

Responding to a complaint

This factsheet helps lawyers and their staff to understand what they must do and consider if they:

- receive a complaint OR
- wish to understand the complaints process to help model a quality management business process for the handling of complaints.

Our role

The *Legal Profession Act 2004* (the Act) established the Legal Services Commission as the sole body responsible for receiving and investigating complaints about the conduct of lawyers and law practice employees. If the Commission receives a complaint against you or your firm, the Commissioner:

- commences a detailed process for the assessment and investigation of the complaint
- sends you a formal letter containing the details of the complaint
- provides a deadline for your response
- details what information is required to be presented in your response.

It is important to understand the complaints process so you:

- know what to do
- are aware of your responsibilities
- understand the potential ramifications of a complaint on your staff and your business.

The process

A complaint can be made to the Commission by a legal consumer (this includes a person who is not your client, e.g. a person who is represented by another lawyer in a transaction or litigation), other lawyers, the Queensland Law Society (QLS) or Bar Association of Queensland (BAQ). The Commission may also initiate its own investigation in the absence of a formal complaint if it is considered warranted—these are called investigation matters.

The Commission only investigates conduct that may amount to either unsatisfactory professional conduct or professional misconduct.

Assessing complaints

When a complaint is received by the Commission it is assessed for its eligibility under the Act before it is accepted. The Commissioner has the power to dismiss complaints if they:

- do not disclose conduct that is covered in the Act
- present as ‘frivolous, vexatious, misconceived or lacking in substance’
- have already been dealt with and there is no reason for further consideration
- are over three years old.

Accepting and classifying complaints

If the complaint contains sufficient information and clearly falls under the jurisdiction of the Act, the Commissioner is obliged to investigate the conduct.

The Commission may classify a complaint as a *consumer dispute* if it is considered on its initial appraisal that no serious issue of unsatisfactory professional conduct or professional misconduct arises. In such cases there is an obvious dispute between the legal consumer and the lawyer, and the Commission attempts to mediate that dispute to achieve a resolution. Similarly telephone enquiries with the Commission are also often dealt with, at least initially, as consumer disputes and resolution is sought through telephone contact with the lawyer and the consumer.

If, in the course of attempting to resolve such consumer disputes, information or evidence emerges to suggest that the conduct constitutes either unsatisfactory professional conduct or professional misconduct, then the matter may be reclassified and an investigation undertaken.

Investigating complaints

The Commission can carry out investigations itself or refer them to the QLS or BAQ, to be carried out under the Commission's direction and control. However, the final decision as to whether a discipline application is pursued rests with the Commissioner.

Note: Neither the QLS nor BAQ has the power to decide how investigations should be concluded or to initiate disciplinary proceedings. These bodies report their findings and recommendations to the Commissioner. The Commissioner is responsible for final review and any decision.

How are investigations undertaken?

You will be informed in writing when an investigation is commenced into a *conduct complaint* or an *investigation matter*. The written notice is issued by the Commission, the QLS or the BAQ, depending on who is handling the investigation of the complaint.

It is important to understand that when an investigation is commenced this does not imply that the complaint is justified or that there has been any impropriety on the part of the practitioner.

Often a prompt and detailed response from the lawyer will assist the matter to a swift conclusion.

The Act requires the investigating body to inform you of:

- the nature of the matter(s) raised in the complaint now subject to investigation
- the identity of the person who made the complaint:
 - for conduct complaints, a legal consumer, other legal practitioner, QLS or BAQ
 - for investigation matters, the Commission
- anything the complainant has done in relation to the complaint before writing to you.

You will be provided with a reasonable time and opportunity to reply to the complaint or to otherwise make your submissions.

The investigation will often be conducted via correspondence, however on occasions you may be called upon to produce your file or other documents, or the commission may contact other witnesses and take statements.

Transparency of the investigation

All investigations must demonstrate procedural fairness. For that reason a practitioner's response will usually be provided to the complainant.

Response to a complaint

We cannot demand you cooperate with us to mediate a consumer dispute, but we ask you to help us resolve the complainant's concerns. Mediation is almost always the best way to resolve matters (for all parties).

Resolution may be as simple as offering an explanation, an apology, negotiating an account reduction or negotiating a plan for payment by instalments.

