Co-Operation without Self Incrimination: Best Practice for Handling Building Practitioner Inquiries

By Justin Cotton, Partner and head of practitioner advocacy, Lovegrove Solicitors (www.lovegrovesolicitors.com)

It is only human, when faced with complaints that you have breached professional duties, to defensively leap to the ramparts in your own cause. A charge of misconduct against any professional will usually feel deeply personal – it is a missile aimed at one's reputation and professional life.

In rushing to your own defence, it often pays to heed the maxim: "speed kills". This is because it is important to ensure you strike the right balance between co-operating with an Inquiry and ensuring that your responses are not only truthful but properly considered.

Prior to Inquiry hearings under section 179 of the *Building Act 1993* it is customary for an investigator to seek to interview the building practitioner. These interviews can take place at such venues as cafes or the practitioner's own office, and some practitioners have recounted that the interview seemed more like a "fire side chat" rather than an inquisition. Nevertheless, it is certainly not uncommon for charges to later be sent to the practitioner with notification of an inquiry hearing date.

Interviews with building practitioners are conducted either by a Building Commission investigator, or commonly an externally engaged investigator who then reports to the Building Commission. This investigator will have been appointed as a result of a complaint from a third party, be it a Council, a building owner or member of the public, or after a referral from the Commission or by VCAT.

If grounds for action under 179 of the Act are established as a result of the record of interview, then a charge or charges (otherwise known as "allegations") will be drafted and written notification will be sent to the practitioner. This notification will advise of the allegations and the facts said to support the allegations, including details of the section of the Building Act or Regulations that the practitioner is said to have breached.

At this point the practitioner will be asked whether they wish to contest (ie defend) or not contest (ie admit) the allegations, and to return the "preliminary information sheet" to the Building Commission advising of that decision. We find as legal advocates that this is the stage when our assistance is usually first sought, but in reality you should consider seeking legal advice even earlier, if possible.

In fact, a practitioner is well advised to seek legal advice as soon as they are aware of a complaint and receive an invitation to attend an interview with the investigator. It is not widely understood, but attendance at such interviews is not compulsory.

In recent times we have instead requested, on behalf of a person facing allegations, that the investigator instead send the questions in writing so that responses can be properly considered, and a written response generated. Investigators accept that personal attendance is not compulsory and are generally amenable to the practitioner (perhaps with the help of their lawyer) sending in a written submission.

That is not to say that a practitioner should never personally attend an interview. This is a decision to be made on a case by case basis. Even if you do attend though, it is necessary for the investigator to give you "the warning" to advise you of your rights and that you do not need to respond to questions, but any answer you do give can be used at any later hearing.

It is also theoretically possible to have a legal representative present at such an interview, if you want that for your own guidance.

Remember also that a written record should be generated as a result of the interview. You may be asked to sign a record of the interview once it is available, and it is possible to elect not to do this.

Always carefully check a written record of the interview before signing it, as we have had situations where practitioners facing a later Inquiry hearing have not considered the transcript to be an accurate record of what they actually said. It goes without saying, that this can be awkward later on, and result in the prosecuting lawyer inferring that the responses at a hearing are 'late inventions'.

Also bear in mind that what one says at a stressful interview may not be fully reflective of the true situation. Some questions posed might require you to go over office documents or notes. If so, you should do this rather than jump to an "off the cuff" answer, as you can always qualify your answers or decline to respond to certain questions.

In cases where there are several allegations, there will generally be at least one that is not contested. This will however allow you or your lawyer to 'mitigate', that is, to give the BPB a full explanation of all surrounding circumstances so that 'your side of the story' is still expressed, even though the overall charge might be admitted.

The aim of this explanation, and a recital of other factors in your favour (eg first offence, early 'guilty' plea, changes to one's practices and systems), is of course to obtain the minimum possible penalty.

In situations where the practitioner has promptly co-operated with an investigation, and assisted third parties such as Councils or others to resolve issues on site, these are factors in favour of a practitioner. Certainly, one should <u>never</u> mislead or obstruct an investigation, as there is a general duty of co-operation and one must always be truthful. If you are obstructive or non-cooperative, this could crystallize a separate offence in itself.

However, this does not mean a person should be "hoist by their own petard" by making rash decisions about how to deal with misconduct allegations – for example by rushing into ill considered responses to investigators.

Also an assessment needs to be made on how best to defend charges/allegations. If such charges are more likely than not going to be found proven on a technical basis, it makes more sense to 'fess up' to the imperfections and focus on what the practitioner has done or is doing to implement best practice from here on in.

That may call for a less adversarial approach; rather a problem solving approach is preferable and this would be appreciated by the BPB when it hands down its ruling.

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For more advice on your rights and responsibilities, misconduct advocacy and the regulatory regime contact Lovegrove Solicitors (Kim Lovegrove or Justin Cotton) for prompt, expert assistance.

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