

NOTICE OF DETERMINATION

A notice made under section 318 of the *Legal Profession Uniform Law (Victoria)*.

Complainant: [REDACTED]
Respondent Lawyer/Law Practice: [REDACTED] of [REDACTED]
Ref: [REDACTED]

ORDERS

Pursuant to section 299(1) of the *Legal Profession Uniform Law (Victoria)* ('the Uniform Law'), I have decided that the Lawyer has engaged in unsatisfactory professional conduct and I make the following order –

The Lawyer is cautioned pursuant to section 299(1)(a) of the Uniform Law.

STATEMENT OF REASONS

BACKGROUND

1. The Lawyer was engaged by the Complainant, to apply for financial assistance from the Victims of Crime Assistance Tribunal ('VOCAT') on his behalf.
2. In or about July 2014, the Lawyer sent an application to VOCAT at the Moorabbin Magistrates' Court, on behalf of the Complainant.
3. Between late 2014 and early 2015, the Lawyer claims she rang the Moorabbin VOCAT office on numerous occasions (but without obtaining any adequate information or response), and attended to collecting further medical information on behalf of the Complainant.
4. In July 2015, the Complainant's two year statute of limitations period to apply to VOCAT for financial assistance expired.
5. In July 2015, the Complainant and his son attended the Lawyer's office and asked about the status of his application. A short time later, they returned to the Lawyer's office and advised her that VOCAT did not have any record of his application.
6. In October 2015, the Lawyer organised and spoke with [REDACTED] of Counsel to deal with a lost application and what to do next.
7. From November 2015 to February 2016, the Lawyer spoke to Counsel who requested further information as to the circumstances of the application. The Lawyer says that she did not have an opportunity to follow up and report back to Counsel due to her increased workload associated with the end of the year.
8. On 2 February 2016, the Lawyer received notice of the Complainant's complaint to the Victorian Legal Services Commissioner ('the Commissioner').
9. On 9 February 2016, the Lawyer re-filed the Complainant's application at VOCAT.

10. On 16 May 2016, VOCAT made its decision in relation to the Complainant's application for assistance and awarded him \$3,409.77.

ISSUES UNDER INVESTIGATION

11. Complainant raised the following concerns in his complaint:
- (a) The Lawyer had not been properly communicating with him during the course of his matter, nor providing him with adequate updates.
 - (b) The Lawyer had not been providing him with proper advice, particularly in relation to any statute of limitation periods that may apply to his victims of crime application.
 - (c) The Lawyer delayed in filing his victims of crime application, the consequence of this delay being that his application was out of time, due to the statute of limitations period.
 - (d) The Lawyer did not provide him with accurate information in relation to his matter in that she told him that she had contacted VOCAT, they were sending her paperwork with a hearing date and that she had received a VOCAT reference number. However, after this conversation, his son telephoned VOCAT, and VOCAT confirmed that it did not have any records of the matter.
 - (e) The Lawyer informed him that VOCAT had not received his application and said that she intended retaining a barrister to assist in seeking special consideration for the delay in lodging the application, however, he had not heard from her further to confirm that those promised steps had been taken.

INVESTIGATION

12. On or about 25 January 2016, the Commissioner received the Complainant's complaint.
13. On 2 February 2016, the Commissioner sent a letter to the Lawyer that gave notice of the complaint, requested a response from her pursuant to section 371(1) of the Uniform Law and invited her to make any written submissions.
14. On 23 February 2016, the Commissioner received a response from the Lawyer. In her response the Lawyer provided a chronology of events and explained, amongst other things, that she:
- (a) failed to follow up on the Complainant's VOCAT application;
 - (b) caused delay by failing to adequately control the file;
 - (c) should have done more to keep up to date with the progress of the matter; and
 - (d) let the Complainant down and deeply regrets her lack of action.

