



# Regulatory Approach

Statement

# 2021

# Introduction

This Regulatory Approach Statement outlines how the Victorian Legal Services Board + Commissioner (VLSB+C) performs our role as the regulator of the legal profession in Victoria. It highlights our approach to delivering on our legislative responsibilities by explaining how we set regulatory priorities, make resource allocation decisions and apply the range of regulatory tools at our disposal.

The legislative requirements that the VLSB+C must meet are set out in the *Legal Profession Uniform Law Application Act 2014* and the *Legal Profession Uniform Law* (Schedule 1 to the Act). We seek to discharge our legislative responsibilities in accordance with the objectives of the Act and the Uniform Law and in a way that:

- + promotes consistency amongst Uniform Law jurisdictions, including through directions and guidance from the Legal Services Council and Legal Services Uniform Commissioner; and
- + is consistent with Victorian Government policies and objectives, including the Attorney-General's Statement of Expectations.



## Setting our regulatory priorities

The legal profession and the broader Victorian community expect that we will be an efficient and effective regulator of the legal profession. As such, we target our regulatory resources towards activities that address the areas of greatest potential harm to consumers of legal services. In doing so, we aim to strike a balance between responding to immediate issues and identifying emerging areas of concern.

### Immediate issues

Responding to information we receive through complaints about lawyers, or from lawyers directly are core activities. In resourcing these immediate issues, we prioritise issues of high risk while looking for ways to streamline our response to lower risks of harm.

### Emerging issues

We use data to identify future trends and design programs of regulatory work that proactively address emerging risks. Such programs may also include strategic education to the profession.



## A collaborative approach

We work collaboratively with our Uniform Law partners for the benefit of the legal profession and broader community. We look for opportunities to partner with the Legal Services Council, the Uniform Commissioner and our fellow Uniform Law regulators in other jurisdictions in setting our priorities, in particular in striking the balance between immediate and emerging priorities to maximise consistency.

We place a high value on the expertise provided by the Law Institute of Victoria and the Victorian Bar, who we work collaboratively and closely with on activities that benefit the profession.



# Principles that guide us

The following principles guide how we respond to immediate and emerging issues. These principles reflect the way we currently approach our work, as well as our aspirations for continuous improvement. They signal to our partners in regulation, the legal profession and the Victorian community, what they should expect from us as modern and future-focused regulator.

## The principles of the VLSB+C's Regulatory Approach

 <p><b>Risk-based</b></p>	<p>We target our resources to the areas of greatest potential harm</p>	<ul style="list-style-type: none"> <li>+ We proactively identify areas of greatest risk to consumers of legal services or to the reputation of the profession and prioritise our resources accordingly.</li> </ul>
 <p><b>Evidence-based</b></p>	<p>We make decisions based on the best available data and intelligence</p>	<ul style="list-style-type: none"> <li>+ Our decisions are supported by evidence gained from a variety of sources, including data provided by lawyers, complaints, external examiners' reports, investigations, audits and stakeholder feedback.</li> <li>+ We undertake monitoring to ensure our programs are effective.</li> <li>+ We build the outcomes of evaluation into regulatory design.</li> </ul>
 <p><b>Outcome focused</b></p>	<p>We aim to achieve practical outcomes when we take regulatory action</p>	<ul style="list-style-type: none"> <li>+ Although process guides our decisions, our focus is on delivering tangible improvements for consumers and the profession.</li> <li>+ We will adapt our processes if necessary to deliver better outcomes.</li> <li>+ We independently exercise our discretion and make objective decisions.</li> </ul>
 <p><b>Collaborative</b></p>	<p>We collaborate with our Uniform Law partners and Victorian stakeholders to achieve positive outcomes</p>	<ul style="list-style-type: none"> <li>+ We seek to foster good relationships with our Uniform Law partners to achieve the best outcomes for the legal profession and consumers of legal services.</li> <li>+ We engage with our Victorian stakeholders as we respect their expertise and value their opinion.</li> </ul>
 <p><b>Consistent</b></p>	<p>We provide the same quality and accuracy of advice and service</p>	<ul style="list-style-type: none"> <li>+ Our business areas are connected and communicate effectively to ensure consumers and the profession receive consistent messages from us.</li> <li>+ We rely on our policies, procedures and standards to ensure we act in the same way over time, so our advice and decisions are fair and accurate.</li> <li>+ We work closely with the professional associations that exercise delegated regulatory functions for us, to ensure our approaches and advice are consistent.</li> </ul>
 <p><b>Transparent</b></p>	<p>We publish information on our activities and are clear about the reasons for our decisions</p>	<ul style="list-style-type: none"> <li>+ We present information in a way that is easily understood and clearly explains our reasoning.</li> <li>+ We report on our activities to demonstrate our performance and make sure we can be held to account.</li> </ul>
 <p><b>Consumer focused</b></p>	<p>We seek to understand consumers and help them make informed choices about legal services</p>	<ul style="list-style-type: none"> <li>+ We seek a deeper understanding of consumer interests and needs through our work with our Consumer Panel and in undertaking consumer research.</li> <li>+ We seek to develop systemic responses to systemic harms. We work towards more accessible and streamlined assistance to consumers.</li> <li>+ We provide guidance and targeted responses to lawyers to improve consumer service.</li> </ul>

