

WESTERN AUSTRALIA
LEGAL PROFESSION COMPLAINTS COMMITTEE

FACT SHEET
NEGLIGENCE

A legal practitioner has a duty to provide professional services with reasonable care and skill. A legal practitioner who fails to do this might have breached their duty of care to a client and been negligent.

Some acts of negligence are more serious than others. For example, having the wrong description of a property on a contract of sale is usually far less damaging to a client than a practitioner's failure to lodge forms with a court when this failure might lead to the case being struck out. Between the two extremes there are many other acts or omissions which might also be negligent.

Negligence and disciplinary action

The *Legal Profession Act 2008* sets out two kinds of breaches of the standards of legal practice which solicitors and barristers in Western Australia must meet:

- **Unsatisfactory professional conduct** includes conduct occurring in the practice of law, which falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner.
- **Professional misconduct** includes conduct which involves a substantial or consistent failure to reach or maintain reasonable standards of competence or diligence and conduct which, if established, would justify a finding that the practitioner is not a fit and proper person to engage in legal practice.

Unsatisfactory professional conduct and professional misconduct can lead to disciplinary action. This can range from a reprimand by the LPCC or referral to the State Administrative Tribunal ('the Tribunal'). The purpose of disciplinary action is to protect the public and maintain proper professional standards.

The courts have determined that negligence is a form of unsatisfactory professional conduct or professional misconduct only when it goes beyond 'mere carelessness' or 'mere negligence'.

For example:

- A legal practitioner who does not know that a contract for the sale of land must be stamped before it can be registered shows a lack of professional competence and diligence. This could lead to disciplinary action.
- A practitioner might know that a contract needs to be stamped but make a simple mistake when calculating the amount of stamp duty due. This would probably be ‘mere negligence’ — not a breach of the Act leading to disciplinary action.

The dividing line between ‘mere negligence’ and misconduct under the Act is not clear. However, very few complaints of negligence amount to professional misconduct or unsatisfactory professional conduct.

Compensation

Clients who complain to the LPCC about legal practitioners usually do not receive compensation even when disciplinary action is taken against the practitioner in the Tribunal. Under the *Legal Profession Act 2008* the LPCC can order compensation if there is a reasonable likelihood that the practitioner will be found guilty of unsatisfactory professional conduct and the Tribunal can order compensation if it finds the practitioner guilty of professional misconduct or unsatisfactory professional conduct, but **only** in cases where:

- the complainant has suffered a financial loss as a result of that conduct (costs incurred, income foregone, rights or entitlements now lost or payments actually made),
- it is in the interests of justice, and
- the complainant has not received, and is not entitled to receive, compensation from the Solicitors’ Guarantee Fund or compensation under an order made by a court (including compensation as a result of negligence proceedings against the legal practitioner).

The amount of compensation awarded by the Tribunal is limited to \$25,000 and the maximum compensation by the LPCC is \$10,000 unless the practitioner consents to a higher amount.

Note: The Committee’s power to award compensation may be limited to conduct occurring after 1 March 2009.

Taking action for negligence

Complainants who want compensation from a legal practitioner usually have to take private legal action against the practitioner for negligence.

When considering legal action against a legal practitioner, complainants should get legal advice. Sources of assistance include Legal Aid on 1300 650 579. A list of bodies which will provide preliminary advice at minimal cost can be obtained from the LPCC's office.

Complainants can lodge a complaint with the LPCC at the same time as taking action for negligence. The two processes are different:

- A complaint with the LPCC can lead to disciplinary action. There are no fees or charges involved, however there is limited opportunity for the complainant to receive compensation.
- An action for negligence can lead to a court order for damages. It can be expensive — even if successful — because it usually means hiring another legal practitioner to present the case.

The LPCC does not play any part in private court actions for negligence. Complaints against practitioners may not be finalised until court proceedings are completed.

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LPCCWA

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