

Out of Time Complaints



What if my complaint is over three years old?

This fact sheet provides information about complaints made more than three years after the lawyer's conduct is alleged to have occurred.

Introduction

You can make a complaint about the conduct of a lawyer at any time.

However, there are limitations on whether the Legal Profession Board (Board) will be able to deal with your complaint if it is made more than three years after the conduct of the lawyer is alleged to have occurred.

Section 428 of the *Legal Profession Act 2007* (Act) provides that a complaint made more than three years after the lawyer's conduct is alleged to have occurred must be dismissed unless the Board determines that the conditions in s 428(2) are satisfied. Those conditions are:

- a) it is just and fair to deal with the complaint having regard to the delay and reasons for the delay; **and**
- b) the complaint is capable of amounting to an allegation of professional misconduct and it is in the public interest to deal with the complaint.

This fact sheet identifies some of the factors which the Board may take into account when deciding whether or not to deal with a complaint out of time.

Conditions which must be satisfied to deal with your complaint

1. *Just and Fair*

In considering whether or not it is 'just and fair' to deal with a complaint out of time, the Board will consider, but is not limited to, the following factors:

- how long the delay is between the lawyer's conduct and your complaint; and
- your explanation for the delay in making your complaint.

The Board may also consider:

- any disadvantage or prejudice to you if the complaint is not dealt with;
- any disadvantage or prejudice to the lawyer if the complaint is dealt with; and
- the fairness in commencing an investigation – for example if there is any loss of evidence such as files, notes, witnesses or witness recollection given the passage of time.

2. *Professional Misconduct*

Professional misconduct is the most serious category of conduct provided for by the Act. The Act has defined professional misconduct as

- a) unsatisfactory professional conduct of a lawyer, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and

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- b) conduct of a lawyer whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.

The Act also provides that breaches of the Act or applicable conduct rules may amount to unsatisfactory professional conduct or professional misconduct.

In Tasmania there have been legal cases which have also defined professional misconduct as behaviour which would reasonably be regarded as ‘disgraceful or dishonourable’¹ by other lawyers and conduct which might reasonably be held to ‘violate, or to fall short of, to a substantial degree, the standard of professional conduct observed or approved of by members of the profession who are of good repute and competency’².

This means if your complaint is out of time, the conduct you are complaining about must be about a serious rather than a minor conduct issue.

3. *Public Interest*

The Board considers ‘public interest’ to be of very broad scope. It includes not only interests which the community has in a matter because of its potential to affect the community financially or to impact upon the legal rights and liabilities of the community, but also matters reasonably perceived to be of public importance.

‘The public’ does not necessarily mean the entire community. It will be in the public interest if it affects a significant section or segment of the community. Sometimes there may be competing public interests, which in any particular case the Board will have to balance in order to determine where ‘the public interest’ lies.

¹ *Law Society of Tasmania v Turner and Kench* [2001] TASSC 129 at [44].

The Board will have to be positively satisfied that this balance of the public interest favours the complaint being dealt with despite its age. This means that although you will have a personal interest in the complaint the Board will consider the interests which a broader section of the community would have in seeing the complaint dealt with despite its age.

Q. My lawyer settled my personal injuries claim just over three years ago and my legal costs were taken out of the settlement. I was really unhappy with the amount of legal fees I had to pay at the time. I have only just found out that I could make a complaint to the Board.

Even though it is only just outside of the three year time limit, the Board would generally be unable to deal with this complaint because the allegation of overcharging by your lawyer is not such a substantial or consistent failure to be characterized as professional misconduct.

Our process

When the Board receives your complaint and you have made allegations about a lawyer’s conduct which occurred more than three years before you make your complaint, we will initially ask for your reasons why the complaint should be accepted and dealt with.

Once we have received your reasons, on most occasions, the lawyer you are complaining about will be given a copy of your complaint and your reasons and will have an opportunity to give reasons why your complaint should not be accepted.

In some cases, the Board may then be in a position to make a determination under s428(2). In other cases, the Board might need to finalise the investigation before it is in a position to determine that it should ‘deal’ with the complaint by way of taking disciplinary action.³

² *Law Society of Tasmania v Turner and Kench* [2001] TASSC 129 at [49].

³ *EFG v Legal Profession Board of Tasmania* [2020] TASSC 26

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If the Board determines it can deal with your complaint out of time, the Board will provide you and the lawyer with a copy of its determination. A determination by the Board about dealing with your complaint out of time is final and cannot be challenged in any proceedings by you or the lawyer concerned

The information contained in this fact sheet does not constitute legal advice.



Further information

If you have any questions or require further information, please contact the Legal Profession Board of Tasmania.

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