

COMPLAINTS AND DISCIPLINE

A GUIDE FOR CLIENTS AND LAWYERS



28 March 2022

The *Legal Profession Act 2006* provides the procedure for making and determining complaints about lawyers. Many complainants and practitioners 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 Law Society Northern Territory's (Society's) complaints investigator or regulatory lawyers.

Making a complaint

Any person may make a complaint about the conduct of a lawyer. There need not be any formal relationship between the practitioner and the complainant. The complaint must:

- Be made in writing (preferably on the Society's approved form, available from our website);
- Identify the complainant;
- Identify the individual against whom the complaint is made;
- Describe the alleged conduct the subject of the complaint.

All complaints about lawyers must be sent to the Society. The Society may make a preliminary assessment of a complaint, mediate the complaint (if it involves a consumer dispute), undertake a full investigation or dismiss it.

A complaint must be made within three years of the date on which the conduct being complained about occurred. The Society 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 or the complaint concerns an allegation of professional misconduct and it is in

the public interest to deal with the complaint. This will depend on the circumstances of each complaint.

What conduct can be investigated?

Complaints about Australian lawyers must describe conduct by the lawyer 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 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 Australian lawyer.

Professional misconduct is conduct by an Australian lawyer that includes:

- unsatisfactory professional conduct of an Australian lawyer, 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 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 practitioner is not a fit and proper person to engage in legal practice; and
- 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 lawyer about the conduct of a lawyer which does not involve an issue of unsatisfactory professional conduct or professional misconduct.

Consumer dispute resolution

Many complaints about the conduct of a lawyer occur because the complainant believes the lawyer’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 complaints investigator for investigation, the investigator will consider whether the matter is a consumer dispute that can be resolved without the need for a lengthy investigation. The action the investigator will take in this regard is as follows:

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

Complaints involving consumer disputes may be referred for mediation by the Society. The Society has the power to compel the parties to a consumer dispute to enter into mediation about the dispute.

Investigation of complaints

A complaint to the Society about a lawyer is usually investigated by the Society’s complaints investigator or regulatory lawyer. On occasion, a complaint file might also be referred to an external investigator who will undertake the investigation as an agent of the Society.

A complaint can be dismissed without investigation if the complainant does not supply further particulars as requested by the investigator, or if after preliminary assessment the complaint is determined to be frivolous, vexatious or without substance.

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

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

The Society’s investigation must be expeditious and timely. Complainants who fail to comply with the Society’s requirements may find their complaints dismissed by the Ethics Committee for lack of evidence. Lawyers who fail to comply with the Society’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 lawyer may also be a criminal offence.

The Society’s investigation must be thorough. The standard of proof in a complaint is that the Society must be satisfied that there is a “reasonable likelihood” that the Legal Practitioners Disciplinary Tribunal (the Tribunal) would find the lawyer is guilty of unsatisfactory professional conduct or

professional misconduct. Usually, the unsupported word of the complainant against the unsupported word of the lawyer will not be sufficient to establish a “reasonable likelihood” of an adverse finding.

The Society’s investigator must ascertain whether support for the statements of the complainant and the lawyer exists, and if so, obtain those supporting documents or statements from the complainant, lawyer or other witnesses.

The Society’s investigation will generally be confined to the complaint that has been made, although it may be widened during the course of the investigation. This means that Society’s investigator should initially confirm with the complainant the issues raised by the complaint. Further facts and submissions will normally be provided by both the lawyer 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 lawyer, may require formal modification of the existing complaint or the initiation of a new complaint investigation separate to the complaint already being dealt with.

The Ethics Committee or Council decision

The Society’s investigator reports the facts and evidence disclosed by the investigation to the Ethics Committee for consideration in the first instance. The Committee comprises Councillors of the Society, non-councillor lawyers and a lay person (non-lawyer). The Committee can require the investigator to undertake further investigations. The investigation continues until the Committee has made a final decision as to what recommendations will be made in respect of the complaint.

If the Ethics Committee forms a view that there is no “reasonable likelihood” that the lawyer will be found guilty, it will invariably recommend that the Society (through its CEO) dismiss the complaint, in accordance with s498.

If the Ethics Committee forms the view that there is a “reasonable likelihood” that the lawyer will be

found guilty of unsatisfactory professional conduct (but NOT professional misconduct), then it must make recommendations to the Society’s Council as to proposed findings and penalties, which may include:

- Reprimanding the lawyer (either publicly, or if special circumstances exist, privately); and/or
- Fining the lawyer (up to a maximum of 50 penalty units).

Only the Society’s Council can summarily conclude a complaint under s499 with a finding of unsatisfactory professional conduct and the imposition of a penalty. This means that if the Ethics Committee, after considering the investigator’s report, recommends that an adverse finding be made and a penalty be imposed, the recommendations must be considered by the Council.

Any such recommendations will be provided to the complainant and the lawyer to allow submissions to be made before the Council’s final determination.

