





# A MEASURE OF RESPONSIBILITY

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Which acts of negligence  
may cross the line?





There is a dividing line between acts that may be negligent but not amount to unsatisfactory professional conduct or professional misconduct. Acting Legal Services Commissioner **Robert Brittan** explains where this line is likely to fall.

## “The standard you walk past is the standard you accept.”

In 2013, Chief of the Australian Army Lieutenant General David Morrison used these words in an address at an International Women’s Day Conference to send a message regarding “unacceptable behaviour” within the Australian Army.

At the time, the Army was in the midst of an investigation into bullying and harassment in the military and Lt Gen Morrison had addressed the media earlier that day about this ongoing investigation into a group of officers whose conduct, if proven, would have brought the Australian Army into disrepute.

His comments were directed at those in the military who by their rank hold a role of leadership, but the essence of his words when considered, at their core, mean that every time we accept the status quo of poor behaviour, we are endorsing it.

As the regulator, one of the core responsibilities of the Legal Services Commission and the main purpose of the *Legal Profession Act 2007* (LPA) is “to provide for the regulation of legal practice in this jurisdiction 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”.<sup>1</sup>

The Act establishes a system for dealing with complaints about the conduct of legal practitioners. The system:

- provides for the discipline of the legal profession
- promotes and enforces the professional standards, competence and honesty of the legal profession
- provides a means of redress for complaints about lawyers
- otherwise protects members of the public from unlawful operators.

The commission’s strategy for promoting standards of conduct in the delivery of legal services commences with receiving and dealing with complaints about the conduct of lawyers and the commission holds practitioners to account when their conduct falls short of expected standards.

It is those expected standards that underline this discussion of unsatisfactory professional conduct, professional misconduct and common law negligence.

## Negligence

The commission commonly receives complaints about a practitioner’s negligence in the handling of a matter.

Lawyers have a duty to provide professional services with reasonable skill and care. They owe their clients a duty of care. Negligence is the failure to exercise the degree of care considered reasonable in the circumstances, but the mere fact that a lawyer fails to achieve what a client hoped to achieve with the lawyer’s advice and assistance does not, of itself, mean that the lawyer was negligent.

However, a lawyer who fails to provide legal services to the client with reasonable care and skill and when that failure then leads to the client suffering financial or other loss, then that lawyer may well have breached their duty of care.

To give these statements some perspective, a lawyer who inadvertently puts the wrong description of a property on a contract of sale will have caused less damage to a client than a lawyer who fails to file required forms with a court or tribunal and that failure leads to the client’s case being struck out.

Should a practitioner breach that duty of care, it may amount to negligence and the client may be entitled to compensation for their loss, but it must be remembered that negligence is a civil action and it is up to a court to decide if a lawyer has breached their duty of care and whether the client is entitled to compensation in the circumstances.

Complaints that allege negligence very often raise complex and contentious questions of both fact and opinion, and there is a likelihood that even after an exhaustive investigation there may not be a sufficiency of evidence to be satisfied that there is a reasonable likelihood of a disciplinary tribunal finding that the lawyer’s conduct amounts to unsatisfactory professional conduct or professional misconduct.

As a general rule, complex and contentious questions of fact and opinion are to be properly decided by a court of law. Once those issues have been heard and determined, then

the commission is better positioned to deal with any disciplinary issues that may have arisen.

At the commission, we encourage complainants in these situations to seek their own independent legal advice about their options and prospects for pursuing such a negligence claim in the courts, if that is what they wish to do.

## Competence and diligence

The commission’s jurisdiction under the LPA is to consider matters where the conduct in question is capable of amounting to “unsatisfactory professional conduct” or “professional misconduct” as defined by the LPA.

Section 418 of the Act relevantly defines unsatisfactory professional conduct as:

“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.”

Section 419 of the Act relevantly defines the meaning of professional misconduct as:

“(1) 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; and
- 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.”

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, and that it is in the public interest to make a discipline application.

It should be kept in mind that the standard of “competence and diligence” prescribed by the LPA is a minimal standard; it does



not purport to be comprehensive. Not every mistake by a lawyer will result in a disciplinary application to a disciplinary body. It is based on a failure by a lawyer to meet the minimal standard; not a failure to achieve an 'ideal' outcome for the client or to provide them with 'perfect' advice.

