

External Complaint Handling and Discipline Systems

Introduction

This title introduces how external complaint handling and discipline systems operate and some of the issues involved. It is for professional associations wanting to develop an external system for their members. The title should assist them to better understand how an existing government legislative external system operates for their profession or industry. It intersects with the related title on internal complaint handling procedures, which deals with firm internal procedures, often the first stage in a complaint process before it is escalated to an external system.

The title illustrates the variety of structures for external complaint handling and discipline systems by comparing the five professions/occupations that the internal complaints title also compared: doctors, lawyers, accountants, engineers and financial planners, along with the Professional Standards Councils (PSC) *Model Code*¹ for approved member associations.

The title has the following parts:

- Role of an External Complaint and Discipline System;
- Hierarchy of Complaint and Discipline Systems;
- Variety of External Complaint and Discipline Systems; and
- Summary.

Role of an External Complaint and Discipline System

Professions (and some non-professional occupations) are very often subject to some form of external complaint handling and discipline requirements. These can be required by government legislation and/or their professional (or occupational) association. The aim of the complaint handling aspect is to assist a client (or customer or patient) resolve their complaint and provide compensation. By contrast, the disciplinary aspect of complaints aims at punishing or sanctioning an individual (or a firm) that has acted in an unprofessional manner. While complaint handling is about ensuring client satisfaction, discipline is ultimately about a profession ensuring its practitioners are behaving properly. In the most serious cases, the individual professional or firm can be excluded from the profession. As such, external systems are also aimed at maintaining the reputation of the profession as a whole.

Complaints usually come from a disgruntled client. However, they can also come from the public or indeed peers and other professionals. For example, a doctor is required to report another doctor who has acted unprofessionally² and auditors are required to report regulatory breaches by financial planners.³ The disciplinary process will often develop a momentum and process quite separate from that of the complainant

¹ In NSW, *Professional Standards Act 1994* (NSW) sch 1.

² See below n 11.

³ *Corporations Act 2001* (Cth) s 990K ('*Corporations Act*').

seeking remediation as it is focused on the defendant. However, both compensation and disciplinary proceedings usually ultimately allow for an appeal process. That could be to a tribunal or ultimately the courts (see Figure 1 below). The process for external complaint handling and discipline systems usually involves many of the steps associated with an internal complaint handling processes (see above related title). However, it will inevitably involve a formal hearing where the two parties (the complainant and the individual or firm) are able to present their views on the matter and relevant evidence, with or without legal representation.

Hierarchy of Complaint and Discipline Systems

External complaints handling and discipline systems vary for each profession and occupation. They can range from minimal through to comprehensive dual systems operated by both government and the professional association. A client may have a range of options in making a complaint. If the firm has an internal complaint handling process, they would usually want to pursue this avenue first. This is because it is direct, relatively quick and can potentially resolve the matter with minimum fuss. Further, some external systems may require a client to pursue that avenue first before referring it to an external system.

In a government system, the government regulator will normally be the investigator and have the power to make decisions on compensation and discipline. Often the most severe forms of discipline such as excluding a person or firm from practice can only be exercised by an independent tribunal. Usually, a regulator's decision can also be appealed at that tribunal. The tribunal will often be an existing multi-purpose and multi-sector government tribunal such as, in NSW, the NSW Civil and Administrative Tribunal ('NCAT'), which is the appeal body for lawyers. For Commonwealth matters, the Administrative Appeals Tribunal is normally the relevant appeal body, such as for financial planners, which are regulated under Commonwealth legislation⁴.

Ultimately, the courts can usually hear appeals from a tribunal, though often only in relation to a specific legal issue, for example, bias in the tribunal or a manifestly unreasonable decision.⁵ However, a complainant can also potentially take their matter directly to the courts at first instance, for example, where a doctor causes a patient injury due to negligence. The value of complaint handling and discipline systems, however, is that they can potentially resolve the matter more quickly and cheaply. Further, while a court may grant compensation, the external discipline system may still be the needed to discipline an offender.

