



Legal Practitioners

Conduct Board

FACT SHEET 8

INFORMATION FOR LAWYERS

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What Is the Legal Practitioners Conduct Board?

The Board was created under the [Legal Practitioners Act, 1981](#). It is an independent body separate from the Law Society of South Australia.

The Board's office is at Level 3, 33 Franklin Street, Adelaide. The Board is the legal profession's regulatory body.

The establishment, functions and work of the Board, the Legal Practitioners Disciplinary Tribunal and the Supreme Court are set out in [Part 6 sections 68 to 90A](#) of the Act.

Current membership and staff of the Board

The Board comprises seven members – four of whom are lawyers and three non lawyers. The Board in meeting votes and decides on reports, information and evidence collected and compiled by the board's investigators.

Copies of the Board's Annual Reports are available from the website www.legalcomplaints.com.au.

Any contact with the Board is through the staff of the Board. Contact details appear at the end of this information sheet.

What are the functions of the Board?

The functions of the Board are set out in [section 74](#) of the Act. They are:

1. To investigate allegations of misconduct (in this information sheet "*misconduct*" refers to "*unprofessional conduct*" and "*unsatisfactory conduct*" and both terms are defined in the Act in [section 5](#)).
2. To deal with misconduct;

- (a) if relatively minor misconduct, pursuant to [section 77AB](#) of the Act or
 - (b) to lay charges before the Legal Practitioners Disciplinary Tribunal.
3. To deal with complaints of overcharging.
 4. To arrange for conciliation of complaints.
 5. To commence disciplinary proceedings before the Supreme Court if appropriate.

Board's Obligation to Investigate

The Board is **obliged** to conduct an investigation if a complaint is made. The Board may decline to investigate where the complaint is "*frivolous*" or "*vexatious*" or in circumstances where the complaint has resolved prior to commencement, or completion, of the investigation. Please refer to [section 76\(1a\)](#) and [section 77A](#) of the Act.

How is an Investigation Conducted?

The Board receives a significant number of enquiries by telephone. Where appropriate, an attempt will be made to address the enquirer's concerns informally at an early stage. Enquirers are frequently advised to raise their concerns directly with their lawyer at first instance so as to avoid the need for formal complaint. The Board's investigators cannot and will not, give legal advice to any caller, nor will the Board's investigators offer an opinion on the merits of any complaint.

Concerns raised by enquirers may be informally conciliated by the Board's conciliator. This process may include contact with you as the lawyer complained about, generally by telephone. Informal conciliation is conducted at the discretion of the Board's staff.

If a formal complaint is made to the Board about you, an investigation will be commenced.

The commencement of an investigation does not mean that the Board's investigator necessarily accepts the veracity or completeness of the allegations or information. At the completion of an investigation the matter is put to the Board for decision. Board Members are not involved in the investigation of the complaint and therefore may not be aware of the complaint at the investigation stage.

The Board, pursuant to [section 75](#) of the Act has delegated some of its powers and functions to the Director, Principal Legal Officer and staff of the Board. A decision in relation to a complaint may be made pursuant to the delegated authority.

A timely and detailed response from you may result in early clarification of the matters complained about and may result in a prompt resolution of the complaint.

A complaint can be made by anyone, not only your client. When a complaint is made about a lawyer representing a person who is in dispute with the complainant, issues of legal professional privilege and ulterior motive may affect what action (if any) is taken by the Board.

The Act does not prescribe a time limit in which a complaint must be made, however, it may be a factor in the Board's investigation or in its assessment of the matter.

The Board does not automatically publish (send) the complaint to you. Some complaints are not published to the lawyer at all, although in the ordinary course of events a lawyer will be notified that a complaint has been made.

The Board is aware that sometimes a complainant will try to use the Board's processes to avoid their responsibilities towards you in relation to payment of costs.

Where legal action has been initiated; either for the recovery of costs, or in relation to other matters, and conciliation is not appropriate, the Board may suspend its investigation until those issues are concluded before the Court.

The length of an investigation is influenced by a range of factors including the multiplicity and complexity of issues, the volume of documentation in relation to the matter and the time taken to respond to the Board by either the lawyer, the complainant, or other relevant third parties.

Response to the Board

When the Board's investigator seeks a response from you, as the lawyer being complained about, there is no preconception that there is any impropriety on your part. The Board is simply seeking your version of events, which may include a response to particular questions. Often a matter will be adequately explained and finalised after the receipt of your response with copies of relevant documents. The Board will not determine any complaint until the investigator has given both you and the complainant adequate opportunity to comment on any information that is disparate.

You do need, however, to respond to all correspondence from the Board. Do not ignore letters or phone calls. **Failure to respond to correspondence or communications from the Board may in itself amount to *misconduct*.**

Do not respond in anger. Keep in mind that your letters will not only be seen by the complainant, but by the Board Members (and perhaps others if the matter proceeds to a Tribunal or Court). Notwithstanding that you may feel frustrated, upset or angry upon receiving a complaint, courteous communication with the Board is expected and advisable.