The Commission has substantial powers of investigation, including (but not limited to) the power to demand:

- a full explanation of the matter(s) subject to investigation, in writing or in person, although lawyers can refuse to disclose information that might incriminate them or that would contradict or invalidate a professional indemnity insurance policies.
- that you produce any document in your 'custody, possession or control' that you are required at law to produce.

We strive to make requests in a courteous and respectful manner. However the Commissioner may take disciplinary action if you do not provide a response as directed or if the response you provide is inadequate.

The Act requires you to provide the Commission with 'reasonable help' throughout the course of the investigation. It also states it is an offence to 'obstruct an investigator in the exercise of a power [without] a reasonable excuse'.

The courts and disciplinary tribunals have reinforced the point. The Solicitors Complaints Tribunal commented in the matter of *Whitman* in 2003 that 'a solicitor has a duty to be truthful even to his own detriment, and not just a duty to be truthful but a positive duty to be full and frank and for his answers to be candid as well as truthful'. The Court of Appeal

observed in that same matter on appeal that ‘neither the investigation [nor any subsequent disciplinary] hearing is criminal in nature—it is a process directed towards protection of the public. Recognising that, a practitioner is duty bound to cooperate reasonably in the process.’ Both judgments can be accessed via the Commission’s discipline register.

Note: Failure to comply with a notice of this kind within fourteen days is prima facie evidence of professional misconduct.

How should I respond?

When the Commission or one of its representatives is undertaking an investigation you are required to cooperate.

Remember:

- Your first written notice is not an accusation, but a request for your side of the story.
- Do not ignore letters or phone calls from the Commission. In itself, that failure to act may amount to misconduct.
- When we receive your response we can decide whether a complaint has merit.
- Respond as fully and frankly as possible. It is rarely constructive or helpful to respond in anger, particularly as any letter may be seen not only by the complainant but by the Legal Practice Tribunal or Legal Practice Committee. The Commission does expect courteous communications from lawyers.
- Respond quickly and within the stated timeline. However, should an extension of time be necessary contact the Commission promptly requesting the extension.
- We are an independent investigator.

Important: If you don’t know what to do, or you are confused or concerned, or relevant staff involved with your complaint are unavailable, or you are time-constrained, contact the Commission’s investigator as soon as possible.

Common questions

Why do clients complain to the Commission?

A client will take their complaint to the Commission when they feel they have run out of options to rectify their issues with you or your law firm. By this stage the client is likely to have had enough and no longer wants to retain a relationship with your firm.

The majority of complaints stem from common misunderstandings regarding business practice and client communication.

How will I know if there is a complaint against me?

- ✓ You will be informed in writing when a *conduct complaint* or an *investigation matter* is accepted by the Commission against you. The written notice is issued by the Commission, the QLS or the BAQ, depending on who is handling the complaint.
- ✗ You will generally not be informed in writing in the case of a *consumer dispute*; however we will call you to discuss the matter and to give you greater opportunity to negotiate how best to proceed.
- ✗ You will not usually be informed if the Commission dismisses a complaint without investigation.

Can I contract out of the Act?

No. The Act provides that a provision in any agreement aimed at preventing a person from making a complaint or disclosing information to the Commission about practitioner conduct, is unenforceable.

Can I charge my client for my response to the complaint?

No.

How can I safeguard my business from complaint?

We urge you, whatever the complaint, to learn from your experience and the experiences of others. Ask yourself if there was anything you might have done differently to avoid the complaint, or to prevent the issue from escalating to a formal complaint (see factsheet 9 *Avoiding complaints*).

Whatever you do, do not put your head in the sand or let things get the better of you. Doing nothing or getting angry or defensive only makes things worse.

Deal with the issues of substance and deal with them on their merit as soon as you can.

Get help if necessary, and consider contacting your professional body. The QLS maintains lists of senior counsellors who can provide members with free and privileged ethical advice. It also provides a free legal advice service of up to three hours for members who have been officially notified they are subject to investigation. Law Care is also available on a strictly confidential basis, for solicitors who may be experiencing emotional or stress-related problems. The BAQ offers similar services to its members and can refer members of the Bar to a member of its Ethics Committee or Senior Counsel for ethical advice on a strictly confidential basis.

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>.