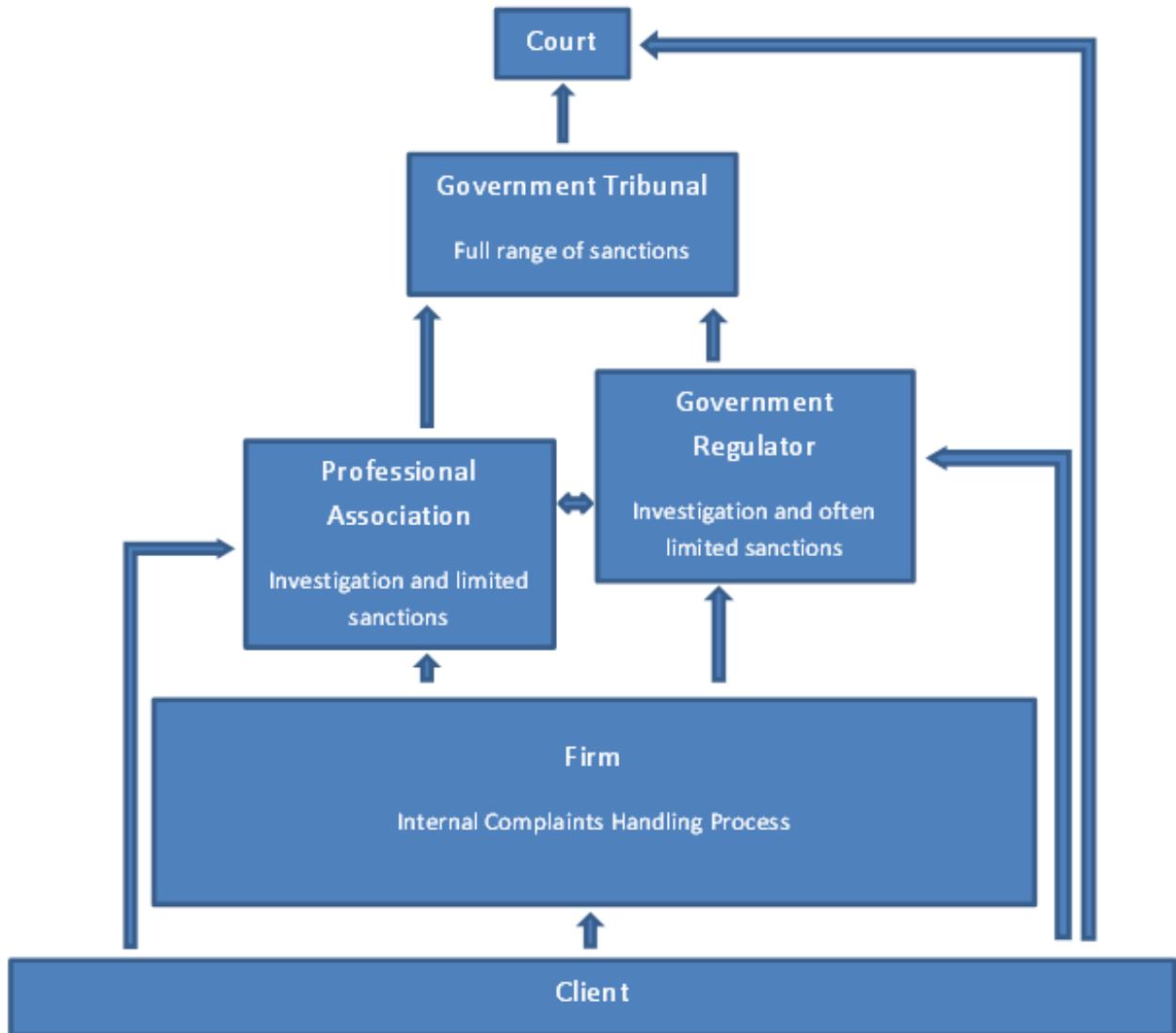
Figure 1 shows some potential pathways through an illustrative hierarchy covering both internal and external complaints and discipline systems, as well as the courts. The pyramid nature emphasises that most complaints are dealt with at the lower level such as a firm's internal complaints handling system. Only a few

⁴ See generally JRS Forbes, *Justice in Tribunals* (Federation Press, 4th ed, 2014).