In a practical sense, lawyers must use their best endeavours to complete any professional work competently, diligently and as promptly as reasonably possible.<sup>2</sup> If it becomes apparent that this cannot be done within a reasonable time, then the client should be informed immediately.

"Competence and diligence" covers a range of conduct matters and largely depends on one's perspective. So what legal practitioners consider to amount to competence and diligence on their part will not necessarily be the same view held by a client or indeed by another legal practitioner.

As a result, whether a practitioner acts with competence and diligence is generally looked at in broad terms. These include:

- Is the practitioner sufficiently knowledgeable about the specific area of law?
- Does the practitioner carry out the technical aspects of the legal practice required with skill?
- Does the practitioner manage the legal practice required efficiently?
- Does the practitioner identify issues beyond his competence and bring them to the attention of the client?
- Does the practitioner properly prepare and carry out the necessary tasks required in the matter?
- Is the practitioner capable both intellectually/emotionally and physically?

When a practitioner's competence and diligence is being considered, these terms will offer some guidance as to the extent to which the practitioner may have failed to maintain a minimum standard.

## Case authorities

The issue of what amounts to "unsatisfactory professional conduct" involving a lack of competence and diligence has been considered by the Queensland Civil and Administrative Tribunal (QCAT) and its predecessors on several occasions.

A useful starting point is the decision in *Legal Services Commissioner v McClelland* (2006) LPT 13, in which the lawyer in question had failed to provide, in several conveyancing transactions, a certificate required by the relevant property legislation to be provided to purchaser client. He had failed to provide the requisite certificate on 16 separate occasions.

The respondent lawyer had argued before the tribunal that it did not amount to a lack of competence and diligence because he

had misread the legislation. However, when finding that the conduct in question amounted to "unprofessional conduct" (which was the applicable categorisation at the time), the tribunal said:<sup>3</sup>

"The Tribunal accepts the submission advanced by the applicant that this breach is properly characterised as one going to competence and diligence, amounting to unprofessional conduct. It was based on a misreading of the legislation, and Mr Cronin submitted it did not even reach the level of unprofessional conduct. But the respondent's approach bespoke a 'failure to maintain reasonable standards of competence or diligence' (s3B(1)(c) *Queensland Law Society Act*), which put it into that category. A practitioner must have the wit carefully to read and comprehend a provision like this, designed for the protection of clients in an area in which he substantially practices. The 'failure' referred to in s3B(1)(c) would not embrace all cases of error, but this is substantial enough to fall within its ambit."

The matter was further considered in *Legal Services Commissioner v Bone* (2013) QCAT 550 where reference to an "error" being "substantial enough" was picked up and the tribunal said:<sup>4</sup>

"Both ss418 and 420 of the LPA contain flexible tests, such that not every error which a practitioner may make will constitute unsatisfactory professional conduct. Decided cases suggest, rather, that a finding of that kind will usually involve repeated errors or a significant departure from accepted standards of competence."

In that case, a technical breach of a professional rule, which required notice of a charging clause in a will to be provided in writing (where the substance of the rule had effectively been carried out)<sup>5</sup> was found not to amount to "unsatisfactory professional conduct" because the tribunal was not persuaded that it was conduct "at the level, or with the requisite degree of seriousness or substance, to which s418 is directed".<sup>6</sup>

The definitive test is that set out in the statute, in section 418 of the LPA.

In *Legal Services Commissioner v Slipper* (2008) LPT 8, the lawyer had failed to lodge a notice of change of address for service with the court and his failure to do so resulted in the client losing a hearing date and being ordered to pay costs.

In that case, although the conduct of the respondent was conceded to be an isolated incident, it was nevertheless recognised that the respondent's client had been denied the opportunity to test the worth of her application and there were consequences to the client who was ordered to pay the respondent husband's costs.

This was considered to be a lack of competence and diligence sufficient to amount to "unsatisfactory professional conduct". So although very few acts of negligence tend to amount to unsatisfactory professional conduct or professional misconduct, a single act of neglect is capable of amounting to unsatisfactory professional conduct, but it is evident from the authorities that it would have to be serious.