# Our regularity tools and activities

We have a range of regulatory tools we can employ to address immediate and emerging issues. In determining which tools to use, we assess the impact of the conduct we are seeking to prevent or mitigate and apply an appropriate tool in a way that is consistent with our guiding principles.

We use 'light touch' regulatory tools wherever possible to assist lawyers comply with their obligations and address low-level harm. However, we also have 'harder edge' tools at our disposal to address serious issues, particularly where there is substantial harm to consumers of legal services and corresponding damage to the reputation of the legal profession.

We work across the organisation to ensure our regulatory activities are coordinated and our regulatory tools are consistently applied. In designing our education programs and setting regulatory standards, we aim to be proactive and to address emerging areas of risk in a way that is consistent with our principles. We use intelligence gathered from our work, including data collected from lawyers, complaints and compliance monitoring activities to inform the development of programs to respond to emerging risks.

## Specific regulatory tools – responsive and proportionate to address immediate issues



### Potential responses to high impact conduct

#### Removal from the Supreme Court roll (strike-off)

We may seek to have a lawyer removed from the Supreme Court Roll if a lawyer has:

- + been found guilty of an indictable offence, principally involving dishonesty;
- + a history of serious adverse conduct that demonstrates they are no longer fit and proper to be a lawyer; and
- + been removed from an interstate roll.

#### Suspension and/or cancellation of practising certificate

We may immediately suspend a practising certificate where it is considered necessary in the public interest.

We may suspend or cancel a practising certificate if we are satisfied a lawyer is no longer fit and proper because they:

- + have been charged with or convicted of certain offences;
- + are unable to fulfill the inherent requirements of legal practice; and
- + failed to comply with certain requirements under the Uniform Law.

In addition, we must suspend or cancel a practising certificate at VCAT's direction.

#### Criminal prosecutions and other court based responses

Criminal investigations / prosecutions can be undertaken for:

- + the indictable offence of causing a deficiency in a trust account; or
- + the summary offence of engaging in legal practice when not entitled to do so.

In addition, injunctive powers are available to restrain actual/likely breaches of the Uniform Law along with action to impose civil penalties.

#### External intervention

We may intervene in the business and professional affairs of law practices where there is a need to protect the interests of the clients of the practice, the law practice and its employees and the general public.

The intervention may range from the appointment of a supervisor of trust money, the appointment of a manager or a recommendation to the Supreme Court for the appointment of a receiver.



## Potential responses to high impact conduct

### VCAT orders

We may apply to VCAT for an order against a lawyer if we are satisfied that the conduct may amount to:

- + professional misconduct; or
- + unsatisfactory professional conduct.

