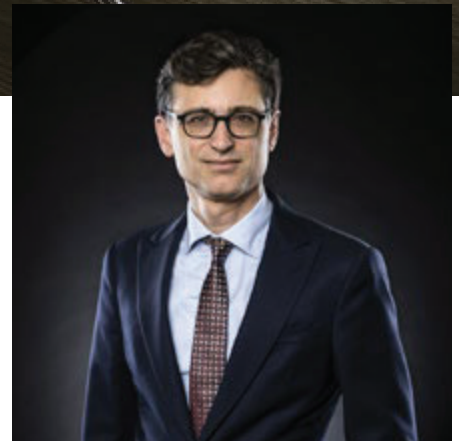


The work of PCCs

By Michael Izzo SC

One of the most significant regulatory functions the Bar Association performs is the resolution of complaints made against barristers under the *Legal Profession Uniform Law 2014* (NSW) (LPUL). While complaints are ultimately determined by the Bar Council, the important work in investigating complaints, inviting submissions, preparing reports and formulating a proposed determination is undertaken by the Bar Association's four professional conduct committees (PCCs).

This article explains the composition of PCCs, the nature of their work, and the sorts of complaints that come before them.



PCCs

There are four PCCs each chaired by a senior counsel and comprising approximately 20 barrister members appointed by the president. Each committee also has three lay members, comprising legal academics and other members of the community, whose views can be particularly valuable in assisting the committee to consider whether alleged conduct is consistent with community standards and expectations of barristers.

While the primary work undertaken by PCCs is the investigation of complaints, PCCs also assist the Bar Association to investigate other matters relevant to its regulatory function, such as investigation of disclosures of automatic show cause events (s 88 and 90 LPUL), mandatory disclosures (s 51 LPUL) and disclosures on renewal of practising certificates. PCCs investigate these disclosures to determine whether the barrister is a fit and proper person to practise and consider whether the Bar Association should move to suspend, cancel, or impose additional conditions on practising certificates.

Sources of complaints

Complaints under the LPUL can be made by any person. Common sources of complaints are:

- Clients and instructing solicitors. Complaints from clients and instructing solicitors are the most prevalent. They may relate to matters such as fee disclosure or the amount of fees charged, the quality of the barrister's work or performance, communication, not following instructions, and behaviour towards clients and solicitors.
- Opposing parties or their representatives. This is the next most common source of complaint. Such complaints will often be about conduct in court (particularly cross-examination), conduct in mediations or other extra-curial contexts, the use of court processes, misleading the court, lack of candour and conflicts.
- Judicial officers. Complaints made by judges or magistrates generally relate to the barrister's competence or performance in court, including conduct of the barrister that has misled the court, prolonged proceedings or involved the making of baseless allegations.
- Bar Council. Complaints are occasionally made by Bar Council where concerns have been referred to it by a judge, statutory authorities or members of the community; or where matters have come to the Bar Council's attention in the course of an investigation or as a result of disclosures made by the barrister. Such complaints sometimes involve personal conduct which may bear on the barrister's fitness and propriety to practise. The Bar Council occasionally makes its own complaints following investigation about matters that

did not form part of an original complaint, such as failure to disclose in response to requirements under the LPUL, non-compliance with fee disclosure laws, or failure to comply with conditions imposed on the barrister's practising certificate.

The life cycle of a complaint

Complaints against legal practitioners are made in the first instance to the Office of the Legal Services Commissioner (OLSC). In most cases, complaints about barristers are referred by the OLSC to the Bar Association for resolution (pursuant to delegated powers).

On receipt of a complaint by the Bar Association, it is allocated to one of the four PCCs.

The PCC must undertake a preliminary assessment of a complaint. After preliminary assessment, it may recommend that the Bar Council close the complaint without further consideration of its merits on a number of specified grounds, including that it is misconceived or lacking in substance, it is out of time, the complainant has not responded to a request for information, or the Bar Council having considered the complaint forms the view that it requires no further investigation (LPUL, s 277).

If the complaint is not closed, the PCC will conduct an investigation, which may involve inviting further information from both the barrister and the complainant, gathering information from other sources such as

instructing solicitors and eyewitnesses, and obtaining documents from court files.

After investigation, the PCC may recommend to Bar Council the following courses:

- Closure of the complaint.
- The making of a finding of unsatisfactory professional conduct under s 299 of the LPUL. Where such a finding is made, the Bar Council can also make the following orders: a caution; a reprimand; an apology; that the barrister redo the work or waive the fees; that the barrister undertake training, education or counselling or be supervised; a fine (up to \$25,000); imposition of conditions on a practising certificate.
- The commencement of proceedings in the NSW Civil and Administrative Tribunal (NCAT) under s 300. This course is available where (a) the alleged conduct may amount to unsatisfactory professional conduct that would be more appropriately dealt with by the tribunal (for example, where there is a conflict in the accounts given by the complainant and the barrister that should be resolved by the hearing of evidence); or (b) the alleged conduct may amount to professional misconduct. Following a hearing, if NCAT is satisfied that the conduct is proved and amounts to unsatisfactory professional conduct or professional misconduct, it can make any of the orders outlined above, as well as a range of other orders, including that the barrister pay compensation or a fine (up to \$100,000), that the barrister's practising certificate be suspended or cancelled or made subject to specified conditions, or recommending that the barrister's name be removed from the roll (s 302 LPUL).

