

**JURISDICTION** : SUPREME COURT OF WESTERN AUSTRALIA

**TITLE OF COURT** : FULL BENCH

**CITATION** : LEGAL PRACTITIONERS COMPLAINTS  
COMMITTEE -v- McKERLIE [2007] WASC 119

**CORAM** : MARTIN CJ  
SIMMONDS J  
BLAXELL J

**HEARD** : 21 MAY 2007

**DELIVERED** : 21 MAY 2007

**FILE NO/S** : LPD 7 of 2004  
LPD 2 of 2007

**BETWEEN** : LEGAL PRACTITIONERS COMPLAINTS  
COMMITTEE  
Applicant

AND

COLIN ROBERT McKERLIE  
Respondent

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*Catchwords:*

Legal practitioners - Disciplinary proceedings - Removal from Roll of Practitioners - Practitioner convicted of unlawful and indecent assault and sexual penetration without consent - Whether practitioner a fit and proper person to remain a member of legal profession - Turns on own facts

*Legislation:*

Nil

*Result:*

Practitioner struck off Roll of Practitioners

*Category:* B

**Representation:**

*Counsel:*

Applicant : Ms C F M Coombs  
Respondent : No appearance

*Solicitors:*

Applicant : Law Complaints Officer  
Respondent : No appearance

**Case(s) referred to in judgment(s):**

A Solicitor v Law Society (NSW) (2004) 216 CLR 253

Legal Practitioners Complaints Committee v Palumbo [2005] WASC 129

Ziems v The Prothonotary of the Supreme Court of New South Wales (1957) 97  
CLR 279

1     **MARTIN CJ:** This is a motion by the Legal Practitioners Complaints  
Committee seeking an order that Colin Robert McKerlie, a legal  
practitioner, be removed from the Roll of Practitioners ("the Roll").

2             In evidence before the Court is a reference from the State  
Administrative Tribunal dealing with the matter and recommending that  
Mr McKerlie be struck off the Roll of Practitioners. There is also a  
reference from the Legal Practitioners Disciplinary Tribunal  
recommending that Mr McKerlie be struck off the Roll. I will come back  
to the second reference later.

3             The reference I will deal with first is a reference based upon  
Mr McKerlie's criminal convictions. There are three relevant convictions.  
The first is for an unlawful and indecent assault which occurred on  
7 February 2002 when Mr McKerlie unlawfully and indecently assaulted  
a female by placing his mouth on her breast.

4             On the same day, Mr McKerlie committed the offence of sexual  
penetration of the same female without consent by inserting his thumb or  
finger into her anus and then Mr McKerlie committed his third offence;  
being, sexual penetration of the same female without consent by inserting  
his penis in her vagina.

5             He was convicted of all of those offences after a trial before Judge  
Nisbet in the District Court and a jury and was sentenced to a period of  
imprisonment of 1 year for the unlawful and indecent assault, 3 years and  
6 months imprisonment for the first count of sexual penetration without  
consent, and 4 years and 8 months imprisonment on the second count of  
sexual penetration. All sentences were directed to be served concurrently,  
so that the total term was 4 years and 8 months imprisonment.

6             Sentence was passed by Nisbet DCJ. His remarks at the time of  
passing sentence are before the Court. In the course of those remarks, he  
observed that not only did Mr McKerlie's victim have to endure the  
physical aspects of his assault upon her, the memory of which she would  
carry with her for a very long time, but she also had to endure the assault  
upon her character which he had perpetrated in the running of his defence,  
a defence which, in his Honour's view, the Crown prosecutor correctly  
described as a farrago of lies.

7             The question that comes before the Court in a circumstance in which  
application for removal from the Roll is made because of criminal  
conviction is whether the material demonstrates that the practitioner is not  
a fit and proper person to remain a legal practitioner. Authority for that

proposition is to be found in the decision of the High Court in the case of *A Solicitor v Law Society (NSW)* (2004) 216 CLR 253.

8 As that decision and a series of decisions in this Court have made clear, honesty and integrity are essential prerequisites to the right to practice law and the conduct most likely to result in striking-off of the Roll is that which undermines the trustworthiness of the practitioner or which suggests a lack of integrity, so that the practitioner cannot be trusted to deal fairly within the system within which he or she practises.

9 If any authority for that self-evident proposition is required it can be found in the decision of this court in the *Legal Practitioners Complaints Committee v Palumbo* [2005] WASC 129. The decision of the High Court in *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279 is another case in which the High Court has dealt with the circumstances in which a practitioner's fitness comes to be considered in the context of the commission of a crime. In that case, Kitto J set out a number of the principles properly applicable when cases of that kind arise.

10 Relevant to the application of those principles are the extent of premeditation, whether the crime indicates a tendency to vice and lack of probity. All of those circumstances are present in the circumstances that gave rise to Mr McKerlie's conviction. It is also clear from the remarks made by the sentencing Judge that the circumstances of the trial showed a lack of remorse or insight in relation to the commission of his offences, which is of course relevant to the assessment of the risk of further transgressions.

11 It follows that this Court cannot have the confidence in Mr McKerlie that is required of its practitioners. The circumstances giving rise to the offences and the convictions themselves demonstrate a lack of the personal qualities that are required to enable Mr McKerlie to remain on the Roll.

12 As I have mentioned, there is another reference before the Court from the Legal Practitioners Disciplinary Tribunal which deals with a large number of matters of unprofessional conduct in which adverse findings were made against Mr McKerlie. Because of the view to which I have come in relation to the reference based upon his criminal convictions, it seems to me to be unnecessary to deal with that reference and I would simply propose that that reference be stood over.

*MARTIN CJ*  
*SIMMONDS J*  
*BLAXELL J*

13 For those reasons, I would make an order removing Mr McKerlie's  
name from the Roll.

14 **SIMMONDS J:** I agree both with the reasons and the orders proposed.

15 **BLAXELL J:** I agree with the Chief Justice that the respondent should  
be struck off the Roll and I have come to that conclusion for the same  
reasons as expressed by the Chief Justice.