Complaints Process Information

The Legal Profession Act provides the procedure for making and determining complaints about solicitors. Many complainants and solicitors may not be familiar with the processes.

The following outline is intended to assist them, but it is not exhaustive.

If you need clarification of any of the points covered or further information please contact the Professional Standards Department investigator dealing with the matter.

Making a complaint

Any person may make a complaint about the conduct of a solicitor. There need not be any formal relationship between the solicitor and the complainant.

The complaint must:

- Be made in writing;
- Identify the complainant;
- Identify the individual against whom the complaint is made;
- Describe the alleged conduct the subject of the complaint.

All complaints about solicitors must be sent to the Legal Services Commissioner. The Commissioner may investigate a complaint, mediate the complaint, refer it to the Law Society Council for investigation or dismiss it.

A complaint must be made within *three* years of the date on which the conduct being complained about occurred. The Commissioner has the discretion to accept a complaint about conduct that occurred more than three years ago if judged to be just and fair to do so. This will depend on the circumstances of each complaint.

What conduct can be investigated?

Complaints about Australian lawyers must describe conduct by the solicitor which is capable of being *unsatisfactory professional conduct*, *professional misconduct* or which gives rise to a *consumer dispute*. These terms are defined by legislation.

Unsatisfactory professional conduct includes conduct of an Australian legal practitioner 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 Australian legal practitioner.

Professional Misconduct is conduct by an Australian legal practitioner that includes:

- unsatisfactory professional conduct of an Australian legal practitioner, where 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 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 practitioner is not a fit and

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proper person to engage in legal practice.

- conduct that is declared by the Legal Profession Act to be professional misconduct;

Professional Misconduct also includes:

- conduct in the pursuit of the person's profession, "which would be reasonably regarded as disgraceful or dishonourable by the person's professional brethren of good repute and competency".

Consumer disputes are disputes between a person and a solicitor about the conduct of a solicitor which does not involve an issue of unsatisfactory professional conduct or professional misconduct.

Dispute Resolution

Many complaints about the conduct of a solicitor occur because the complainant believes the solicitor's conduct has resulted in some harm to the complainant, and the complainant hopes to obtain some redress through the process of making a complaint.

If a complaint is referred to the Professional Standards Department for investigation, the Department investigator will consider whether the matter can be resolved without the need for lengthy and costly investigation. The action the Department investigator will take in this regard is as follows:

- Determine whether the conduct described by the complainant means it is possible there may be a resolution of the complaint.
- Find out what the complainant hopes to achieve through the complaints process.
- Find out the solicitor's attitude to an efficient resolution of the complaint.
- Facilitate a meeting between the complainant and the solicitor to discuss resolution.
- Facilitate negotiations between the complainant and the solicitor by correspondence, if the complainant and solicitor are not prepared to meet.

Complaints involving consumer disputes may be referred for mediation by the Legal Services Commissioner or the Council of the Law Society. The Professional Standards Department has qualified mediators available. The Commissioner may also *compulsorily* require the parties to a consumer dispute to enter into a process of mediation.

Investigation of complaints by the Professional Standards Department

A complaint about a solicitor referred to the Law Society Council is investigated by an investigator employed in the Society's Professional Standards Department. A complaint can be dismissed without investigation if the complainant does not supply further particulars in the form requested by the Department.

The Department's investigator reports the facts and evidence disclosed by the investigation to the Professional Conduct Committee which represents the Law Society Council in the complaints process. The Committee comprises Councillors of the Law Society, non-councillor lawyers and lay persons (non-lawyers).

The Department's investigation must be fair. The Department investigator will not be biased in dealings with either the complainant or the solicitor. Unless instructed otherwise, the Department's solicitor includes in the report to the Professional Conduct Committee only facts and evidence disclosed to both the complainant and the solicitor. If either the complainant or the solicitor asks that some or any of the allegations or evidence submitted be withheld from the other party the request will be considered.

