

## OPERATIONAL GUIDANCE

# Complaints by lawyers about lawyers

July 2021

### 1. Purpose

This Operational Guidance ('the Guidance') has been developed to provide information to lawyers about how we deal with certain types of complaints or concerns by lawyers about other members of the profession. In particular, it provides information about complaint matters the Commissioner is unlikely to consider and reminds lawyers of their professional obligations and options for self-resolution of disputes between lawyers.

This document is not intended to cover complaints by lawyers on behalf of their clients.

The Guidance does **not** provide information about the mandatory reporting of suspected misconduct of lawyers to the Commissioner – a recommendation of the Royal Commission into the Management of Police Informants that is currently being progressed by the Victorian Government. We will develop separate guidance for the profession on mandatory reporting, ahead of its legislative enactment.

### 2. Context

The Victorian Legal Services Board + Commissioner (**VLSB+C**) is the regulator of the legal profession in Victoria.

Regulation of the legal profession in Victoria is governed by the **Legal Profession Uniform Law**, the overarching objectives of which are to promote the administration of justice and an efficient and effective Australian legal profession by:

- (a) enhancing the protection of clients of law practices and the protection of the public generally;
- (b) ensuring lawyers are competent and maintain high ethical and professional standards in the provision of legal services; and
- (c) promoting regulation of the legal profession that is efficient, effective, targeted and proportionate.

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The VLSB+C strategy illustrates our clear direction towards ensuring we are an effective regulator and underpins all that we do as we work towards our goal of maintaining and enhancing public trust and confidence in the legal profession. Our strategic objectives include assisting the profession and protecting consumers.

**Operational Guidance** such as this provides guidance to our staff on the issues they should consider in exercising their discretion and powers. Having clear, publicly available Operational Guidance is aligned with the principles in our **Regulatory Approach Statement:**

- **Consistency:** Relying on policies, procedures and standards helps ensure we act consistently over time, so our advice and decisions are fair and accurate.
- **Transparency:** Providing guidance to consumers on the factors we consider in exercising discretion and powers, and the processes that will be followed. Making our Operational Guidance publicly available ensures transparency and makes it clear to lawyers and consumers of legal services how we exercise our discretion in relation to our powers.
- **Outcome-focus:** We aim to achieve practical outcomes when we take regulatory action.
- **Risk-based:** We target our resources to the areas of greatest potential harm.

### **Compliance and Enforcement Policy**

The legislation sets out a range of tools which we may use to address behaviour which falls short of the professional standards set by legislation and rules, the common law, and the profession itself. These tools are outlined in our [Compliance and Enforcement Policy](#). This Guidance is intended to be read in conjunction with that policy.

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### 3. Relevant rules

In addition to the common law, there are some rules we consider to be particularly relevant to how lawyers engage with each other. The definitions of unsatisfactory professional conduct and professional conduct are also relevant. These have been stipulated below.

**Rule 4 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015**

**Rule 5 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015  
Dishonest and disreputable conduct**

**Rule 32 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015  
Unfounded allegations**

**Rule 8 of the Legal Profession Uniform Conduct (Barristers) Rules 2015**

**Section 296 of the Legal Profession Uniform Law (Victoria)  
Unsatisfactory professional conduct**

**Section 297 of the Legal Profession Uniform Law (Victoria)  
Professional misconduct**

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### 4. Scope of Matters

We often receive complaints by lawyers about the behaviour of other lawyers who they engage with in the course of legal practice. Some of the issues raised in these complaints do not warrant our intervention and/or raise issues that could or should have been resolved between the parties directly.

Trust and confidence in the profession and the administration of justice are of utmost importance. However, given our statutory and strategic objectives, and Regulatory Approach Statement referred to above, we aim to direct our resources where the greatest harm lies.

### 4.1 Threshold Questions

When considering whether to intervene in a complaint by one lawyer about the behaviour of another lawyer, we consider these threshold questions:

- Does the matter involve serious abuse such as threats of physical harm (implied or explicit) or ongoing use of profane language?
- Is the abusive, discourteous conduct repeated and adversely affecting the progress of a matter?
- Has the serious conduct lead to an untenable or unreasonable outcome for the client?
- Have the rights of the client been adversely affected?
- Does the matter evidence dishonesty or a significant lack of integrity on the part of the lawyer

If the answers to any of the above are 'yes', then it is likely that will trigger an investigation.

