

Complaints by Solicitors about Solicitors

In New South Wales, regulation of the legal profession is governed by the legal profession legislation (as defined in s3A of the *Legal Profession Uniform Law Application Act 2014*) which includes the *Legal Profession Uniform Law (NSW)* (**Uniform Law**).

The NSW Legal Services Commissioner (the **NSW Commissioner**), the Council of the Law Society of New South Wales (the **Law Society Council**) and the Council of the Bar Association of New South Wales (the **Bar Council**) are co-regulators of the legal profession.

Under the Uniform Law, all complaints about lawyers must be made to the NSW Commissioner as the NSW Commissioner is the designated local regulatory authority for Chapter 5 of the Uniform Law which is concerned with complaints and discipline.

The NSW Commissioner has delegated functions under Chapter 5 of the Uniform Law to the Law Society Council and the Bar Council and refers complaints to them to be dealt with under Chapter 5.

This Policy explains the operational approach taken by the Law Society Council to complaints made by solicitors about solicitors, with a view to efficiently managing our available regulatory resources, in the public interest and having regard to the objects of the Uniform Law.

1. Purpose

This Policy has been developed to provide information to solicitors about how complaints made by solicitors about other solicitors that have been referred by the NSW Commissioner are dealt with by the Law Society Council. In particular, it provides information about the types of complaints that may be closed, if appropriate, following preliminary assessment (s277 of the Uniform Law). The Policy also reminds solicitors of their professional obligations, options for self-resolution and the resources available to members of the profession who may be experiencing personal difficulties.

This Policy is consistent with the Statement of Regulatory Approach which is published on the Law Society of NSW's webpage.

The Law Society gratefully acknowledges Ms Jacqui Dawson's article "*Acting with a cool head: Dealing with difficult practitioners*" (Law Society Journal, Issue 76, April 2021) and the Victorian Legal Services Board's July 2022 "*Operational Guidance on Complaints by Lawyers about Lawyers*", which have informed this Policy, in the interests of regulatory consistency.

2. Legislative Objects

The overarching objectives of the Uniform Law are to promote the administration of justice and an efficient and effective Australian legal profession by:

- (a) enhancing the protection of clients and 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.

3. Relevant Rules

The *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (the **Conduct Rules**) contain rules that govern how solicitors engage with each other in the course of legal practice or otherwise.

A solicitor's paramount duty is to the Court and the administration of justice (rule 3). Other ethical duties include the duty:

- to be honest and courteous when engaging in legal practice,
- to deliver legal services, competently, diligently, and as promptly as reasonably possible,
- to avoid any compromise to their integrity and professional independence (rule 4),
- not to engage in conduct (whether or not in the course of legal practice) which demonstrates that they are not fit and proper to practise law,
- not engage in conduct (whether or not in the course of legal practice) which is likely to a material degree to prejudice or diminish the public confidence in the administration of justice or bring the profession into disrepute. (rule 5)

Other conduct rules state that a solicitor must not:

- communicate with another solicitor's client except in certain circumstances (rule 33),
- be a material witness in a client's case (rule 27),
- make unfounded allegations about another solicitor (rule 32), and
- take unfair advantage of another solicitor or other person's error (rule 30).

Solicitors should be familiar with the Conduct Rules and comply with them at all times, noting that under s298 of the Uniform Law, breaches of the Conduct Rules may be conduct that amounts to unsatisfactory professional conduct (s296) and professional misconduct (s297).

Trust and confidence in the legal profession are of utmost importance to the administration of justice. As Spigelman CJ stated in *NSW Bar Association v Cummins* [2001] NSWCA 284 52 NSWLR 279 at 20:

“Clients must feel secure in confiding their secrets and entrusting their most personal affairs to lawyers. Fellow practitioners must be able to depend implicitly on the word and the behaviour of their colleagues. The judiciary must have confidence in those who appear before the courts. The public must have confidence in the legal profession by reason of the central role the profession plays in the administration of justice. Many aspects of the administration of justice depend on the trust by the judiciary and/or the public in the performance of professional obligations by professional people.”

In relation to the central role courtesy between lawyers has in the administration of justice, White J observed in *Rinehart v Rinehart* (2015) 108 ACSR 415 (at [27]):

“Discourteous conduct is likely to increase tensions, inflame disputes and bring the administration of justice, in its wider sense, into disrepute... As has been said, civility within the legal system not only holds the profession together, but also contributes to the continuation of a just society...Conduct that may be characterised as uncivil, abrasive, hostile or obstructive

necessarily impedes the goal of resolving conflicts rationally, peacefully and efficiently, in turn delaying or even denying justice”.

