

# Negligence

This factsheet describes the role of the Legal Services Commission in the event that you suspect your lawyer has been negligent in the conduct of your matter.

## What is negligence?

Lawyers owe their clients a duty of care. Negligence is a failure to exercise the degree of care considered reasonable in the circumstances, resulting in financial or other loss.

Clearly, the mere fact that a lawyer fails to achieve what a client hoped to achieve with the lawyer's advice and assistance does not, in itself, mean that the lawyer was negligent.

Equally clearly, lawyers do have a responsibility to their clients. A lawyer who fails to provide a legal service to a client with at least reasonable care and skill and whose failure causes the client to suffer a financial or other loss may well have breached his or her duty of care. The breach of that duty may amount to negligence and the client may be entitled to compensation for the loss.

**Important:** In the case of negligence, it is up to a court to decide if the lawyer breached their duty of care and whether the client is entitled to compensation for any loss.

## What to do?

You are entitled to lodge a complaint with the Commission if you believe your lawyer has been negligent.

It is important however to understand that the system for dealing with complaints about lawyers is not the only way and as a rule is not the best way for you to resolve your concerns.

We recommend if you believe your lawyer has been negligent and you are seeking compensation that you obtain independent legal advice as to your rights and remedies and the strength of your case.

For independent legal advice contact:

- Legal Aid Queensland (phone 1300 651 188) [www.legalaid.qld.gov.au](http://www.legalaid.qld.gov.au)
- Queensland Public Interest Law Clearing House (QPILCH) (phone 07 3012 9773)
- Queensland Law Society online referral service (phone 07 3842 5842) or [www.qls.com.au](http://www.qls.com.au)
- A community legal centre (e.g. Caxton Legal Service)
- A solicitor.

## Negligence, complaints and professional discipline

The *Legal Profession Act 2004* (the Act) established the Legal Services Commission as the sole body responsible for receiving complaints about the conduct of lawyers and law practice employees in Queensland.

The Act obliges the Commissioner to investigate any complaint that would, if it were proved, establish that a lawyer's conduct amounts to either *unsatisfactory professional conduct* or *professional misconduct*. It also empowers the Commissioner to start disciplinary proceedings against a lawyer before a disciplinary body. This occurs when the Commissioner is satisfied the evidence obtained during the investigation is sufficient to establish a reasonable likelihood the disciplinary body will find the lawyer's conduct to amount to either unsatisfactory professional conduct or professional misconduct.

So what do these words mean?

The Act says *unsatisfactory professional conduct* includes 'conduct 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'.

It says *professional misconduct* includes a substantial or consistent failure to reach that same standard. This is therefore generally more serious and less likely to be a 'one-off', accidental oversight or failure.

Not surprisingly given these definitions, the very same conduct by a lawyer that might amount to negligence might at the same time fall into one of the above two categories—for example:

- inadequate supervision by a lawyer of the way their law firm deals with a client's money
- serious delays completing work on a client's behalf including, for example, missing a statutory timeframe so that a client's claim becomes statute barred
- failing to keep a client informed of the progress of their matter.

### What will the Commission do if you lodge a complaint about negligence?

Your complaint will be assessed by one of the Commission's legal officers. The Commissioner will then decide what action to take on your complaint, if any. There are three options:

(a) to take no further action on your complaint:

The Commissioner might decide to take no further action on your complaint about negligence for the same reasons that apply to complaints more generally—because, for example, the conduct about which you have complained:

- occurred more than three years ago and there is no justifiable reason for the delay, or
- was the subject of a previous complaint that has been dismissed or dealt with, and the complaint discloses no further reason to reconsider the matter.

The Commissioner might however decide to take no further action on your complaint because the complaint by its very nature simply cannot be productively investigated.

Complaints that allege negligence very often raise complex and contentious questions of both fact and opinion. In these circumstances the Commissioner is unlikely to be in a position, even after exhaustive investigation, to be satisfied that there is a reasonable likelihood a disciplinary body will find the lawyer's conduct amounts to either unsatisfactory professional conduct or professional misconduct.

As a general rule, complex and contentious questions of fact and opinion can only be decided by a court, and the Commission can deal with any disciplinary issues that arise only after a court has made a decision. In these circumstances, your only remedy is to commence proceedings for professional negligence in the appropriate court.

(b) to try to resolve your concerns through mediation:

The Commissioner might decide to try to resolve your concerns through mediation, especially if the conduct about which you complain is at the less serious end of the scale.

In these circumstances the Commission will encourage and assist the parties in dispute to come to an agreement acceptable to both sides. Much of the process is conducted by telephone with a view to resolving things at the earliest possible opportunity.

**Note:** The Commission cannot impose a solution nor give you legal advice as to your options.

(c) to start an investigation into some or all of the matters you have raised in your complaint:

The Commissioner might decide to investigate some or all the matters you raise in your complaint if the nature of the conduct you are complaining about could, in the Commissioner's opinion, lead to a finding of unsatisfactory professional conduct or professional misconduct—that is to say, if your complaint is unlikely to raise any complex and contentious questions of fact or opinion that can only be properly decided by a court.

### Can you be compensated?

The Commissioner does not have power to award compensation—only the disciplinary bodies have that power. They can make a compensation order, but only if they make a finding that:

- your lawyer's conduct amounts to either unsatisfactory professional conduct or professional misconduct, and
- you suffered a financial loss as a direct result of that unsatisfactory professional conduct or professional misconduct.

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The purpose of disciplinary proceedings is to protect the public generally and not to compensate individual complainants.

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Importantly, the disciplinary bodies cannot make a compensation order to compensate you for any damage to your reputation your lawyer's conduct may have caused, or for any stress or psychological injuries it may have caused you. They can make compensation orders for financial loss but, unless both parties agree, not for more than \$7500.00 (see factsheet 4 *Compensation orders*).

Remember that the system for dealing with complaints and discipline is generally not the best way for you to prove your lawyer was negligent and to seek compensation. Only a court can decide if your lawyer is negligent.

### Where can you get more information?

If you have any questions regarding this information or wish to enquire about the role of the Legal Services Commission, please visit the LSC website or contact the Commission on:

Telephone: **07 3406 7737** (Brisbane)  
**1300 655 754** (outside Brisbane)  
**133 677** (if you require the use of the National Relay Service)  
**131 450** (if you require a translator/interpreter)

For more information visit the Legal Services Commission website <[www.lsc.qld.gov.au](http://www.lsc.qld.gov.au)>.