

Exercising discretion under section 300 of the Legal Profession Uniform Law

Purpose

1.1

This Operational Directive ('the Directive') has been developed to provide guidance on when the VLSB+C will issue proceedings against a lawyer at the Victorian Civil and Administrative Tribunal (VCAT).

Under section 300 of the Uniform Law, the Victorian Legal Services Commissioner ('the Commissioner') has discretion as to whether to initiate and prosecute proceedings against a lawyer at VCAT if they conclude that the alleged conduct may amount to:

1. professional misconduct that does not fulfil the criteria set out in 3.1; or
2. unsatisfactory professional conduct that would be more appropriately dealt with by VCAT as per the criteria set out in 3.2.

This Directive will provide guidance around how this discretion is exercised and will explain the decision-making process.

Context

2.1

The VLSB+C is the primary regulator of the legal profession in Victoria.

Regulation of the legal profession in Victoria is governed by the **Legal Profession Uniform Law**, the overarching objectives of which are to promote the administration of justice and an efficient and effective Australian legal profession by:

- (a) enhancing the protection of clients of law practices and the protection of the public generally;
- (b) ensuring lawyers are competent and maintain high ethical and professional standards in the provision of legal services; and
- (c) promoting regulation of the legal profession that is efficient, effective, targeted and proportionate.

The VLSB+C [strategy](#) illustrates our clear direction towards ensuring we are an effective regulator and underpins all that we do as we work towards our goal of maintaining and enhancing public trust and confidence in the legal profession.

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Further, **Operational Directives** such as this one provide direction to VLSB+C staff on the issues they need to consider in exercising their powers. Having clear, publically available Operational Directives is aligned with our **regulatory approach principles** in terms of:

- **Consistency.** Relying on policies, procedures and standards to ensure we act in the same way over time, so our advice and decisions are fair and accurate.
- **Transparency.** Providing guidance to consumers on the factors we consider in exercising powers, and the processes that will be followed. Making our Operational Directives publically available ensures transparency and makes it clear to lawyers and consumers of legal services how we exercise our discretion in relation to our powers.
- **Outcome-focused.** The decision-making process set out in this Directive enables us to secure a practical outcome for a matter without using VCAT resources when it is unnecessary to do so.
- **Risk-based.** We target our resources to the areas of greatest potential harm. The criteria set out in 3.1 – particularly the respondent lawyer consenting not to apply for a Practising Certificate or apply for work in a law firm in Victoria and/or Australia – allows for us to take a risk-based approach.

Compliance and Enforcement

The legislation provides for a range of tools which we may use to address behaviour which falls short of the professional standards set by legislation and rules, the common law, and the profession itself. These tools are outlined in our [Compliance and Enforcement Policy](#). This Directive is intended to be read in conjunction with Part 3.6 of that policy.

Professional misconduct 3.1

According to the Uniform Law, **professional misconduct** includes –

- (a) Unsatisfactory professional conduct of a lawyer, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and
- (b) Conduct of a lawyer whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the lawyer is not a fit and proper person to engage in legal practice.

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Professional misconduct also includes misconduct at common law, which is conduct that would be reasonably regarded as disgraceful or dishonourable by a professional brethren of good repute and competency.

Professional misconduct is serious and can have a number of impacts on both consumers and the profession, including financial and psychological impacts, and affecting consumers' trust in the legal profession.

If we form the opinion that a lawyer's conduct amounts to professional misconduct, we will generally initiate proceedings in VCAT, however, we will consider exercising our discretion not to initiate proceedings under section 300 if all of the following criteria are met:

1. We form the opinion that the lawyer has shown insight into their conduct and has demonstrated remorse.
2. Following consultation with the consumer, we form the opinion, there has been no harm suffered by the consumer and/or the harm has been remedied.
3. If the lawyer holds a current practising certificate, they consent to it being cancelled.¹
4. If the lawyer does not hold a current practising certificate, they undertake not to be employed (whether paid or otherwise) at a law practice in any way.
5. The lawyer undertakes not to apply for a practising certificate in Victoria (and if appropriate, any other jurisdiction of Australia) at any time in the future (and consents to this undertaking being shared with all Australian jurisdictions).
6. Case law exists for the conduct that has occurred meaning that the need to initiate proceedings for the purpose of general deterrence is not required.²

¹ Thereby making them a disqualified person as defined in the Uniform Law and therefore cannot work in a law practice.

² For example, the conduct issue of delay in progressing a matter has been the subject of numerous VCAT findings (see *LSC v Mingos (Legal Practice)* [2013] VCAT 1773 (14 August 2013); *LSC v Morgan (Legal Practice)* [2009] VCAT 2080 (28 September 2009); *LSC v Burgess (Legal Practice)* [2015] VCAT 1260 (14 August 2015)).

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Unsatisfactory professional conduct 3.2

Unsatisfactory professional conduct includes conduct of a lawyer occurring 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 lawyer.

The VLSB+C has a number of mechanisms for dealing with unsatisfactory professional conduct, and a ruling is usually made on matters internally. However, the Commissioner will consider exercising their discretion to initiate proceedings under section 300 if one or more of the following criteria are met:

1. Unsatisfactory professional conduct has occurred in addition to professional misconduct.
2. If the conduct raises a matter of general or special importance.
3. If the Commissioner forms a view that there is a need for an assessment of the matter by VCAT.

Process 4.1

Before a decision is made not to prosecute a matter at VCAT pursuant to section 3.1 of this Operational Directive, the complainant will be contacted to give them an opportunity to provide a submission to the VLSB+C on any harm they have experienced as a result of a matter. We will consider this submission in our decision-making.

Related documents 5.1

- [VLSB+C Strategy – A Clear Direction](#)
- [Regulatory Approach Statement](#)
- [Compliance and Enforcement Policy](#)