⁵ See, e.g., *Administrative Decisions (Judicial Review) Act 1977* (Cth); *Administrative Decisions Review Act 1997* (NSW).

matters reach the tribunal level and even fewer reach court. This pyramid structure of dealing with regulatory matters has been espoused by John Braithwaite and others to emphasise that a properly functioning system should result in a pyramid profile, thus avoiding 'bottlenecks' at the higher levels.⁶

Figure 1: Complaint and Discipline System Hierarchy



Pathways through an example internal and external complaints and discipline systems hierarchy. The 'pyramid' shape emphasises that most complaints are dealt with internally (at the bottom) with only a very few matters going to all the way to court (at the top).

⁶ Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

Variety of External Complaint and Discipline Systems

Introduction

External complaints and discipline systems can vary significantly, and Figure 1 above merely sets out one possible hierarchy. To illustrate the degree of variety, below are examples from the five professions/occupations (also considered in the related title), namely, doctors, lawyers, accountants, engineers and financial planners in Australia, along with the *Model Code*.

Doctors

Doctors throughout Australia, along with several other health professionals, are regulated by the Health Practitioner Regulation National Law,⁷ which establishes, for doctors, the Medical Practitioners Board of Australia. The Law has a comprehensive external complaint handling and discipline system,⁸ which includes a Professional Standards Committee, an Assessment Committee and a Council.⁹ Where a party is unsatisfied with the Council's decision, they can appeal, in NSW, to NCAT.¹⁰ Importantly, as mentioned above, the Law also now requires mandatory reporting by all health professionals where they observe a breach of the Law. This is something that the regimes for lawyers and other professionals considered below, generally do not require.¹¹ Disciplinary measures include a caution, reprimand, fine, registration conditions, further training, or suspension or cancellation of the doctor's registration. The two main professional associations are the Australian Medical Association and the Royal Australian College of General Practitioners ('RACGP'). Both have established complaints handling and disciplinary regimes for members with wide discretion as to appropriate action including terminating membership.¹² The AMA has established an Ethics Committee to investigate complaints.¹³

Lawyers

Lawyers in NSW and Victoria are regulated by the *Legal Profession Uniform Law* ('*Uniform Law*')¹⁴ with the other States and Territories having their own regimes. As with doctors, the *Uniform Law* has a comprehensive external complaints and discipline system. All complaints in NSW must initially be made to the government regulator, the Office of the Legal Services Commissioner ('OLSC'). It investigates less serious matters and refers more serious matters such as professional misconduct to the professional association, the Law Society of NSW for investigation and disciplinary action.¹⁵ The Law Society is a formal,

⁷ In NSW, Health Practitioner Regulation National Law 2009 (NSW).

⁸ *Ibid* pt 8.

⁹ *Ibid* ss 146-49E.

¹⁰ *Ibid*.

¹¹ *Ibid* ss 141-3. See generally Kathleen Jackson and Malcolm Parker, 'Full Steam Ahead on the SS "External Regulator?" Mandatory Reporting, Professional Independence, Self-Regulation and Patient Harm' (2009) 17 *Journal of Law and Medicine* 29.

¹² AMA (NSW), *Constitution of the AMA (NSW) Ltd* (May 2016) cls 19-20; RACGP, *Constitution* (6 October 2010) cls 27-8.

¹³ See, e.g., AMA (NSW), *By-Laws of the AMA (NSW) Ltd* (May 2011) pt 10.

¹⁴ *Uniform Law*.

¹⁵ Law Society of New South Wales, *Complaints Process*

<<https://www.lawsociety.com.au/ForSolicitors/professionalstandards/Complaints/Complaintsprocess/index.htm>> (accessed 1 August 2017); see generally Justine Rogers, Dimity Kingsford Smith and John Chellew, 'The Large Professional Service Firm: A New Force in the Regulative Bargain' (2017) 40 *University of New South Wales Law Journal* 10.

co-regulator appointed under the legislation.¹⁶ Sanctions include a caution, reprimand, redoing work, compensation or practice conditions. In the most serious instances, the Society can prosecute the matter in the NSW Civil and Administrative Tribunal ('NCAT'),¹⁷ which can revoke the practitioner's annual practicing certificate or recommend that the Supreme Court permanently remove the solicitor's name from the Roll of Lawyers.¹⁸ The Law Society also retains discretion to terminate a practitioner's association membership who ceases to hold a practicing certificate, is suspended or, in the Society's opinion, engages in 'unbecoming' conduct.¹⁹ Texts such as that by Gino Dal Pont set out in detail lawyers' responsibilities including those under the external complaint and discipline system.²⁰