VCAT may make a range of orders, including to suspend or cancel a practising certificate, impose a fine, issue a reprimand or require a lawyer undertake additional training.

### Variation of practising certificate

We may vary a practising certificate for the same general reasons as suspending or cancelling a practising certificate, where the conduct does not justify that extreme action. Conditions we may impose include:

- + whether the holder should be authorised to receive trust money;
- + restrictions on the type of practising certificate a lawyer may hold (i.e. restricted to employee practising certificate);
- + undertaking specific or continuing legal education;
- + requirements to undergo counselling or medical treatment, and to act in accordance with medical advice;
- + requirements on the lawyer to use the services of an accountant or book-keeper; and
- + restrictions on the lawyer's ability to supervise other lawyers.

### Commissioner's Determination for unsatisfactory professional conduct

We may make a determination if we are satisfied that a lawyer's conduct amounts to unsatisfactory professional conduct.

A determination may caution or reprimand a lawyer or may order the lawyer to take actions such as:

- + apologise;
- + redo work;
- + undertake training; or
- + pay a fine.

### Commissioner's Determination to resolve a dispute

We may make a determination to resolve a dispute about legal costs or order compensation for consumer loss if, in our view, it is fair and reasonable to do so.

A determination may order that a lawyer:

- + reduces or refunds legal costs to the consumer;
- + apologises;
- + be cautioned;
- + redo work;
- + undertakes training, education, counselling or supervision; or
- + pay compensation to a consumer.

### Compliance audits and management system directions

Where there is an indication of systemic problems in the management of the law practice, we may audit a law practice to assist the lawyer in correcting these issues. In the event that the issues are not satisfactorily dealt with, we may give a management system direction to a law practice (or a class of law practices) if we consider it reasonable to do so to ensure that appropriate business and practice management systems are implemented and maintained.

A management system direction may also be made as a result of issues in a complaint or a trust account investigation.



## Potential responses to service related issues and other conduct with a low likelihood of disciplinary finding

### Negotiated outcomes

We seek to negotiate with a lawyer if there is evidence of a possible low risk disciplinary breach or service concerns that can be addressed by the lawyer agreeing to certain actions to come into compliance.

Negotiated sanctions may include seeking an undertaking or imposing or varying conditions on a practising certificate with the lawyer's consent.

### Warning

We may issue a warning if a possible breach is low risk and there are mitigating factors such as previous good performance that indicate the lawyer is unlikely to re-offend. For example, a lawyer may be asked to correct and improve costs disclosure and billing practices.

### Dispute resolution – minor conduct issues

We seek to resolve disputes between lawyers and their clients that may not amount to disciplinary breaches but would benefit from informal resolution, mediation or an informal agreement. A warning about certain practices, for example, in relation to billing and disclosure, may be given as part of the resolution.

### Dispute resolution – consumer issues

Common examples of disputes include costs, poor service and communication issues. These disputes may be resolved by mediation and informal conciliation with resolutions including repayment of costs, payment of compensation, apologies and other actions to remedy the harm suffered by the complainant.

## Ongoing regulatory activities – proactive and targeted to address emerging issues

### Targeted

### Broad



### Monitoring compliance

We may carry out specific compliance audits and/or investigations in response to complaints and other notifications about individual lawyers as part of compliance monitoring.

We monitor risks of harm by conducting planned programs of trust account investigations and CPD audits. We require annual independent examinations of trust records to be conducted by external examiners and we assess the results.



### Setting standards

We ensure that lawyers have the appropriate practising certificate and are fit and proper to engage in legal practice.

We develop policies that explain our approach and seek to influence legislative and other reforms to the Legal Profession Uniform Law.



### Education and information

We target specific groups or classes of lawyers with education and information to address identified risks or concerns.

We provide general information to raise awareness to the regulatory requirements for lawyers and our role.



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We acknowledge the Traditional Owners of the land on which our office sits, the Wurundjeri People, and pay our respects to their Elders; past, present and emerging.