

# Disciplinary Applications

## Guidelines

Date: 7 May 2013

Version 1

## 1. Guideline Statement

The Legal Profession Complaints Committee (*LPCC*) is established under the *Legal Profession Act 2008 (the Act)* to supervise the conduct of legal practitioners. Other functions of the LPCC include inquiring into complaints and, where it is appropriate to do so, instituting professional disciplinary proceedings against a legal practitioner in the State Administrative Tribunal (*SAT*).

The decision by the LPCC to institute disciplinary proceedings in SAT is a discretionary one. The LPCC is committed to ensuring that its discretion to institute disciplinary proceedings is exercised fairly, impartially and consistently in order to further the purposes of professional disciplinary proceedings.

## 2. Purpose

The purpose of these guidelines is to set out the principles by which the LPCC will be guided in exercising its discretion to institute disciplinary proceedings in SAT.

The guidelines are intended to assist members of the LPCC, staff of the LPCC, legal practitioners and members of the public to understand how that discretion is exercised.

## 3. Background

The LPCC receives and investigates complaints made about the conduct of legal practitioners. It may also investigate conduct of a legal practitioner on its own initiative, if it has reasonable cause to suspect the practitioner has been guilty of unsatisfactory professional conduct or professional misconduct.<sup>1</sup>

Unless a complaint is dismissed in the exercise of the LPCC's powers to summarily dismiss, or withdrawn, all complaints are investigated.<sup>2</sup>

After an investigation is completed, the LPCC must:

- (a) in the case of the investigation of a complaint, dismiss the complaint or, in the case of an investigation on the initiative of the LPCC, decide to take no further action; or
- (b) take action under the LPCC's summary conclusion of complaints procedure; or
- (c) refer the matter to SAT.<sup>3</sup>

The Act provides that the LPCC may dismiss a complaint if satisfied:

- (a) that there is no reasonable likelihood that the practitioner would be found guilty by SAT of unsatisfactory professional conduct or professional misconduct; or

---

<sup>1</sup> Section 421(1)

<sup>2</sup> Section 421 (2) & (3)

<sup>3</sup> Section 424(1)

(b) it is in the public interest to do so.<sup>4</sup>

#### 4. Threshold Issues

The LPCC will not refer a matter to SAT, unless it is satisfied that:

- there is a reasonable likelihood that SAT would find the legal practitioner guilty of unsatisfactory professional conduct or professional misconduct (*reasonable likelihood test*);
- it is in the public interest to refer the matter (*public interest test*); and
- it is not a matter which can be, and is more appropriately, dealt with in the exercise of its summary conclusion powers.

#### 5. Reasonable likelihood test

In deciding whether or not the reasonable likelihood test is satisfied, the LPCC will consider the strength of the case against the practitioner and whether it would satisfy the requisite standard of proof. In particular, it will evaluate:

- the availability of relevant evidence;
- the admissibility of the evidence;
- the strength of the evidence;
- the competency, reliability and availability of witnesses;
- whether there are lines of defence that might be raised.

The standard of proof applied by SAT is the civil standard – balance of probabilities. However, in evaluating evidence in vocation proceedings involving legal practitioners, SAT applies the *Briginshaw* approach.<sup>5</sup> That is, SAT must feel an actual persuasion of the occurrence or existence of the relevant fact before being satisfied that an allegation against a practitioner has been made out.<sup>6</sup>

#### 6. Public interest test

One of the stated purposes of Part 13 of the Act is to provide 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. This stated purpose accords with the view taken by the Courts that the object of disciplinary proceedings is the protection of the public and the maintenance of proper standards in the legal profession.<sup>7</sup>

---

<sup>4</sup> Section 425

<sup>5</sup> *Briginshaw v Briginshaw* (1939) 60 CLR 336

<sup>6</sup> *Legal Practitioners Complaints Committee and Gandini* [2006] WASAT 163 at [62] - [65]

<sup>7</sup> *Re Maraj (A legal practitioner)* (1995) 15 WAR 12 at 25

The LPCC recognises that sometimes the public can be protected and proper standards maintained without the need for disciplinary action. This can be achieved in other ways which may be quicker and more cost effective. One example, is by a practitioner agreeing to conditions being placed on his or her practising certificate restricting the practitioner from practising in a certain area of law.

Generally, the more serious the alleged conduct the more likely that the LPCC will refer the matter to SAT.

The factors which the LPCC will have regard to in deciding whether the public interest test is satisfied include:

- the trivial or technical nature of the alleged misconduct;
- the need to protect the public;
- the need to maintain public confidence in the regulation of the legal profession, including discipline of the profession;
- the need to deter other practitioners from behaving in the same or similar way;
- whether the conduct raises a matter of general or special importance;
- whether the conduct involved an element of dishonesty, abuse of power and/or criminality;
- how long ago the conduct occurred relative to the seriousness of the alleged misconduct;
- the practitioner's circumstances, including the practitioner's health (physical and mental), age and years of experience;
- whether the practitioner acknowledges his or her error, shown remorse and/or made good any loss or harm his or her conduct has caused;
- whether the practitioner has a history of complaints in respect to similar conduct;
- the likely length and expense of a hearing if disproportionate to the seriousness of the alleged misconduct;
- the potential outcomes of a hearing, and whether the practitioner agrees to initiate the same or similar outcome himself or herself;
- any other relevant consideration.

## 7. Summary conclusion powers

The LPCC can only exercise its summary conclusion powers following the completion of an investigation, with the consent of the practitioner and when it is satisfied that:

- (a) there is a reasonable likelihood that the practitioner would be found guilty by SAT of unsatisfactory professional conduct but not professional misconduct (the reasonable likelihood test);
- (b) the practitioner is generally competent and diligent;

- (c) the taking of action is justified having regard to all the circumstances of the case and to whether any other substantiated complaints have been made against the practitioner.<sup>8</sup>

In addition to taking into consideration the reasonable likelihood test factors and the public interest test factors, the factors the LPCC will have regard to in deciding whether or not to offer to a practitioner to exercise its summary conclusion powers include:

- the practitioner's disciplinary history;
- the nature of any expressions of concerns issued by the LPCC to the practitioner in the previous 10 years;
- the nature and seriousness of any conduct which is the subject of any complaint, conduct investigation or inquiry which has not been finalised;
- the seriousness of the alleged misconduct;
- whether the practitioner made a mistake and is unlikely to repeat the conduct;
- whether the practitioner co-operated fully and frankly during the investigation;
- whether there are grounds for special leniency;
- any other relevant consideration.

## 8. Conclusion

The LPCC will endeavour to apply these guidelines fairly, impartially and consistently.

The LPCC will not be influenced by the following factors when deciding whether to refer a matter to SAT:

- the race, religion, sex or political association, activities or beliefs or any other personal characteristic of the practitioner or complainant or any other person who may be involved in the matter;
- personal feelings about the alleged conduct, the practitioner, the complainant or any other third party;
- any possible political advantage or disadvantage to the government or any political party;
- the possible effect of the decision on the personal or professional circumstances of those responsible for the decision.

### Acknowledgement

These guidelines have relied in large part on the Guidelines for Discipline Actions developed by the Queensland Legal Services Commissioner, the Victorian Legal Services Board and Legal Services Commissioner Compliance and Enforcement Policy and the Western Australian Statement of Prosecution Policy and Guidelines 2005.

---

<sup>8</sup> Section 426(1)