

# Negligence and complaints

This fact sheet provides information about what is and what is not negligent conduct by a lawyer.

## INFORMATION FOR CONSUMERS

### What is negligence?

Lawyers owe their clients a duty to exercise reasonable care and skill when providing legal services.

A lawyer might be negligent if he or she causes a client to suffer financial or other loss because the lawyer did not exercise reasonable care and skill in the provision of legal services.

Whether or not a lawyer has been negligent varies from case to case. A lawyer might be negligent, for example, if he or she:

- fails to lodge relevant court forms in time
- excessively delays work on a client's file so that the client's claim falls outside the time limits, or
- fails to make important inquiries about a property a client wants to buy.

In these examples the lawyer has failed to take reasonable care and skill in representing a client. Where that failure results in a loss or detriment to the client, the lawyer may have been negligent.

### What is not negligence?

A lawyer will not be negligent merely because the client did not achieve a desired outcome as a result of the lawyer's advice or representation. The likely success of a claim is often very difficult to predict and is dependent on many factors outside a lawyer's control; the test is whether the lawyer appropriately considered all the issues that required consideration and advised their client accordingly.

Minor mistakes such as spelling mistakes in correspondence or incorrect information in draft documents cannot amount to negligence, nor can errors that do not result in loss or detriment to the client.

### What can I do?

If you suspect that your lawyer has been negligent, there are a number of options available to you. Generally if you are seeking compensation for any loss caused by a lawyer's alleged negligence, you should bring a private legal action. Before commencing such an action you should obtain independent legal advice. In some cases, such claims are settled with the involvement of the lawyer's professional indemnity insurer. This is generally the preferred course of action where there is a large claim.

You may also make a complaint to the Victorian Legal Services Commissioner.

### What will happen if I make a complaint about negligence?

A complaint to the Commissioner alleging negligence will be assessed on the information provided. We will determine how best to handle the complaint depending on the issues raised and the seriousness of the conduct. This means we will decide whether it should be dealt with through a dispute resolution process and/or whether it requires a more detailed disciplinary investigation.

#### *Dispute Resolution*

If you make a claim seeking compensation for a loss resulting from your lawyer's alleged negligence, we will assess it to see if it might be resolved with our assistance. Often such complaints involve complex personal and legal issues that are more suitable for resolution with the assistance of a senior conciliator.

If we are unable to resolve your matter, we may undertake further investigation to determine whether a compensation order should be made. Unless you and your lawyer agree, we cannot make a compensation order unless -

- you have suffered loss because of the lawyer's conduct, and
- it is in the interests of justice that the order be made.

Further, our power to order compensation is limited and any monetary compensation cannot exceed \$25,000. We also cannot deal with claims by commercial or government clients.

#### *Disciplinary investigation*

If the lawyer's negligence appears to the Commissioner to be so serious that it may require disciplinary action, we will investigate the conduct.

A disciplinary investigation will look to see if the lawyer has committed an offence such that if the matter was taken to the Victorian Civil and Administrative Tribunal (VCAT), the lawyer might reasonably be found guilty of either:

- unsatisfactory professional conduct, or
- professional misconduct.

The word negligence is not used to define either outcome, therefore a lawyer who has been negligent will not automatically be found guilty of unsatisfactory professional conduct or professional misconduct. VCAT will assess the seriousness of the lawyer's negligence and balance a range of other factors.

It is only in unusual circumstances that negligence would be sufficiently serious to satisfy this test for disciplinary action to be taken.

#### **Further information:**

Contact the Victorian Legal Services Commissioner

Tel: 1300 796 344

Email: [admin@lsbc.vic.gov.au](mailto:admin@lsbc.vic.gov.au)

The Commissioner acknowledges the NSW Office of the Legal Services Commissioner's fact sheet on negligence, from which parts of this document were derived.