Accountants

There is no profession-specific government regime regulating accountants in Australia and thus no legislated external complaints and discipline system. However, the two main professional associations, Chartered Accountants Australia and New Zealand and CPA Australia, have both established external complaints and discipline systems for their members. These include, for Chartered Accountants, a Professional Conduct Committee, a Disciplinary Tribunal and an Appeals Tribunal,²¹ and for the CPA, a Disciplinary Tribunal.²² Both systems allow for sanctions including a reprimand, fine, altering membership status, requiring further training and suspending or terminating membership.²³

Engineers

Queensland has a profession-specific legislative regime for engineers: the *Professional Engineers Act*,²⁴ which, as with the other legislative regimes, has a detailed external complaints and discipline regime including a Board of Professional Engineers. This Board investigates complaints and takes low-level disciplinary action such as requiring an undertaking, reprimanding or placing a condition on an engineer's registration.²⁵ For more serious matters, the Queensland Civil and Administrative Tribunal ('QCAT') has the power to impose a fine of over \$200 000, reprimand, impose practice conditions, suspend or cancel registration, or disqualify from again practicing.²⁶ The main professional association is Engineers Australia. It has established an external system for members including a Professional Conduct Committee, which has the power to warn, reprimand, impose conditions, alter membership status, or suspend or expel a member.²⁷

¹⁶ Ibid.

¹⁷ In particular, NCAT's Administrative Decisions Tribunal division: Law Society of New South Wales, *Disciplinary Decisions*

¹⁸ Law Society of New South Wales, *Complaints Process*, above n 15.

¹⁹ Law Society of New South Wales, *Memorandum of Articles of the Law Society of New South Wales* (October 2007) cls 4.1.2, 4.2.1.

²⁰ Gino Dal Pont, *Lawyers' Professional Responsibility* (Law Book, 5th ed, 2012) pt 5 'Discipline of Lawyers'.

²¹ Chartered Accountants ANZ, A2 By-Laws s 5 'Professional Conduct': Chartered Accountants Australia and New Zealand, *Chartered Accountants ANZ Handbook*

<<http://membershandbook.charteredaccountants.com.au/im/resultSummary.jsp?commentaries=AUGQ9H6AIR4JFJABRP6rZd>> (accessed 1 August 2017).

²² CPA Australia, *What Happens When I Make a Complaint?* <<https://www.cpaaustralia.com.au/about-us/member-conduct-and-discipline/making-a-complaint/what-happens-when-i-make-a-complaint>> (accessed 1 August 2017).

²³ Ibid; above n 21.

²⁴ Professional Engineers Act 2002 (Qld).

²⁵ Ibid s 73.

²⁶ Ibid ss 41, 73.

²⁷ Engineers Australia, *Engineers Australia General Regulations 2013* (2013) pt 2 div 4, especially s 2.32.

Financial Planners

Financial planners are regulated under the *Corporations Act*²⁸ and the government regulator, the Australian Securities and Investments Commission ('ASIC'), has many powers. These include a stop order for misleading activity,²⁹ enforceable undertakings,³⁰ a ban on individual financial planners or suspending or cancelling a firm's licence.³¹ The Act also requires financial planners to be a member of an ASIC-approved external dispute resolution scheme covering complaints by retail clients,³² which ASIC describes as:

a forum for consumers and investors to resolve complaints or disputes that is quicker and cheaper than the formal legal system; and ... an opportunity to improve industry standards of conduct and to improve relations between industry participants and consumers.³³

The main scheme, the Financial Ombudsman Service ('FOS'), can require the repayment of money, forgive or vary a debt, waive or vary a fee, or enforce a contract.³⁴ Being an independent, not-for-profit and non-government organisation, FOS is a new type of 'regulatory' structure. However, its powers are limited to compensation, rather than substantive discipline. A complainant can accept a FOS decision, which then binds the financial planner or else reject it and pursue the matter in court.³⁵ The Act also requires financial planners to have PI insurance and this can be seen as another form of external 'regulation'.³⁶ The primary professional association representing financial planners is the Financial Planning Association of Australia ('FPA'). It has established a detailed external complaint handling and discipline system of over 50 pages for members. This includes a Conduct Review Commission and a Disciplinary Panel with sanctions including a reprimand, apology, fine, undertaking, supervised practice, or suspend or cancel membership.³⁷