The Department's investigation must be impartial and the Department's investigator cannot give any legal advice to either the complainant or the solicitor. Clarification of the complaints process, identification of issues involved and the nature of relevant evidence can be raised with both the complainant and the solicitor as the need arises.

The Department's investigation must be expeditious and timely. Complainants who fail to comply with the Department's requirements may find their complaints dismissed by the Professional Conduct Committee for lack of evidence. Solicitors who fail to comply with the Department's requirements may be required to provide information or documents, and a further failure to comply with such requirements, without reasonable excuse, may be professional misconduct. Failure by a solicitor may also be a criminal offence.

The Department's investigation must be thorough. The standard of proof in a complaint is that the Administrative Decisions Tribunal (the Tribunal) must be "comfortably satisfied" the solicitor is guilty of unsatisfactory professional conduct or professional misconduct. Usually, the unsupported word of the complainant against the unsupported word of the solicitor will not be enough to allow the Tribunal to be "comfortably satisfied".

Professional Standards Department investigators must ascertain whether support for the statements of the

complainant and the solicitor exists, and if so, obtain those supporting documents or statements from the complainant, solicitor or other witnesses.

The Department's investigation will be confined to the complaint that has been made, although it may be widened during the course of the investigation. This means that Department investigators should initially confirm with the complainant the issues raised by the complaint. Further facts and submissions will normally be provided by both the solicitor and the complainant in the course of an investigation. It is appropriate to deal with these as part of the complaint. However, facts raising an entirely new or different complaint, even against the same solicitor, may be referred to the Commissioner for a decision about how to proceed.

The Professional Conduct Committee decision

The Professional Standards Department investigator reports to the Professional Conduct Committee. The Committee can require the investigator to undertake further investigations. The investigation continues until the Committee has made a final decision. A copy of the report will not be provided to either the complainant or the solicitor.

The Committee must form a view as to whether there is a "reasonable likelihood" that the Tribunal will find the solicitor guilty of unsatisfactory professional conduct or professional misconduct, on the evidence that can be presented to the Tribunal.

If the Professional Conduct Committee forms a view that there is no "reasonable likelihood" that the solicitor will be found guilty, then it will invariably dismiss the complaint.

If the Professional Conduct Committee forms the view that there is a "reasonable likelihood" that the solicitor will be found guilty of *unsatisfactory professional conduct*, then it may:

- Caution the solicitor.
- Reprimand the solicitor and, if the Committee considers it appropriate, make it a condition that the solicitor pay some compensation to the complainant (to a maximum of $10,000).
- Refer the solicitor to the Tribunal for a determination about the complaint.

If the Professional Conduct Committee is satisfied that there is a "reasonable likelihood" that the solicitor will be found guilty of *professional misconduct*, then it MUST refer the solicitor to the Tribunal for a determination about the complaint. Reasons for the decision will be provided.

Review by the Legal Services Commissioner

If the Professional Conduct Committee dismisses a complaint, cautions or reprimands a solicitor, or orders compensation, the complainant may, in writing, ask the Legal Services Commissioner to review the Committee's decision.

An application for such a review must be made within two months of notification to the complainant of the Professional Conduct Committee's decision.

For the purposes of conducting a review, the Commissioner will receive a copy of the entire file held by Professional Standards Department, and may consult with the Department.

After a review the Commissioner can:

- Confirm the decision of the Council in whole or in part;
- Direct the Law Society Council to reinvestigate the complaint;
- Reinvestigate the complaint;
- Refer the matter to mediation;
- Refer the complaint to the Tribunal for hearing;
- Caution or reprimand the solicitor;
- Make a compensation order.

The Commissioner may also review on the Commissioner's own initiative.

Powers and functions of the Tribunal

The Tribunal hears and determines complaints referred to it from the Legal Services Commissioner or the Law Society Council. In such proceedings the Commissioner or the Council becomes the applicant.