Respond succinctly to the issues and send relevant documents, if appropriate.

A reading of the Annual Reports on the Board's website will disclose that over 90% of complaints are finalised with no finding of misconduct against the lawyer.

Requesting more time to respond

If you feel inadequate time has been given for you to respond, or that you need additional time, please contact the Board. The Board's investigator will accede to reasonable requests for an extension of time, although a matter cannot be allowed to remain unanswered indefinitely.

Transparency of Investigation

It is standard practice for a copy of your response and any additional correspondence to be provided to the complainant for comment. The Board will give consideration to a request for non disclosure from either you or the complainant, however good reason is required for non disclosure to occur. The Board's investigation must not lack procedural fairness.

It is preferable for all concerned if correspondence is in a form which can be shown to the other party to allow appropriate comment on the material.

As part of the investigation the Board's investigator may, on occasion, call for your file or speak to other witnesses and take statements from them.

A lawyer's professional obligation to assist the Board

The Full Court has indicated that a lawyer has a professional obligation to assist the Board with its inquiries.

See [The Law Society of South Australia v Jordan](#) (1998) 198 LSJS 434

"...A practitioner whose conduct is the subject of an inquiry by the Board has a duty to assist the Board in its inquiries: Johns v Law Society of New South Wales [1982] to NSWLR 1 at 6, Re Veron; ex parte Law Society of NSW (1966) 84 WN (Pt 1) (NSW) 136 at 141-142. That does not mean that the solicitor must disregard his own interests. But it does mean that there is an obligation upon the solicitor to respond to reasonable requests for information, particularly when one takes into account the fact that often the solicitor will have a better knowledge and understanding of the matter, the subject of the complaint, than will the client who complains."

Be frank and honest with the Board

Lawyers should be frank and completely honest in all dealings with the Board and the Legal Practitioners Disciplinary Tribunal.

Two Judgments of the Full Court of the Supreme Court refer to this issue.

In the matter of [Legal Practitioners Conduct Board v Phillips](#) (2002) 83 SASR 467 the Court noted that the response given by the lawyer was an attempt to, and did in fact, mislead the Board. The Court found that this conduct in itself was unprofessional.

In the matter of [Legal Practitioners Conduct Board v Hay](#) (2001) 83 SASR 454 the Court referred to a *"persistent disregard of proper enquiries and demands from the Board together with the aggravating behaviour before the Tribunal"*.

The Board's compulsory powers

The Board has compulsory powers to require a response from a lawyer who is the subject of investigation (refer [section 76\(4a\)](#)). The Board can also require production of documentation and seize documentation pursuant to Notices issued under [section 76\(3\)](#) of the Act.

These powers are generally used as a last resort by the Board, and usually after attempts to secure a response, or the production of documents, have failed.

Notices are also used on occasions where lawyers request them in situations where legal professional privilege is an issue; for example where the complainant is not your client. Please refer to [section 95C](#) of the Act in relation to self incrimination and legal professional privilege.

Failure to comply with a Notice may amount to an offence. The prescribed penalty under section 76(4) of the Act, is a fine not exceeding \$10,000.00 or imprisonment for one year.

In 2002 the Crown Solicitor's Office brought a prosecution against a lawyer for a breach of two Notices issued by the Board. The Court sentenced the lawyer to four months imprisonment but suspended the sentence on certain conditions including entering into a two year good behaviour bond.

Who can provide you with assistance to prepare a response for the Board?

The Board's investigators can explain the Board's processes and procedures, but cannot give you advice about your response to the Board. Many lawyers, including those at the independent bar, have made themselves available to assist lawyers in preparing their response to the Board. The [PAPA panel of the Law Society](#) or the [Bar Association of South Australia](#) can provide assistance to lawyers in such circumstances.

Advice may also be obtained from [Professional Standards](#) at the Law Society.

Contact details for support services for lawyers are available through the Law Society of South Australia

1. [Professional Standards](#)

The Professional Standards section may be able to assist with advice relating to legal practice and lawyers' duties.

For further information contact:

The Director
Professional Standards
Phone: 8229 0229
Fax: 8410 5688

2. [Law Care](#)

Law Care offers a counseling service with a general medical practitioner.

For further information contact the Law Society on (08) 8229 0222.

3. [The PAPA Panel](#)

The Personal And Professional Assistance Program is an adjunct service to the Law Care counseling service.

For further information refer to the Law Society's website, www.lawsocietysa.asn.au or contact the Law Society's Executive Director, Ms Jan Martin on (08) 8229 0222

Confidentiality obligations of the Board

On occasions, lawyers have expressed concern about whether others may be able to access information held by the Board, especially in relation to complaints about a particular lawyers. The Board is very conscious of the strict confidentiality provision of [section 73](#) of the Act, which binds both Board members and staff of the Board. Board members and staff will not divulge information, except in the circumstances outlined in the Act.

What about legal professional privilege?