Model Code

As noted above, the Professional Standards Legislation (for more information, see the title on professional standards legislation) includes a Complaints and Discipline *Model Code*, which a PSC-approved professional association can adopt for its members. This sets out fundamental requirements such as what may be the subject of a complaint, who can make a complaint, complaint procedures including some time limits. Sanctions the association may impose include a reprimand, practice conditions, further training or cancelling association membership.³⁸

²⁸ *Corporations Act*; see also *National Consumer Credit Protection Act 2009* (Cth) for credit related services.

²⁹ *Corporations Act* s 1020E.

³⁰ *ASIC Act 2001* (Cth) ss 93AA, 93A.

³¹ *Corporations Act* s 915C.

³² *Corporations Act* ss 912(1)(g), 912A(2)(b); *Corporations Regulations 2001* (Cth) reg 7.6.01BA; ASIC, *Regulatory Guide 165: Licensing: Internal and External Dispute Resolution* (July 2015) ('RG 165'); ASIC, *Regulatory Guide 139: Approval and Oversight of External Dispute Resolution Schemes* (June 2013).

³³ ASIC, RG 165, 12.

³⁴ Financial Ombudsman Service, *What We Do* <<https://www.fos.org.au/about-us/what-we-do/>> (accessed 1 August 2017).

³⁵ Financial Ombudsman Service, *Our Dispute Resolution Process* <<https://www.fos.org.au/resolving-disputes/our-dispute-resolution-process/>> (accessed 1 August 2017).

³⁶ See John Morgan and Pamela Hanrahan, 'Professional Indemnity Insurance: Protecting Clients and Regulating Professionals' (2017) 40 *University of New South Wales Law Journal* 140.

³⁷ FPA, *FPA Disciplinary Regulation 2016* (July 2016) sch B 'Sanctions and Costs'.

³⁸ *Ibid.*

Figure 1: Variety of External Complaint and Discipline Systems

Profession/ Occupation	Government Regulation/ Professional Association	General Requirements	Disciplinary Sanctions/Actions
Doctors	<p>Main government regulator is the Medical Board of Australia under the <i>Health Practitioner Regulation National Law</i>.</p> <p>Main two professional associations are the AMA and the RACGP.</p>	<p>Detailed government regime including a Professional Standards Committee, Assessment Committee, Council and NCAT.</p> <p>Both AMA and RACGP have external schemes.</p>	<p>Sanctions include a caution, reprimand, fine, skills testing, counselling or registration suspension or cancellation.</p> <p>Both AMA and RACGP retain wide discretion re sanctions including terminating membership.</p>
Lawyers	<p>Government regulator for NSW solicitors is the OLSC under the <i>Uniform Law</i>.</p> <p>NSW professional association and formal co-regulator is the Law Society of NSW.</p>	<p>Detailed government regime, where OLSC deals with less serious matters and refers more serious matters to the Law Society, which can then discipline or refer to NCAT.</p> <p>No additional professional association scheme.</p>	<p>Sanctions include a caution, apology, reprimand, fine, redo work, training, education, counselling, compensation, external practice management, practice conditions, suspend or cancel practicing certificate, or removal from the roll.</p> <p>Law Society has wide discretion re sanctions including terminating membership.</p>

Summary

This Overview sets out some basics of what external complaints handling and discipline systems are and how they operate. They can be established by government under a legislative framework, by a profession association, either to fill a legislative gap or complement the legislative system, or by an external specialist organisation. They all tend to have some similar features including an investigative body that has some lower-level disciplinary powers. They also usually enable a party to refer a matter to a tribunal, established by either government or the professional association, to deal with the most serious matters and act as an appeal body. Such systems are important, not only for the individual complainants but also the profession generally as a process for ensuring that professional standards are maintained within a profession.

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This subject overview has been written with the support of the following partners:



Australian Government
Australian Research Council



UNSW
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CLMR
Centre for Law, Markets and Regulation



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