If the Tribunal finds a solicitor not guilty, the disciplinary application (and complaint) is dismissed.

If the Tribunal finds a solicitor guilty of unsatisfactory professional conduct or professional misconduct, it may impose a penalty on the solicitor. The penalty can include such things as

- a reprimand,
- a fine,
- a requirement that the solicitor undertake further legal education,
- a restriction on the kind of work that the solicitor may perform,
- suspension or cancellation of the solicitor's practising certificate, or
- removal of the solicitor's name from the Roll of Lawyers.

Compensation

A complainant who seeks monetary compensation may request such compensation and must give relevant particulars, preferably in the initial complaint, but in any event before proceedings against the solicitor have been instituted in the Tribunal if the complaint goes that far.

The complainant must present the evidence in support of the claim for compensation to the Tribunal. The representative of the Law Society Council who conducts the case in the Tribunal will not do this, although the claim for compensation will be included in the disciplinary application filed in the Tribunal.

The maximum amount that the Tribunal can award by way of compensation is $25,000, but a higher amount can be awarded if the solicitor consents. The Tribunal will not award compensation if the complainant has a means of obtaining compensation available through the normal litigation process (e.g. an action for negligence).

Appeal from a determination of the Tribunal can be made to the New South Wales Court of Appeal, but only by the parties to the proceedings. The complainant cannot appeal unless there has been a claim for compensation considered by the Tribunal, and then only in respect of the compensation order, if any.

Other matters to note

- Making a complaint does not operate as a stay or bar to any other legal proceedings between the complainant and the solicitor.
- Making a complaint does not terminate a solicitor/client relationship between the complainant and the solicitor, if there is one. However, a complaint can indicate a loss of confidence or trust in the solicitor, which may make it appropriate for the solicitor to cease to act for the complainant.
- The Council of the Law Society may, if it considers it necessary in the public interest, immediately suspend a practising certificate on the ground of the seriousness of the conduct complained of.
- Investigation of a complaint is not an adversarial process, and thus does not, of itself, prevent ongoing communication between the solicitor and client on other matters, or for the purposes of dealing with the subject matter of the complaint.
- Making a complaint cannot achieve a review or reconsideration of a decision made by a court and the Society cannot investigate complaints against judicial officers.
- A complaint is not the proper way to obtain an independent assessment of a solicitor's costs although overcharging may be a conduct issue that is properly the subject of a complaint.
- Complaints about a solicitor's negligence are properly the subject of complaint if they come within the definitions of unsatisfactory professional conduct or professional misconduct above. However, for disciplinary purposes, mere negligence is not, by itself, a matter upon which a solicitor would be found guilty of unsatisfactory professional conduct or professional misconduct. Many complaints about a solicitor's negligence are dismissed because they do not warrant disciplinary action.
- Disciplinary action taken against a solicitor must be shown on the Register of Disciplinary Action which is available for public inspection on the internet site of the Legal Services Commissioner. Disciplinary action includes the reprimanding of, or the making of a compensation order against, a solicitor.
- Solicitors should not make complaints about other solicitors without first exploring every avenue of resolution of the issue that has arisen. A ruling from the Ethics Committee or assistance through other facilities within the Law Society is an appropriate option for consideration.
- Information and evidence obtained by a complainant or a solicitor in the process of investigating a complaint is strictly confidential. The Legal Profession Act provides penalties for anyone who breaches this duty of confidentiality without lawful excuse.
- The Defamation Act (s.17J) provides the defence of absolute privilege for publication to or by the Law Society of matters relating to a complaint that may otherwise be actionable as defamatory.
  This is intended to encourage frank and open communication in relation to a complaint.
- Where a Council or the Commissioner reprimands or makes a compensation order against a solicitor he or she is entitled to apply to the Tribunal for a review of that decision.
- A copy of a compensation order may be filed in a Local Court and enforced as though it were an order of the Court.