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### 4.2 Matters that the VLSB+C is unlikely to consider

- Matters evidencing mere robustness on the part of a lawyer who is properly acting in their client's best interests.
- A complaint that has been brought solely for the purpose of creating annoyance, frustration or disruption to the lawyer or lawyer's client. This can include retaliatory complaints where there is animosity between opposing parties.
- Low level procedural matters (e.g. a lawyer not complying with certain procedural steps that is of no material consequence to the matter). If the matter is before the court any concerns should be raised there in the first instance.
- Low level or isolated discourtesy, in particular that does not adversely affect the progress of a matter (as outlined in the threshold questions above).
- Differences of opinion as to the law or interpretation of a legal matter, where there are other avenues to adjudicate on this issue (e.g. the matter is or should be before a Court or Tribunal or mediator).
- Differences of opinion with respect to tactics employed in litigation or the handling of a matter, unless it involves a significant lack of competence or an abuse of process that is adversely affecting a client's rights.
- Delays in responding to correspondence or calls unless there is a gross delay, there are particular time sensitivities or the client's interests are adversely affected.
- Issues involving business disputes between partners or principals. These can be resolved by other means. The exception is where the alleged conduct affects client rights, involves dishonest or misleading behaviour, trust account issues or conduct that may affect the lawyer's fitness to practice. With these matters, we should be informed so that we can assess what regulatory response is required. However, they are unlikely to be dealt with as complaints.
- Employment disputes that should be resolved by other legal means or are better dealt with by other regulatory bodies such as the Fair Work Commission or Fair Work Ombudsman. Again, with these matters, we should be informed so that we can assess what regulatory response is required (for example, matters involving sexual harassment or workplace bullying are of particular interest to us).

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- Complaints that seek to re-open matters which have already been the subject of a court or tribunal finding, or resolution through other avenues (e.g. mediation, settlement). The exception is if new or compelling evidence indicates dishonesty or significant consumer harm.
- Complaints that raise matters that have already been investigated and decided by the VLSB+C or a review has been conducted. The exception is if new or compelling evidence indicates dishonesty or significant consumer harm.
- Complaints made prematurely where there are other options available or opportunities for self-resolution that have not been explored.

### 5. Options for self-resolution

It is in a lawyer's interest to maintain positive working relationships with members of the legal profession. With this in mind, we have provided some options below for self-resolution when issues arise.

- Lawyers should always attempt to resolve disputes amongst themselves in the first instance. Lodging a complaint with the VLSB+C should not be the first option in attempting to resolve an issue or dispute. If the outcome you are seeking is something you can achieve directly, then attempts must be made to do so. For example, raising a concern directly may elicit an apology or a change in behaviour, which is the preferred outcome for all parties.
- If a lawyer has shown insight, remorse and offered an apology and there is a demonstrated change in behaviour, there is no utility in raising the matter with us.
- Reflect on the matter in its entirety and consider whether the conduct was isolated and/or did not cause any harm to you or your client.
- Consider the mode in which you communicate with the lawyer and whether this can be adjusted, taking into account your obligations and your duty to the court and your client.

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- If conduct causes concern about a lawyer's health and wellbeing, consider suggesting to the lawyer that there are organisations that may be able to offer assistance, such as the Law Institute of Victoria (LIV) or the Victorian Bar. Some referral points may be:
  - The LIV offers Practice Management Consulting that may be able to assist you. They also operate a Trust Consulting service. The LIV can be contacted on 03 9607 9447.
  - You may also wish to review the LIV's online Ethics Hub. See <https://www.liv.asn.au/Professional-Practice/Ethics>
  - The Legal Practitioners Liability Committee also have a number of services to assist their insured practitioners. See <https://lplc.com.au/>
  - The Victorian Bar has an Ethics Committee and a Grievance Protocol, information about which can be found here (requires a Victorian Bar login): <https://www.vicbar.com.au/members/victorian-bar/ethics-complaints/conduct-policies-and-internal-complaints-procedures>
  - Further details about the Victorian Bar's health and wellbeing support can be found here: <https://www.vicbar.com.au/public/community/health-and-wellbeing>

### 6. Related documents

[VLSB+C Strategy – A Clear Direction](#)

[Regulatory Approach Statement](#)

[Compliance and Enforcement Policy](#)

## Complaints by lawyers about lawyers

### Document control

#### (Internal use only)

#### **Responsible for review and update**

Discipline and Suitability

#### **Approved by**

Manager, Discipline and Suitability

#### **Endorsed by**

Victorian Legal Services Board CEO & Commissioner

#### **Next review**

July 2022