

# The Pointy End of Complaints

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Of course no legal practitioner ever likes to be confronted with a complaint in respect of their professional conduct, but complaints do happen, and in some cases the Law Society, after completing an investigation of the complaint, finds that there has been some unsatisfactory professional conduct or professional misconduct.

Practitioners facing this outcome need to be aware of the legislative framework in relation to conclusion of complaints, and how the scheme of penalties operates so that they can maximise their prospects of successfully mitigating any penalty imposed.

## Preliminary findings and recommendations of the Ethics Committee

The Ethics Committee of the Society exercises a recommendatory function only. The purpose of having an Ethics Committee is to ensure that a diversity of views is obtained in relation to complaints, and to enable relevant professional expertise to be utilised in the forming of recommendations to the Chief Executive Officer (in the case of complaints to be dismissed) or to the Law Society Council (in the case of complaints where an adverse finding and penalty are recommended).

Once the Ethics Committee has finalised its recommendations, these are sent to both the complainant and the practitioner, so that an opportunity is provided for

submissions to be made on either the findings, or proposed penalty, or both. It is usual to request that those submissions be made to the Society within 14 days, so that the recommendations and submissions can be referred on to the Council in a timely way.

## Determination by the Society Council

The Council's function is to conclude the complaint if it is empowered to do so. Section 499 of the *Legal Profession Act* provides the basis on which the Law Society, constituted by the Council, can summarily conclude a complaint.

The Society cannot summarily conclude a complaint if there is considered to be a reasonable likelihood that the practitioner would be found guilty of professional misconduct. Any such matters must be determined by the Legal Practitioners Disciplinary Tribunal.

If there is a reasonable likelihood that the practitioner would be found guilty by the Disciplinary Tribunal of unsatisfactory professional conduct, then under s.499, the option of summary conclusion of the complaint is available, subject to the Society being satisfied that the practitioner is otherwise competent and diligent, and that no other material complaints have been made against the practitioner [s.499(c)].

If the Society is not so satisfied, then the matter cannot be summarily

concluded and must be dealt with by the Legal Practitioners Disciplinary Tribunal. Your submissions on these matters are therefore most important.

## "Otherwise competent and diligent", and "no other material complaints"

The first phrase is also found in the equivalent sections of the Legal Profession Acts of New South Wales, Victoria and Western Australia.

There is, however, almost nothing in the way of judicial guidance on what the phrase means. A decision of the Administrative Decisions Tribunal of NSW, *Margiotta v Law Society of New South Wales (no.2)* [2007] NSWADT 65, in which the practitioner appealed from the Society's decision to publicly reprimand him, suggests that a practitioner's competence and diligence may be judged by reference to the practitioner's length of time in practice, experience, the size and nature of the practitioner's practice and degree of success in running the practice.

The Tribunal in that case also referred to a matter of *NSW Bar Association v Meakes* [2006] NSWCA 340, and noted that the Court of Appeal had held in that matter that the length of time a practitioner had been in practice without any other blemish on his record was a matter to be taken into account in determining the appropriate penalty.

The second phrase is expressed

in these jurisdictions as “no other substantiated complaints”, so it is suggested that the phrase “no other material complaints have been made against the practitioner” should be interpreted to mean no other substantiated complaints, rather than, for instance, complaints of a similar nature.

#### Penalties available under s.499

If the preconditions for summary conclusion are met, then the Society may do any or all of the following:-

- (a) publicly reprimand the practitioner or, if there are special circumstances, privately reprimand the practitioner;
- (b) impose a fine on the practitioner of a specified amount.

The maximum fine that can be imposed through summary conclusion is 50 penalty units, which under the *Penalty Units Act* 2009 means \$130.00 per unit (or as indexed) in cases where the conduct giving rise to the complaint occurred after 1 July 2009, or \$110.00 per unit where the conduct occurred earlier.

The Council passed a resolution on 29 October 2009 in relation to the form and content of public reprimands. The resolution is as follows:-

1. “A public reprimand for the

purposes of s.499 of the *Legal Profession Act*:-

- (a) Will be published on the Society’s website in the form of a hyperlinked PDF document;
- (b) will remain on the website for a period of 12 months from the date of the Society’s determination; and
- (c) the document referred to in (a) will contain details of the practitioner’s name, date of first admission, home jurisdiction, the Society’s complaint file reference number, the basis of the public reprimand and the date of the Society’s determination.

2. The publication will be made via the “Disciplinary Action Register” section of the Society’s website under an explanatory notice relating to public reprimands in the form annexed.
3. This resolution is to apply only to public reprimands imposed by determinations of the Society under s.499 after the date of this resolution.”

#### Annexure

#### PUBLIC REPRIMANDS

Pursuant to s.499 of the

*Legal Profession Act* 2006, where the Society after completion of the investigation of a complaint determines that there is a reasonable likelihood that a practitioner will be found guilty by the Disciplinary Tribunal of either unsatisfactory professional conduct or professional misconduct, the Society may issue the practitioner with a public reprimand.

A public reprimand is not “disciplinary action” within the meaning of s.540 of the *Legal Profession Act* but the Council of the Law Society has resolved that details relating to the reprimand will be made public by being published on the Society’s website, and that details will remain available for 12 months from the date on which the reprimand was imposed by the Society. Details can be found by clicking on the link below.”

The primacy of public reprimands over private ones is a reflection of the consumer protection focus of the *Legal Profession Act*, and for that reason, a practitioner faced with summary conclusion of a complaint will need to provide detailed reasons as to why his or her circumstances are special and warrant a private reprimand. }