As the tribunal observed in *Legal Services Commissioner v Laylee and Another* [2016] QCAT 237:<sup>7</sup>

"If every negligent act or error made by a practitioner were to be categorised as unsatisfactory professional conduct, disciplinary prosecutions would follow every claim against a legal practitioner for professional negligence, for which every practitioner must be insured."

The tribunal felt that there needed to be an "appreciable departure" from the standard for the conduct to amount unsatisfactory professional conduct.

"An isolated instance, not involving unethical conduct, and more in the nature of conduct which might give rise to an assertion of negligence, is less likely to amount to unsatisfactory professional conduct. Serious or repeated instances, are more likely to amount to unsatisfactory professional conduct or professional misconduct."<sup>8</sup>

Therefore, to be clear, the falling short required by section 418 of the Act must be substantial and very obvious.

Interestingly, in that matter, which involved the lodgement of a caveat on the assumption of a written loan agreement that did not exist, the tribunal was not satisfied there had been a substantial error, preferring to view the respondent's conduct as being more in the nature of a "mere slip" rather than the "very stark misapprehension of instructions" that the commission had argued for.

Justice Carmody took the view that the difference between unprofessional conduct and professional misconduct was "one of degree" in *Legal Services Commissioner v Mould* (2015) QCAT 440, in which he cited the observations made by Kirby P (as he then was) in *Pillai v Messiter (No.2)*<sup>9</sup> regarding the conduct of medical practitioners and emphasised that in light of the potential consequences for the practitioner, such a finding should only be made where necessary to protect the public from:

"Delinquents and wrongdoers...(or) seriously incompetent professional people who are ignorant of basis rules or indifferent as to rudimentary professional requirements."

Ultimately, whether or not a practitioner's conduct is sufficient to amount to unsatisfactory professional conduct will be determined based on the facts of each individual case.

## A recent Court of Appeal decision

Last year the Court of Appeal had cause to consider a solicitor's conduct against the standards prescribed in section 418 in the matter of *Legal Services Commissioner v Sheehy* (2018) QCA 151, in which the commission appealed a QCAT decision to dismiss a disciplinary application against a legal practitioner for her conduct of a conveyancing matter.

In brief, the respondent acted for the wife in a contract for the sale of land that was being sold pursuant to court orders made in a matrimonial dispute. The other seller was the former husband, who had his own legal representation. The buyer ran into difficulties and the nominated settlement date was extended by agreement between the husband and the wife, as the sellers. However, when the purchaser still could not settle on the revised nominated date, things became less clear between the husband and the wife. Whilst the wife wanted to proceed, the husband wanted to terminate the contract.

The commission alleged that the respondent solicitor, by instructing, receiving and accepting the balance of the proceeds into her trust account, had engaged in unsatisfactory professional conduct by completing the contract for sale of the land when she knew or ought to have known that the joint owner (the husband) was against it and had not authorised the settlement.

There was a long established principle, in the High Court decision of *Lion White Lead Ltd v Rogers*<sup>10</sup> that the respondent would or should have known that where one party purports to terminate the contract then settlement could not proceed without the consent of all parties.

The facts of the matter were that this was an acrimonious situation, where the land was being sold as part of a matrimonial property dispute. It was the only asset held by the parties that could be sold to pay out the mortgage and there would be no residue for the parties to share. So this sale was a necessity, which the parties had little choice about.

The respondent took the view that she had done nothing that could be considered to be "professionally blameworthy" and that if there had been a lapse in her judgment it was insufficient to warrant disciplinary action or sanction.

The question that became crucial was whether the contract could have been terminated at the election of one, but not both, of the sellers.

At hearing, the commission had relied on the report of an independent expert,

Mr Purcell, who had analysed the transaction and concluded that, measured against the standards of the hypothetical "qualified competent and careful" lawyer, such a lawyer would have known or ascertained that:

- Further variation of the contract required the assent of the parties including the husband.
- The husband was entitled to terminate the contract and the wife was not entitled to insist that settlement occur without his consent.
- The respondent had no authority to accept the purchase monies or direct that they be paid into her trust account.

The lawyer would also have advised the wife that, whether or not the contract had been terminated validly, the wife could not take it upon herself to vary the contract by a further extension of time.