The Lawyer also outlined the changes she has since made to her file management and outlined further continued professional development programs she intends to undertake over the next 12 months. She also noted that she provided the Complainant with a letter of apology on 22 February 2016.

15. On 14 October 2016, the Commissioner sent a letter to the Lawyer and the Complainant which gave notice of the proposed determination and invited written submissions about

the proposed order. The Commissioner has not received a response from either the Lawyer or the Complainant in this regard.

FINDINGS OF FACT ON ISSUES UNDER INVESTIGATION

16. On the basis of the admissions made by the Lawyer and the evidence before me, I find the following proved:
- (a) The Lawyer failed to follow up on the Complainant's application to VOCAT from between July 2014 and July 2015.
 - (b) After becoming aware in July 2015 that VOCAT had not received the Complainant's application the Lawyer failed to re-file his application until 9 February 2016.
 - (c) The Lawyer's conduct at paragraphs (a) and (b) above, resulted in delays in progressing the application of approximately seven months after expiry of the statute of limitation period for the Complainant to make an application to VOCAT, and a delay of approximately one year and seven months overall.

OTHER CONCERNS

17. Based on the evidence before me, I cannot conclude whether or not the Lawyer provided the Complainant with accurate advice, in or about July 2015, in relation to any statute of limitations periods that applied to the Complainant's application to VOCAT. The Complainant says that the Lawyer misled him about the statute of limitations period, however, the Lawyer denies this. The Lawyer does acknowledge, however, that she was unlikely to have provided the Complainant with advice in relation to the statute of limitations period at the beginning of the matter, as it was not a relevant issue at the time. I have recommended to the Lawyer that she advise clients of any statute of limitations periods that apply, regardless of the stage of the matter.
18. In addition, based on the evidence before me, I cannot conclude whether or not the Lawyer properly communicated with the Complainant throughout the course of this matter.
19. In light of paragraphs 17 and 18 above, I therefore cannot find that this conduct amounts to a disciplinary breach.

RELEVANT LAW

20. The Uniform Law and the *Legal Profession Uniform Law Solicitors' Conduct Rules 2015 (Victoria)* ('the Conduct Rules') apply to the conduct, the subject of the findings of fact. The conduct occurred between July 2014 and February 2016, and is taken to be one continuous block of conduct that has occurred in a period both prior to and after 1 July 2015. The Uniform Law and the Conduct Rules therefore apply, because the applicable date is taken to be the most recent date of the conduct, being up until the Lawyer re-filed the Complainant's application on 9 February 2016.

CHARACTISATION OF THE CONDUCT

21. Rule 4.1.3 of the Conduct Rules states that:

A solicitor must also deliver legal services competently, diligently and as promptly as reasonably possible.

22. My conclusion is derived from the information outlined above and by reason of the above findings of fact. I find that the Lawyer failed to follow up on the Complainant's application to VOCAT between July 2014 and July 2015. I also find that her subsequent delay between July 2015 and February 2016 in re-filing the application the Lawyer caused a delay of seven months after the statute of limitation period had expired and a delay of one year and seven months overall, in breach of rule 4.1.3 of the Conduct Rules.
23. This breach constitutes unsatisfactory professional conduct pursuant to section 298(b) of the Uniform Law, which prescribes that, without limitation, conduct capable of constituting unsatisfactory professional conduct includes conduct consisting of a contravention of the Conduct Rules.

DETERMINATION

24. In light of the foregoing and having considered all of the evidence and relevant law, I determine that it is fair and reasonable in all the circumstances to make the orders detailed above.

APPEAL

25. Pursuant to Section 314 of the Uniform Law, a respondent lawyer or a legal practitioner associate of a respondent law practice may, in accordance with the applicable legislation appeal to the Victorian Civil and Administrative Tribunal ('the Tribunal'), or seek a review by the Tribunal, of this determination made under s299 of the Uniform Law.



Michael McGarvie
Victorian Legal Services Commissioner

Date: 8 February 2017