The Council must also be satisfied that the lawyer it is dealing with for a summary conclusion of a complaint is “generally competent and diligent” and that “no other material complaints” have been made against the lawyer. These are matters the lawyer should address when making submissions on the recommendations of the Ethics Committee to the Council.

If the Council is satisfied that there is a “reasonable likelihood” that the lawyer will be found guilty of professional misconduct, then it MUST refer the lawyer to the Tribunal for a determination about the complaint.

Reasons for the decision will be provided.

Powers and functions of the Tribunal

The Tribunal hears and determines complaints referred to it from the Society’s Council. In such proceedings the Council becomes the applicant.

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

If the Tribunal finds a lawyer guilty of unsatisfactory professional conduct or professional misconduct, it may impose a penalty on the lawyer.

The penalty can include such things as:

- a reprimand,
- a fine,
- a requirement that the lawyer undertake further legal education,
- a restriction on the kind of work that the lawyer may perform,
- placing the lawyer's practice under management or periodic inspection,
- suspension or cancellation of the lawyer's practising certificate; or
- a recommendation for the removal of the lawyer's name from the Roll of Lawyers (which can only be done by the Supreme Court).

The Tribunal is also the first level appeal body in relation to complaint determinations made by the Society.

If a complaint is dismissed by the Society, the complainant has a right to appeal the decision, on filing a notice of appeal within 28 days after receiving the statement of reasons for the Society's decision.

If a complaint is upheld and a reprimand and/or fine are imposed on the lawyer under s499, the lawyer has the right to appeal, again within 28 days after receiving the statement of reasons for the Society's decision.

The Tribunal hears the appeal by way of rehearing, and is bound by the rules of evidence in conducting the hearing. The parties to the appeal are the complainant, the lawyer against whom the complaint was made, and the Society.

In relation to an appeal of the Society's determination, the Tribunal can either affirm or set aside the Society's decision, set aside and direct the Society to start disciplinary proceedings in the Tribunal, or set aside and substitute its own penalty under s499(2) (publicly reprimand, privately reprimand and/or fine).

Compensation

A complainant who can prove that he or she has suffered a loss because of the conduct of a lawyer that is the subject of a complaint may seek a compensation order. A compensation order may take the form of:

- An order that the lawyer cannot recover or must repay some or all of the costs charged for specified legal services;
- An order discharging a lien that a lawyer possesses in relation to documents; and/or
- An order that the lawyer pay the complainant a specified amount of monetary compensation.

A complainant may request such compensation and must give relevant particulars, preferably when the complaint is first made. The complainant must present the evidence in support of the claim for compensation to the Society or Tribunal. The Society will only make a compensation order in limited circumstances. This includes if it is satisfied a lawyer is reasonably likely to be found guilty of unsatisfactory professional conduct or professional misconduct by the Tribunal and, importantly, only if it is sending a complaint matter to the Tribunal. The Society will not make a compensation order when it dismisses a complaint or imposes a summary penalty.

The Tribunal can make a compensation order if it finds the lawyer guilty of unsatisfactory professional conduct or professional misconduct in relation to the complaint made.

The maximum amount that the Society or Tribunal can award by way of compensation is \$10 000, but a higher amount can be awarded if both the complainant and the lawyer consent.

The Society or Tribunal must not award compensation if a complainant has already received compensation through an alternative process (such as an action in negligence or a claim on the Fidelity Fund), or has previously established their right to receive that compensation or successfully make that claim for the loss in question.

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 lawyer.
- Making a complaint does not terminate a lawyer/client relationship between the complainant and the lawyer, if there is one. However, a complaint can indicate a loss of confidence or trust in the lawyer, which may make it appropriate for the lawyer to cease to act for the complainant.
- The Society's Council 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 lawyer 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 lawyer's costs although charging of excessive costs may be a conduct issue that is properly the subject of a complaint.
- Complaints about a lawyer'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, negligence is not, by itself, a matter upon which a lawyer would be found guilty of unsatisfactory professional conduct or professional misconduct. Many complaints about a lawyer's negligence are dismissed because they do not warrant disciplinary action.
- Disciplinary action taken against a lawyer must be shown on the Register of Disciplinary Action which is available for public inspection on the Society's website. Disciplinary action is an order or finding made by a court or tribunal following a finding of professional misconduct, but does not include findings made and penalties imposed by the Society's Council. Public reprimands imposed under s499 are also published on the Society's website and remain on the website for a period of 12 months from the Society's determination.
- Lawyers should not make complaints about other lawyers without first exploring every avenue of resolution of the issue that has arisen.
- Personal information obtained by the Society, its employees and any members of the Society (including Committee and Council members) when exercising functions related to investigation of complaints may not be disclosed unless disclosure is authorised or required by law.
- Making a complaint about a conflict of interest will not necessarily have the effect that the lawyer allegedly acting in conflict has to cease to act. Only the court has the power to require that outcome.