The Board adopts the view that if your client makes a complaint to the Board about you, then there is an implied waiver of privilege insofar as it would apply to your response to the complaint. If there is any doubt, you may wish to obtain your own advice in that regard. On occasion, complaints are made by persons other than the client. In this situation, your client's privilege is not abrogated. If a response to the Board would require your client to waive privilege, or disclosure could prejudice your client, you should notify the Board.

[Section 95C](#) of the Legal Practitioners Act addresses the question of self incrimination and legal professional privilege. [Section 95C](#) broadly indicates that it is not an excuse for a person to refuse or fail to answer a question, or to produce a document as required under the Act, on the grounds of either self incrimination or legal professional privilege. [Section 95C](#) provides protection by making matters compulsorily disclosed to the Board or Tribunal inadmissible in other proceedings.

On occasions, lawyers have preferred that the Board formally issue a Notice compelling them to provide information or documents in such circumstances (refer [Section 76\(4a\)](#) and [Section 95C](#) of the Act).

What happens once the investigation is complete?

On completion of an investigation, the Board's investigator will prepare an advice to the Board. The Board is presented with the advice and copies of relevant correspondence and material. The Board is fully informed and reaches its decision, after discussion, consideration and majority vote. On occasions, the Board Members may direct that further investigation is carried out, or advice obtained from counsel at the independent Bar.

The Board's decisions can result in:

- (a) No further action and no adverse finding concerning a lawyer's conduct.
- (b) Charges being laid before the Legal Practitioners Disciplinary Tribunal.
- (c) If there is evidence of minor misconduct (and only with the consent of the lawyer) pursuant to [section 77AB](#):
 - (i) a reprimand; or
 - (ii) an order that the lawyer undertake training or counseling, or
 - (iii) an order that the lawyer make a payment; or
 - (iv) an order imposing a condition on a Practising Certificate.
- (d) A recommendation that a lawyer's bill be reduced or an amount paid be refunded.

Conciliation

Conciliation is an important function of the Board.

Complaints received by the Board are assessed to determine whether conciliation is appropriate for resolution of the matters in dispute. Resolution pursuant to conciliation between the parties often results in no further action being taken.

Conciliation is a flexible process and it can be conducted by an exchange of letters, shuttle negotiation between the parties, a telephone conference or by face to face (referred to as Conciliation Conference). The Conciliator will try to identify issues for discussion that may lead to a resolution of the dispute, and may assist in raising options for resolution.

The Conciliator is impartial and does not judge or decide the merits of the dispute. It should be noted that the Board will not conciliate any issues of misconduct. The Conciliator cannot give advice, legal or otherwise, but may provide general information and opinions about Court and legal procedures and the Board's complaint process.

If an agreement is reached at a Conciliation Conference, the Board Members and the investigator are informed of the terms of the agreement. The content of the discussions divulged in the conference, however, are confidential and will not be disclosed to external parties. If you are interested in conciliating a complaint at the Board you can read further about this process in Fact Sheet 10 "*Conciliation Conferences*" and Fact Sheet 5 "*Conciliation at the Board*".

Complaints of overcharging and cost assessments by the Board

One of the functions of the Board is to receive, and deal with, complaints of overcharging. The Board's functions, powers and obligations in relation to complaints of overcharging are set out in [Section 77A](#) of the Act.

The Board does not have jurisdiction to investigate complaints in relation to party and party costs; that is complaints by one party in relation to costs orders, or claims for costs, by the other party.

In order to properly investigate allegations of overcharging, the Board's investigator may request the production of your file. The file may also be referred for assessment by an independent cost assessor engaged by the Board.

The purpose of obtaining an assessment from an independent cost assessor is to have someone look at the bill against the file, and provide the Board with an opinion as to whether there has been overcharging. As part of the assessment, the cost assessor will consider the validity of the retainer agreement between the firm and the client.

It should be noted that the cost assessor is providing an opinion to the Board in relation to the bill levied, and is not performing a taxation of costs or preparing a bill in taxable form. As the assessor is not assessing costs at large, they will consider and report with respect to the bill or bills rendered.

The provision of a full set of itemised accounts and computer records (WIP records), if they are available, will help to properly facilitate the assessment process.

If, after an assessment has been conducted, you disagree with any aspect of the assessment, you will be given the opportunity to provide further comment to the Board prior to a final decision being made.

The following further information sheets are available from the Board:-

1. General Information about the Board.
2. General Information about Lawyers Representing Another Party.
3. The Role of the Legal Practitioners Conduct Board when legal action has commenced.
4. General Information about Legal Costs.

5. Conciliation at the Board.
6. Complaints about Negligence or Mistakes.

The Board has also published "*Guidelines Of The Legal Practitioners Conduct Board In Making Findings Of Unprofessional Conduct And Unsatisfactory Conduct*".

All information sheets and guidelines are available on the Board's website www.legalcomplaints.com.au.

Contact details for the Legal Practitioners Conduct Board

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