

Out of Time Complaints

Policy

Date: January 2012

Version 2

Acknowledgements

This policy has been prepared with reference to the Legal Services Commission (Victoria) *C & I 011Time Limit Extension Guidelines & Checklist* and prepared with reference to the loose-leaf edition of ASIC Corporate Investigations and Hearings.

Information about this policy

Policy Statement	The Legal Services Commissioner must investigate complaints of “professional misconduct” or “unsatisfactory professional conduct” concerning legal practitioners which occurred up to three years ago. However, in respect of conduct occurring more than three years ago the Commissioner has discretion as to whether or not to accept the complaint.
Purpose	The purpose of this policy is to set out the factors which the Legal Services Commissioner may take into account when deciding whether to accept a complaint “out of time”.
Who does it apply to?	All investigators
Direct queries to?	Director of Investigations Manager- Compliance
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1. Background

The *Legal Profession Act 2007* (“**the Act**”) provides that it is within the discretion of the Legal Services Commissioner (“**Commissioner**”) to accept a complaint regarding conduct¹ of an Australian legal practitioner or law practice employee which occurred more than 3 years ago. Like any exercise of discretion it is important to appreciate that each case must be determined upon its own facts. This policy aims to identify for complainants and respondents some of the factors which the Commissioner may take into account when deciding whether or not to accept a complaint out of time.

The Commissioner will only accept “out of time complaints” if the conditions prescribed in section 430 of the Act are satisfied. Section 430 of the Act provides that the Commissioner may deal with a complaint regarding conduct which occurred more than 3 years ago if:

“ (i) it is **just and fair** to deal with the complaint having regard to the extent of, and reasons for, the delay; or

(ii) the complaint involves conduct of the following type and it is in the **public interest** to deal with the complaint —professional misconduct”

The Commissioner will generally seek submissions from the complainant as to why the complaint should be accepted out of time. If necessary, the respondent will also be provided with an opportunity to make submissions. The Commissioner will provide the complainant (and, if necessary, the respondent) with a copy of his decision and reasons for choosing to accept or refuse an out of time complaint.

¹ See s 428 of the Act and Chapter 4 of the Act generally.

2. Definitions

Australian legal practitioner means an Australian Lawyer as defined by the Act.

The Act means the *Legal Profession Act 2007* (Qld).

Out of time complaint means a complaint regarding conduct which occurred more than 3 years ago.

3. Policy

The factors that the Commissioner may consider in deciding whether or not to accept an out of time complaint pursuant to the Act fall under two broad concepts: “just and fair” and “in the public interest.”

In considering whether or not it is “**just and fair**” to deal with a complaint out of time, the Commissioner may consider, but is not limited to, the following factors:²

- (i) the extent of the delay;
- (ii) the explanation for the delay, including the complainant’s (or representative’s) diligence in exercising his or her rights
- (iii) any disadvantage or prejudice to the complainant;
- (iv) any disadvantage or prejudice to the respondent; and
- (v) the fairness in commencing an investigation – eg loss of evidence such as files, notes, witnesses or witness recollection.

In the event that the alleged conduct is capable of constituting professional misconduct the public interest must also be considered before accepting an out of time complaint. In considering whether or not it is “**in the public interest**” to deal with a complaint out of time, the Commissioner may consider, but is not limited to, the following factors:

- (i) whether or not it is just and fair to accept the complaint out of time;

² see *Salido v Nominal Defendant* (1993) 32 NSWLR 524 at 532-533 and *McLaren v Legal Practitioners Disciplinary Tribunal* [2010] NTSC 02 at [120] – [121].

- (ii) the nature and purpose of legal profession disciplinary investigations and proceedings;
- (iii) the seriousness of the alleged conduct (eg dishonesty versus competence);
- (iv) any investigation would satisfy the Commissioner's regulatory and enforcement priorities;
- (v) whether any investigative and subsequent disciplinary proceedings will have a regulatory impact (such as sending a compliance message through both personal and general deterrence or educative effect);
- (vi) whether any investigative and subsequent disciplinary proceedings will promote public confidence in the regulatory system, the reputation of the legal profession or the administration of justice;
- (vii) the likely outcome in any disciplinary proceedings which may follow from the investigation;
- (viii) any relationship that might exist between the respondent and complainant; and
- (ix) the fact that the respondent no longer engages in legal practice or is employed by a law practice.

Subject to the above, the Commissioner is not influenced by the following factors when deciding whether to accept an out of time complaint:

- (a) the race, religion, sex or political association, activities or beliefs or any other personal characteristic of the lawyer or any other person who may be involved in the matter;
- (b) personal feelings about the alleged conduct, the lawyer or any other third party;
- (c) possible political advantage or disadvantage to the Government or any political group or party; and
- (d) the possible effect of the decision on the personal or professional circumstances of those responsible for the decision.

4. Procedure Flowchart

