

# The role of the Fidelity Fund in claims against lawyers

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The Society maintains the Legal Practitioners Fidelity Fund (the Fund) pursuant to section 57 of the *Legal Practitioners Act 1981* (SA) (the Act). Part 5 of the Act deals with claims made against the Fund.

A person (or their personal representative) who has suffered a loss due to a “*fiduciary or professional default*” and where there is “*no reasonable prospect of recovering the full amount of that loss*” other than from the Fund, is eligible to make a claim.

A “*fiduciary or professional default*” in relation to a legal practitioner is defined in section 5 of the *Legal Practitioners Act 1981* (SA) as follows:

“*any defalcation, misappropriation or misapplication of trust money received in the course of legal practice by the legal practitioner or an incorporated legal practice or firm of which the legal practitioner is a member; or*

*any wrongful or negligent act or omission occurring in the course of the practice of the legal practitioner, or an incorporated legal practice or firm of which the legal practitioner is a member, whether committed by the legal practitioner, an employee of the legal practitioner or any other person*”

Some of the claims considered by the Society include:

- A claim by a former client where there was a misappropriation of trust money;
- A claim by the beneficiaries of an estate for loss as a consequence of misappropriation of estate proceeds by the practitioner acting for the executor;
- A claim by a former client where there was an error made by the practitioner in the course of representing the client;
- A claim by Counsel for loss due to a failure by the instructing solicitor to disclose counsel invoices to the client and a failure by the instructing solicitor to appropriate money paid by the client towards counsel fees; and
- A claim by a former client for loss as a consequence of over-charging by the practitioner.

The Fund is a claim of last resort. An action in negligence or any other cause

of action should first be considered. However, an action that would not be taken by an “*...ordinarily prudent, self-funded litigant is to be disregarded.*”

The amount of such a claim is limited to the actual pecuniary loss suffered by the claimant as a result of the fiduciary or professional default. The reasonable costs of making the claim are to be included in the total amount sought, most commonly where the claimant has engaged a legal practitioner to assist in making the claim.

Where a claimant has been successful in recovering part of the pecuniary loss or is reasonably expected to recover part of the pecuniary loss in a separate action, the amount claimed from the Fund is reduced accordingly.

A claim cannot be made against the Fund where a liability is indemnified under professional indemnity insurance. The location of the fiduciary or professional default is also important as a claim cannot be made where such default occurred outside South Australia unless it occurred in the course of, or incidentally to, “*legal work arising from instructions*” taken in South Australia or “*legal work substantially carried out*” in South Australia.

There is generally no limitation period for a claim to be made against the Fund however no claim can be made for a fiduciary or professional default that occurred before 4 December, 1969. In circumstances where the Society publishes a notice, fixing a date by which claims in respect of a fiduciary or professional default referred to in the notice must be made, that date will serve as the limitation date.

The maximum amount payable for claims made pursuant to a notice published by the Society cannot exceed a prescribed percentage (must not be less than 20%) of the Fund balance. It is possible that such claims may not be wholly satisfied, with the Society to apportion the amount allowable between the various claims, as per section 64 of the Act.

The Society has the discretion to make

advance payments to a claimant, where a determination is pending, if the Society is satisfied that the claim is likely to be accepted and an advance payment is warranted to alleviate hardship. Where the claim is denied or accepted for an amount that is less than the advance payment made, the advance payment or part of the advance payment, will form a debt owed to the Fund and recoverable by the Society.

In considering a claim against the Fund, the Society may request evidence relevant to the determination of the claim. Once the evidence has been made available, the Society must determine whether the claim is a valid claim and the amount payable in satisfaction of the claim.

Once the Society has made a determination, the claimant must be informed in writing. If the claimant disagrees with the determination, there is a right of appeal to the Supreme Court within three months of the date the determination was served on the claimant.

Where a legal practitioner or incorporated legal practice has paid compensation to a person for a pecuniary loss suffered in consequence of a fiduciary or professional default by a partner, director, clerk, officer or employee of the legal practitioner or legal practice, a claim may be made against the Fund in accordance with section 66 of the Act.

The Ethics and Practice Unit advises the Society on the validity of claims made against the Fund and all claims are referred to the Ethics and Practice Committee for a determination. Where a determination is made to accept a claim against the Fund, the Society must seek the approval of the Attorney-General to satisfy the claim.

As per section 65 of the Act, the Society has the right, through subrogation, to recover amounts paid from the Fund from “*...any person liable at law or in equity for the fiduciary or professional default in respect of which the payment was made.*”

For further information about Fidelity Fund claims you may contact the Ethics and Practice Unit on 8229 0229. **B**