If the PCC's recommendation is adverse to the barrister, the draft report is provided to the barrister who is invited to make submissions before the report is considered by Bar Council. The draft report is also provided to the complainant who is invited to make submissions.

Common types of complaint and how to avoid them

While the particulars of each complaint are confidential, and the facts giving rise to them can differ markedly, some generalisations can be made about the nature of complaints regularly seen by PCCs and steps that can be taken to avoid them.

Complaints often arise out of direct access work. Because there is no solicitor involved, the potential for misunderstanding about likely fees and the role of a barrister is increased. Further, where fees are paid in advance directly to the barrister, there is scope for dispute about the terms on which they are paid. Barristers doing direct access work should familiarise themselves with Barristers Rules 11 and 13, and ensure they comply with their disclosure obligations under ss 174 and 175 of the LUPL and Barristers Rule 22. If accepting payment in advance, they should familiarise themselves with the requirements of clause 15 of the *Legal Profession Uniform Law Application Regulation 2015* (NSW). It is prudent to maintain filenotes (as a solicitor would) of any interactions with the client; and to confirm in writing any advice that is given.

Another trigger for complaints is billing disputes. These often arise where a client is met with a large or unexpected bill and (typically) where he or she has lost the case and is dissatisfied with the barrister's conduct. It can happen that a client makes a complaint about a barrister's performance and/or overcharging which is not substantiated, but the investigations reveal that the barrister has failed to comply with fee disclosure requirements. To avoid this, barristers should ensure they comply with their disclosure obligations under ss 174 and 175 of the LUPL, provide estimates and update them, and bill at frequent intervals rather than at the end of the case. Bills should contain the notifications of a client's rights required by s 192 of the LUPL. Where fees are unpaid, barristers who have complied with their disclosure obligations may be entitled to bring legal proceedings to obtain payment, but should take particular care to avoid intimidating clients when bringing or threatening to bring such proceedings.

The return of briefs is a common source of complaint – from briefs that are returned late, to briefs that are not returned at all but should be (e.g., for confidentiality or conflict reasons). All barristers should remind themselves of the terms of rules 101 to 120 dealing with the return of briefs, conflicts and confidentiality. Particular attention should be paid to these rules if a barrister is contemplating whether or not to return a brief. In the event of uncertainty, ethical advice should be sought from professional colleagues or from a silk on a PCC in accordance with the Bar Association's ethical guidance scheme: <https://nswbar.asn.au/bar-standards/ethical-guidance>.

Recent times have seen an increase in complaints relating to bullying and sexual harassment. Such conduct can occur across a range of contexts – from social events, to chambers, mediations and court appearances. Barristers should familiarise themselves with the recently amended Barristers Rule 123 and with the Bar Association's new best practice guidelines. In many cases, concerns about bullying or sexual harassment can be resolved without a formal complaint being made; a consciousness of appropriate standards of conduct and an awareness of the available grievance handling processes is an important way to ensure this can occur.

Responding to complaints

If a complaint is notified to you, the most important thing is not to ignore it and to take it seriously. You will be given time to provide information and make submissions. If you require an extension of time you should ask for it.

You should also seek assistance and advice in responding to complaints. It is good practice to find a professional colleague whose judgment and objectivity you respect to look over any response you propose to submit. Insight, perspective and self-reflection are critical. The complaint may well arise out of circumstances where your conduct has been less than ideal. Acknowledging any shortcomings in your conduct and demonstrating contrition and insight are matters that PCCs and the Bar Council take into account when determining how the complaint should be dealt with. They often spell the difference between whether a PCC recommends a caution or a reprimand in relation to findings of unsatisfactory professional conduct.

You may be obliged to notify your insurer of the complaint. You should also consider speaking to your insurer about retaining lawyers to assist you in responding to the complaint. There are several law firms regularly retained in disciplinary matters who are closely familiar with the investigation process and can assist you in dealing with the complaint.

Finally, complaints can be stressful, costly and time-consuming. If you need help contact BarCare at <https://www.barcare.org/get-help>. **BN**

Disposition of complaints: a snapshot from 2020-2021

According to the Bar Association's most recent annual report, in the financial year 2020–21 there were 160 complaints investigated by the Bar Association: 58 made during that year, and 102 complaints made in previous years which remained on foot.

A total of 69 complaints were determined by the Bar Council. Of these:

