

Dealing with less serious complaints – section 456



What does the Board do with less serious complaints?

This fact sheet provides information for lawyers about the operation of section 456 of the *Legal Profession Act 2007* (‘the Act’) for less serious complaints.

Introduction

After a complaint has been investigated, the Board has a number of powers under section 450 of the Act. If the Board considers that the complaint is capable of amounting to unsatisfactory professional conduct but it is not sufficiently serious to warrant a hearing it may decide to deal with the complaint in accordance with section 456 of the Act.

Section 456 sets out the procedure for dealing with a less serious complaint.

The section 456 process

If the Board decides to proceed by section 456 it will serve on you –

- a notice to appear in person before the Board to give your explanation of the complaint; or
- a notice to provide the Board with your written explanation.

Appearing before the Board

The notice you receive will –

- tell you the date, time and place you are required to appear
- set out the particulars of the matter (complaint allegations)
- tell you that you are entitled to make submissions and to give evidence
- advise you that you are not entitled to be represented
- confirm that an appearance before the Board is not open to the public
- advise you of your rights to request that the matter be referred directly to the Disciplinary Tribunal
- advise you of the other circumstances which may result in the matter being referred to the Disciplinary Tribunal

The notice may include any other information the Board considers necessary.

Timeframe

The date for your appearance will be at least 14 days after you have been served with the notice. The Board will try to give you as much notice as possible. Generally it tries to schedule appearances close to a scheduled Board meeting date. If there is any reason why you can’t attend on the nominated day you should immediately write to the Chair of the Board and seek an adjournment to another date.

If you fail to appear before the Board as required by the notice, the Board will refer the matter to the Tribunal.

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Who is the Board?

A quorum of the Board is at least 1 lay member and 3 legal members. The full Board is 6 members. Our website provides information about who the Board members are. Ordinarily the full Board will hear your matter, subject to any disclosed conflicts or other absences.

What happens on the day?

The Board has its own hearing room which will usually be configured with a bar table. The investigator may also be at the bar table with your original file and any other evidentiary material obtained during the investigation.

Section 456 proceedings are not open to the public.

Proceedings are conducted as informally as possible. You will have an opportunity to provide your explanation directly to the Board. If you wish, you may read from a prepared written statement. On the day you may bring with you any notes or other evidence that you want to present or speak to. If you wish to hand up submissions at the end of giving your explanation you may do so. Board members may ask you questions.

Board members may be addressed as 'Chair', 'Sir' or 'Madam' or by their full name. Refer to our website for information about who the Board members are.

The Board will allow at least one hour to hear your explanation and any additional time as required, depending on the complexity of the matter.

If at any time during the proceedings you would like a short break you should simply address the Chair to seek a short adjournment.

After hearing your explanation the Board will ask you to withdraw so that it can consider your explanation. You should be prepared to make a submission as to penalty. Alternatively the Board may seek written submissions from you as to the appropriate penalty after giving you an indication that they are satisfied that the matter has been substantiated.

Written explanation

If the Board requires you to provide a written explanation the notice served on you will contain all of the same information as a notice with respect to appearing before the Board and it will give you a date you are required to provide the Board with the written explanation. If there is any reason why you can't comply with the timeframe you should immediately write to the Chair of the Board and seek an extension of time.

If you do not provide the Board with your written explanation by the date required in the notice the Board will refer your matter to the Tribunal.

What happens next?

If after considering your explanation, either in person or in writing, the Board is satisfied that the matter has been substantiated but it is not sufficiently serious to warrant a hearing, it may make one or more determinations.

On occasions the Board may be satisfied that the matter has been substantiated and that it is not sufficiently serious to warrant a hearing and that none of the determinations set out in section 456(7) are appropriate. In that case the Board will find the matter substantiated but will not make a determination.

If the Board is **not** satisfied that the matter has been substantiated, it is required to dismiss the complaint.

If the Board is satisfied that the matter has been substantiated and it is sufficiently serious to warrant a hearing, it is to refer the matter to the Disciplinary Tribunal.

Determinations which may be made

The Board may make the following determinations (section 456(7) of the Act):

- That you be cautioned or reprimanded
- That you make an apology

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- That you make an undertaking to take or refrain from taking any specified action
- That you make reparation on the terms specified by the Board
- That you complete a specified course or further legal education or receive counselling specified by the Board, within a certain timeframe.

The Board may also make a determination that no further action will be taken against you if they are satisfied that:

- you are generally competent and diligent; and
- there has been no substantiated complaint other than this one about your conduct within the last 5 years.

The Board will provide you with written Notice of Determination and Reasons for Determination.

Who is told about the Determination?

The Act requires the Board to serve notice of the determination on the complainant, you and the Law Society.

Your rights after a Determination

You have 21 days after you have received the notice of the determination to apply to the Disciplinary Tribunal or Supreme Court to have the matter determined by the Tribunal or Supreme Court. You may also make an application to the Tribunal or Supreme Court to stay the Board's determination pending the finalisation of your application.

The Complainant has the same period of time to apply to the Disciplinary Tribunal or Supreme Court.

Please note that the decision of the Board to dismiss the complaint after considering your explanation (section 456(6)) is not a determination which is capable of an application to the Disciplinary Tribunal or Supreme Court for a re-hearing: section 458(2).

The effect of a Determination

A determination made under section 456 following a finding of unsatisfactory professional conduct is defined as 'disciplinary action' (section 496 of the Act). Disciplinary action is to be recorded on the Register of Disciplinary Action and is publically available on the Board's website. Disciplinary action will not be put on the Register until at least 21 days after the date of the determination. If during the 21 days after the determination you (or the complainant) apply to the Tribunal or Supreme Court to have the matter determined by the Tribunal or Supreme Court or if you apply to either of those bodies to stay the determination, the disciplinary action will not go onto the Register until it has been finalised before the Tribunal or Supreme Court.

If you fail to comply with the terms of a determination your failure is capable of constituting unsatisfactory professional conduct or professional misconduct.

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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The normal hours of opening
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