Although the tribunal indicated that it felt "greatly assisted" by what Mr Purcell had prepared to show the professional standard of competence and the reasonable expectations of the public, the tribunal considered that "in the end, the application of the test is a facts sensitive question of law and cannot be delegated to an expert".

The tribunal judge was not satisfied that the facts were capable of supporting the commission's allegation that the respondent had acted in breach of her professional obligations or standards and expressed the view that:<sup>11</sup>

"Practitioners are defined by the legality and ethical (not moral) virtue of the choices they reasonably make in the hurly-burly of professional life. They are allowed to make reasonable contestable or contentious even questionable decisions without their conduct being branded unprofessional or substandard. They are accountable for their actions or failures in performing professional roles according to reasonably acceptable and achievable (not arbitrary or impossible) standards of behaviour.

"Tested objectively and measured against the statutory standard, the practitioner did not act illegally, unprofessionally, unethically, or in breach of any duty to the husband, another practitioner, the profession or the public...

"Nothing she did or failed to do is indicative of a misunderstanding or misapplication of 'the precepts of honest and fair dealing'<sup>12</sup> in relation to the public interest or demands of practical justice."

On appeal, the Court of Appeal disagreed with the tribunal judge's comments, noting that the term "unsatisfactory professional conduct" is defined by section 418 of the LPA but that the tribunal judge had not referred to that section and "it fairly appears that he did not apply that definition in his analysis of the respondent's conduct".

The court also disagreed with the tribunal judge's reference to *Kennedy v Council of the Incorporated Law Institute of New*

*South Wales* (where Rich J had described the conduct of a solicitor as sufficiently serious to warrant his name being removed from the roll) taking the view that that case was not relevant to the assessment of the respondent's conduct against the standards prescribed by section 418.

The Court of Appeal took the view that the judge had proceeded on an "incorrect analysis of the transaction and without reference to the question which was effectively defined by s418".<sup>13</sup>

The commission maintained the same argument on appeal, namely that, based on the evidence of Mr Purcell, the respondent had gone ahead without any consideration of the legal position between the parties, which would be expected of a reasonably competent legal practitioner.

It was noted that the respondent solicitor had done nothing to consider the entitlement of the husband to terminate the contract; she had conducted no research and had apparently not encountered the problem previously; even so, she sought no advice from another practitioner. Instead she simply proceeded in the belief that the interests of her own client would be best served by doing so.

In the court's decision delivered on 29 June 2018, McMurdo JA (with whom Philippides JA and Douglas J agreed) concluded that:<sup>14</sup>

"In my view, a reasonably competent legal practitioner would have known or ascertained that she was not entitled to take steps to complete the contract over the objection of





[the husband], which she did by calling upon the buyer to settle by paying the price to her trust account and by necessary implication from that conduct (if not expressly) released the buyer's solicitor from his undertaking which had been given for the benefit of both [the husband and the wife]. By her conduct, she effectively induced the buyer's solicitor in breach of his undertaking to hold the transfer documents on behalf of both sellers. Her conduct fell short of the standard of competence and diligence to be expected of a reasonably competent legal practitioner."

The circumstances that have been outlined in all these cases authorities suggest that there needs to be substantial and/or consistent failure to reach or maintain a reasonable standard of competence and diligence in order to attract sanction for unsatisfactory professional conduct.

## Professional misconduct

The commission takes the view that being an effective regulator depends in part on how well we use our disciplinary and enforcement powers.

The commission's strategy focuses on ensuring that, when disciplinary or enforcement action is needed, our actions are fair, proportionate and consistent. It is a role that the commission takes seriously and, when considered appropriate, the commission will not shy away from challenging decisions and testing the law.

In the last year, we have successfully appealed three QCAT decisions, one being the case of

*Sheehy*. Another that I would like to highlight is the findings of the Court of Appeal in the matter of *Attorney-General of the State of Queensland v LSC & Anor; LSC v Shand* (2018) QCA 66 (*Shand*) and the comments<sup>15</sup> made by the court regarding the fitness of those on the court's Roll of Practitioners:

"The community needs to have confidence that only fit and proper persons are able to practise as lawyers and if that standing, and thereby that confidence, is diminished, the effectiveness of the legal profession, in the service of clients, the courts and the public is prejudiced. The Court's Roll of Practitioners is an endorsement of the fitness of those who are enrolled."