4. Scope of this Policy

The NSW Commissioner often receives complaints by lawyers about the behaviour of other lawyers with whom they engage in the course of legal practice or otherwise, which are referred to the Law Society Council each year. Many of these complaints are closed after preliminary assessment and without proceeding to investigation as the issues raised in these complaints either:

- (i) do not warrant disciplinary intervention; or
- (ii) raise issues that could or should have been resolved between the parties directly, or
- (iii) should be raised with the relevant Court or Tribunal, if the conduct occurs in the course of litigation, or
- (iv) a combination of the above.

Each complaint that is referred to the Law Society Council will be considered on the available evidence or information and in accordance with the law. However, in accordance with our Statement of Regulatory Approach, we aim to direct our resources to where the greatest risk of harm lies.

5. Threshold Questions

When considering whether a complaint by one solicitor about the behaviour of another solicitor, will proceed beyond preliminary assessment, a number of threshold questions in relation to the alleged conduct will be considered.

The key questions to be considered, consistent with the Statement of Regulatory Approach, are:

- Does the alleged conduct involve the risk of serious harm, or result in actual serious harm to clients of law practices or the public generally?
- Is the administration of justice seriously compromised (or at risk)?

This may be demonstrated by considering the following factors:

- Does the matter involve serious abuse such as threats of physical harm (implied or explicit) or ongoing use of profane language?
- Is the abusive, discourteous conduct repeated and adversely affecting the progress of a matter?
- Has the serious conduct lead to an untenable or unreasonable outcome for the client?
- Have the rights of the client been adversely affected?
- Does the matter evidence dishonesty or a significant lack of integrity on the part of the solicitor?
- Does the matter raise underlying fitness issues on the part of the solicitor?
- Does the matter raise commonly occurring conduct that requires a disciplinary response in order to educate the profession and maintain high ethical standards?

If the answers to any of the above are ‘yes’, then the complaint may proceed to investigation.

6. Complaints that are not likely to proceed beyond Preliminary Assessment

Whilst each complaint is considered on the material available, there are some complaints that are not likely to proceed to investigation and may close after preliminary assessment. These include:

- a. Matters evidencing mere robustness on the part of a solicitor who is properly acting in their client's best interests.
- b. A complaint that has been brought solely for the purpose of creating annoyance, frustration or disruption to the solicitor or the solicitor's client or to gain a forensic advantage in matters before a court or tribunal. This can include retaliatory complaints where there is animosity between opposing parties. Solicitors need to be aware of rule 32 concerning the making of unfounded allegations.
- c. A complaint that seeks an outcome that the complaints process is unable to deliver.
- d. A complaint that relates to conduct better dealt with through another part of the Uniform Law or another regulatory or investigatory body;
- e. Low level procedural matters (e.g. a solicitor not complying with certain procedural steps that is of little consequence to the matter). If the matter is before the Court any concerns should be raised there in the first instance.
- f. Low level or isolated discourtesy, in particular that does not adversely affect the progress of a matter (as outlined in the threshold questions above).
- g. Differences of opinion as to the law or interpretation of a legal matter, where there are other avenues to adjudicate on this issue (e.g. the matter is or should be before a Court or Tribunal or mediator).
- h. Differences of opinion with respect to tactics employed in litigation or the handling of a matter, unless it involves a significant lack of competence or an abuse of process that is adversely affecting a client's rights.
- i. Delays in responding to correspondence or calls unless there is a gross delay, there are particular time sensitivities or the client's interests are adversely affected.
- j. Issues involving business disputes between partners or principals. These can be resolved by other means. The exception is where the alleged conduct affects client rights, involves dishonest or misleading behaviour, trust account issues or conduct that may affect the solicitor's fitness to practice. With these matters, we should be informed so that we can assess what regulatory response is required. However, they are unlikely to be dealt with as complaints.
- k. Employment disputes that should be resolved by other legal means or are better dealt with by other bodies such as the Fair Work Commission or Fair Work Ombudsman. Again, with these matters, either the Law Society Council or the NSW Commissioner should be informed so that an assessment of the regulatory response required can occur (for example, matters involving sexual harassment or workplace bullying).
- l. Complaints that seek to re-open matters which have already been the subject of a Court or Tribunal finding, or resolution through other avenues (e.g. mediation, settlement). The exception is if new or compelling evidence indicates dishonesty or significant consumer harm.

- m. Complaints that raise matters that have already been investigated and decided by the Law Society Council or the NSW Commissioner. The exception is if new or compelling evidence indicates dishonesty or significant consumer harm. In some circumstances, it may be useful to seek an internal review.
- n. Complaints made prematurely where there are other options available or opportunities for self-resolution that have not been explored.

