disciplinary findings against the respondent
  - the likely length and expense of the hearing
  - the likely disciplinary outcome if an application proceeds, and whether the respondent agrees to initiate the same or similar outcome him or herself - for example, by undertaking to complete a stated course of further legal education or to be subject to periodic inspection by a person nominated by the Commission or other regulatory body or to engage in legal practice only subject to stated conditions or to take advice from a stated person in relation to the management of his or her practice<sup>15</sup>

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<sup>14</sup> The Commission has adopted, with appropriate modifications, the list of considerations the Commonwealth and Queensland Directors of Public Prosecutions take into account in exercising their counterpart discretion.

<sup>15</sup> sections 456 and 458 set out the orders the Queensland Civil and Administrative Tribunal and the Legal Practice Committee respectively may impose.

- whether there are grounds for special leniency (see Cooperation policy, below)
  - any other relevant consideration.
23. Some of these considerations (the need to send a message, for example) tend to weigh in favour of making a discipline application. Others (the respondent's acknowledgement of his or her error, for example, or agreement to undertake further legal education or to change his or her work practices or systems) tend to weigh in favour of dismissing the complaint or investigation matter in the public interest. Generally speaking, the more serious the alleged unsatisfactory professional conduct or professional conduct, the less likely the Commissioner will exercise its discretion to dismiss a complaint or investigation matter in the public interest.

### Cooperation policy

24. The Commissioner wants to encourage legal practitioners and law practice employees whose conduct may have fallen short of expectation or who know of others whose conduct may have fallen short of expectation to come forward to assist the Commission in its work.
25. Accordingly and in the public interest, the Commissioner will actively consider being lenient with legal practitioners and law practice employees who:
- voluntarily come forward with relevant evidence of conduct that contravenes the Act but that the Commission has either no knowledge of or insufficient evidence to make a discipline application
  - provide the Commission with full and frank disclosure of the conduct in question and any documentary or other evidence that may be available or known to them
  - undertake to cooperate throughout the Commission's investigation and comply with that undertaking
  - have not compelled or induced any other person to take part in the conduct in question or been a 'ringleader' in instigating the conduct.
26. The Commissioner may exercise this policy in either of two ways, by:
- not making a discipline application where appropriate
  - undertaking to make submissions (joint or otherwise) to a disciplinary body in mitigation of the sanction.

### Conclusion

27. The Commissioner will endeavour to apply these guidelines consistently, fairly and transparently. The Commissioner will deal with complaints and investigation matters on a case by case basis on their individual merits having regard to the evidence in its totality and to:

- the broad purposes and specific requirements of the Act
  - the well established principle that professional discipline should be directed primarily to the protection of the public rather than the punishment of errant practitioners <sup>16</sup>
  - the desirability of maintaining and enforcing high standards of professional and personal conduct among legal practitioners and public confidence in the legal system and the profession. <sup>17</sup>
28. The Commission will not allow itself to be influenced in coming to a decision to make a discipline application or alternatively to dismiss a complaint or investigation matter by:
- the race, religion, sex or political association, activities or beliefs or any other personal characteristic of the respondent legal practitioner or law practice employee or any other person or persons who may be involved
  - the Commissioner's personal feelings or the personal feelings of the staff of the Commission about the alleged conduct, the complainant, the respondent or any other person or persons who may be involved
  - any possible political disadvantage to the government of the day or other political party or any possible media or community reaction to the decision
  - the possible impacts of the decision on the personal or professional circumstances of the Commissioner or staff of the Commission or members of the disciplinary bodies or any other person or persons who may be or be perceived to be responsible for the conduct and outcome of the disciplinary proceedings.

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<sup>16</sup> Clyne v NSW Bar Association (1960) 104 CLR 86; A-G v Bax (1999) 2Qd R 222; Law Society of NSW v Foreman (1994) 34 NSWLR 408

<sup>17</sup> Ziems v Prothonotary of NSW (1957) 97 CLR 279 at 285-286 and Legal Services Commissioner v Baker (2005) LPT 002