The events in *Shand* are notorious but in summary, in 2002 the respondent made a corrupt payment to a Minister of the Crown and in doing so committed a crime. After a District Court trial in 2011, the respondent was convicted and sentenced to a period of imprisonment.<sup>16</sup> The commission applied for a disciplinary order against the respondent and even he conceded before the tribunal that his criminal conduct amounted to professional misconduct.

The tribunal, although finding that he had engaged in professional misconduct, considered an order that the respondent not be granted a local practising certificate before the expiry of a period of five years would be sufficient. The commission and the Attorney-General took a different view and appealed, contending that the tribunal had erred in not recommending that the respondent's name be struck from the roll of practitioners.

The tribunal's reasoning appeared to have been that, although the respondent was "currently unfit to practice" (meaning at the time of the disciplinary hearing), the respondent was not then "permanently unfit to practice". So the tribunal was of the view that the respondent was then unfit, but it was not probable that he would remain so.

The purpose of disciplinary proceedings has long been seen not to punish errant practitioners but to protect the public and to maintain confidence in the profession in the estimation of the public.<sup>17</sup>

Although in *Shand* the respondent had disavowed any intention to engage in legal practice, that was not the end of the matter. The Court of Appeal considered the test of probable permanent unfitness to be:

"...as the Attorney-General submits, a way of identifying that the character of the practitioner is so *indelibly marked by the misconduct* that he cannot be regarded as a fit and proper person to be upon the Roll."<sup>18</sup> [*emphasis added*]

McMurdo JJA said further at [60]:

"It is difficult to imagine that a mature person having studied and practised the law, could

have failed to underestimate the seriousness of an offence of corruption involving a Minister of the Crown. It was an isolated offence, but nevertheless an unfitness to practise law was plainly demonstrated by this offence when it was committed in 2002."

Effectively, the character of the respondent was considered to have been revealed by the offence itself and some persuasive evidence would be required if the respondent wanted to argue that the position was now different.

The commission takes some comfort in the court's ruling in *Shand* (notwithstanding mental illness issues or other addictions) that the probable unfitness of the practitioner can be gauged by identifying that the character of the practitioner can be so indelibly marked by the misconduct itself and the seriousness of the offending, that they should not remain on the roll.

## Conclusion

Clients have the right to expect a minimum standard of competence from a solicitor who is deemed to be a fit and proper person.

At a minimum, practitioners need to maintain a basic knowledge of the law and keep in touch with developments in their area of practice and ignorance of the law remains no excuse for changing requirements of practice or ethical standards.

It is hoped that these types of discussions and analysis about unsatisfactory professional conduct, professional misconduct and negligence and the standards that members of the public are entitled to expect of a legal practitioner will assist in better understanding the types of conduct that might qualify for investigation.

### Notes

<sup>1</sup> LPA Part 1.1.3(a).

<sup>2</sup> Rule 4.1.3 Australian Solicitors Conduct Rules (ASCR).

<sup>3</sup> *Legal Services Commissioner v McClelland* (2006) LPT 13 at [27].

<sup>4</sup> [2013] QCAT 550 at [65].

<sup>5</sup> The disclosure requirement of rule 10 ASCR had been made orally to the client and apparently understood rather than specifically being "in writing" and "before the client signs the will".

<sup>6</sup> (2013) QCAT 550 at [67].

<sup>7</sup> At [40].

<sup>8</sup> At [44].

<sup>9</sup> (1989) 16 NSWLR 197.

<sup>10</sup> (1918) 25 CLR 533.

<sup>11</sup> (2017) QCAT 276 at [45]–[46] and [48].

<sup>12</sup> *Kennedy v Council of Incorporated Law Institute* (1939) ALJ 563.

<sup>13</sup> *LSC v Sheehy* (2018) QCA 151 at [44].

<sup>14</sup> *Ibid* at [51].

<sup>15</sup> (2018) QCA 66 McMurdo JJA at 17 [55].

<sup>16</sup> To a term of 15 months' imprisonment, suspended after four months.

<sup>17</sup> *Baker v LSC* (2006) QCA 145.

<sup>18</sup> *Shand* at [57].