7. Closure following preliminary assessment

The power to close a complaint in whole or part without further assessment of the merits of the matter is provided by s277 of the Uniform Law and may be exercised for any of the following reasons:

- (a) the complaint is vexatious, misconceived, frivolous or lacking in substance;
- (b) the complaint was made out of time;
- (c) the complainant has not responded, or has responded inadequately, to a request for further information;
- (d) the subject matter of the complaint has been or is already being investigated;
- (e) the subject matter of the complaint would be better investigated or dealt with by police or another investigatory or law enforcement body;
- (f) the designated local regulatory authority has made a recommendation under s82(4) in relation to the lawyer concerned;
- (g) the subject matter of the complaint is the subject of civil proceedings, except so far as it is a disciplinary matter;
- (h) the designated local regulatory authority, having considered the complaint, forms the view that the complaint requires no further investigation, except so far as it is a consumer matter;
- (i) the complaint is not one that the designated local regulatory authority has power to deal with;
- (j) the designated local regulatory authority is satisfied that it is otherwise in the public interest to close the complaint.

A complaint may be closed at the preliminary assessment stage, without any investigation or without completing an investigation (s277(3)). In addition, s277(4) of the Uniform Law allows a complaint to be closed without giving a complainant, a lawyer or law practice an opportunity to be heard or make a submission in relation to the complaint.

8. Options for Self-Resolution

Noting the central role of civility in the administration of justice, it is in a solicitor's interest to maintain positive working relationships with members of the legal profession. With this in mind, there are alternatives to making a complaint to the NSW Commissioner:

- Solicitors should always attempt to resolve disputes amongst themselves in the first instance. Lodging a complaint should not be the first option in attempting to resolve an issue or dispute. If the outcome you are seeking is something you can achieve directly, then attempts must be made to do so. For example, raising a concern directly may elicit an apology or a change in behaviour, which is the preferred outcome for all parties. Solicitors may choose to call, send a letter, or meet

with their colleague. In many cases a solicitor will acknowledge their error when it is tactfully brought to their attention.

- If a solicitor has shown insight, remorse and offered an apology and there is a demonstrated change in behaviour, there is no utility in making a complaint.
- Reflect on the matter in its entirety and consider whether the conduct was isolated and/or did not cause any harm to you or your client. Was the conduct a momentary aberration, or part of a course of conduct?
- Consider the mode in which you communicate with the solicitor and whether this can be adjusted, taking into account your obligations and your duty to the Court and your client.

Solicitors should carefully consider whether threatening to make a complaint will cause them to be in breach of the rule on dealing with other persons (see Conduct Rules, rule 34).

It is suggested that before making a complaint, a solicitor should contact the Ethics Unit of the Law Society's Professional Support Unit (PSU) on 02 9926 0114 or ethics@lawsociety.com.au. Solicitors may also find useful information about complaints and the complaints process on the website of the Office of the NSW Commissioner (<https://www.olsc.nsw.gov.au/>).

9. Law Society Resources

The Law Society's website provides key information and guidance for solicitors about practising law in New South Wales (<https://www.lawsociety.com.au/practising-law-in-NSW>).

In particular, PSU provides confidential, prompt and reasoned information, guidance and assistance to solicitors to assist them to comply with the obligations imposed under legal profession legislation. Solicitors can contact PSU to discuss their concerns or seek clarification and assistance on ethics, costs and regulatory compliance issues. More information about PSU and its resources may be found at <https://www.lawsociety.com.au/practising-law-in-NSW/professional-support-unit>.

In addition, solicitors acting for both parties in a matter may seek guidance from the Law Society Ethics Committee as to the correct approach on an ethical issue. The agreement of both parties is required before a referral will be made. Arrangements can be made by contacting the Professional Support Unit.

If conduct causes concern about a solicitor's health and wellbeing, consider drawing the solicitor's attention to resources available on the Law Society website, including the Solicitor Outreach Service (SOS).

SOS is the Law Society's mental health and wellbeing support service. It is a dedicated and confidential psychological support service for NSW solicitors who may be experiencing emotional difficulties and stress. Through SOS, NSW solicitors can access up to three psychological sessions per financial year and telephone crisis support if in acute distress, funded by the Law Society.

SOS is available to solicitors who hold a current practising certificate from the Law Society of NSW, including those who may be the subject of a disciplinary process. The phone number for the service is 1800 592 296. Learn more about this service at <https://www.lawsociety.com.au/sos>.