



STATEMENT OF REGULATORY APPROACH



**PROFESSIONAL
STANDARDS**
THE LAW SOCIETY
OF NEW SOUTH WALES

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INTRODUCTION

The Council of the Law Society of NSW (the **Council**) exercises regulatory functions under the *Legal Profession Uniform Law* (NSW) (**Uniform Law**) to maintain professional standards among solicitors in NSW. This is principally directed at protecting the public and the administration of justice.

The Council operates as part of a co-regulatory system which is overseen by the NSW Office of the Legal Services Commission (**OLSC**). The Council is the designated local regulatory authority under Chapter 3 of the Uniform Law which concerns the grant, renewal, suspension and cancellation of practising certificates. In addition, the Legal Services Commissioner (the **Commissioner**), has delegated powers under Chapter 5 to the Council to deal with complaints against solicitors.

The Professional Standards Department (**PSD**) supports the Council and its sub-committees on the exercise of certain regulatory functions under the legislation.

While a large part of this work involves the handling of complaints under Chapter 5 of the Uniform Law, it also assesses other matters that come to its attention

and makes recommendations on regulatory action that should be taken under the legislation, principally under Chapter 3.

One of the key objectives of the Uniform Law is to promote regulation of the legal profession that is:

“efficient, effective, targeted and proportionate”.

This Statement is intended to provide transparency around how PSD undertakes its work to achieve this objective.

It describes how we set priorities, make decisions on the allocation of resources and deploy the regulatory tools available under the Uniform Law and other non-regulatory approaches to deliver regulatory outcomes.

Consistent with the objective set out above, this Statement particularly seeks to ensure the approach recommended by PSD is proportionate to the risk of serious harm that exists or actual serious harm caused, but also strives to promote consistency of decision making.

OUR PRIORITY OBJECTIVES

The objectives of the Uniform Law, as set out in section 3, are wide ranging and include:

1. Promoting the administration of justice
2. An efficient and effective Australian Legal Profession
3. Maintaining competency and high ethical and professional standards
4. Protection of clients of the law practice, and the public generally
5. Allowing consumers to make informed choices about services and costs
6. Promoting a co-regulatory framework, with an appropriate level of independence of the profession.

While PSD seeks to pursue all of the objectives in the work it does, particular attention and priority is given to ensuring the **effective administration of justice** and **protection of the clients of law practices and the public generally**. In this regard, those matters which are more likely to result in serious harm, or which result in actual serious harm, will receive a stronger, and timely regulatory response.

Successfully focussing on and achieving these priority objectives, will generally support or underpin the other objectives in section 3.

OUR REGULATORY APPROACH

In advising the Council, PSD prioritises its effort and resources to ensure that it is *efficient, effective, targeted and proportionate*. The core principles it applies are as follows.

Fair and transparent	We treat all parties fairly through the regulatory process, we ensure parties are afforded procedural fairness and provide reasons for the decisions we make.
Proportionate	Our regulatory response is commensurate with the seriousness of the conduct, and whether it is more likely to result in serious harm or results in actual serious harm.
Consistent	We treat similar matters in a similar way.
Firm	Wilful non-compliance causing a risk of serious harm or actual serious harm should be dealt with swiftly and strongly.
Risk-based	Our effort is focussed on those matters where the conduct is more likely to result in serious harm, or results in actual serious harm, to clients (or the public generally) or to the effective administration of justice.
Outcomes-focussed	We achieve practical, timely outcomes that deal with the issue or problem in a proportionate way.
Securing compliance	Approaches that secure compliance with the law will often be sufficient to protect the public interest.
Education focussed	A response based on education of the solicitor may be appropriate for less serious matters.

These principles will guide discretionary decision making under the legislation, particularly in determining matters that require consideration of the public interest.

WHAT WE DO

PSD generally deals with two classes of matters:

- (i) Matters relating to the **conduct** of practitioners; and
- (ii) Matters relating to the **fitness to practise** of practitioners

These are brought to the attention of PSD through a range of sources.

Chapter 5 Complaints

All complaints made about solicitors are to be made under Chapter 5 of the Uniform Law to the OLSC. The Commissioner has delegated powers under Chapter 5 to the Council to deal with complaints against solicitors, and refers these complaints to the Law Society for assessment and investigation.

These are referred to as ‘complaints’ and generally involve conduct matters (though sometimes they involve fitness issues). In some cases, the fitness and conduct issues are inter-twined.

These matters are dealt with under Chapter 5 with a view to taking disciplinary action.

The Commissioner has the power to issue guidelines and directions in relation to the exercise of Chapter 5 functions by delegates. A similar power exists for both the Commissioner for Uniform Legal Services Regulation and the Legal Services Council.

The Commissioner also has the power to conduct an internal review of decisions made by the Council under delegation.

In relation to matters referred to the Council by the Commissioner, PSD will generally deal with those matters in accordance with Chapter 5 of the Act.

In some cases, however, PSD may find an alternative way to deal with Chapter 5 complaints where an alternative is available under the legislation, and which is consistent with the Principles in this Statement. For example, a Chapter 5 complaint which involves underlying conduct that is also a “designated show cause event¹⁹” may be dealt with by either the Professional Conduct Committee (**PCC**) or the Disclosure Committee using the show cause process in Part 3.5 of the Act.

Similarly, a complaint which raises an underlying fitness issue (such as mental health concerns) may be able to be dealt with by way of action by the Council on a practitioner’s Practising Certificate (**PC**) under Chapter 3, without the need to progress a complaint investigation under Chapter 5.

In some cases, it may be in the public interest to close a complaint because an alternative regulatory outcome can be achieved that resolves the issue, or ensures compliance in the future.

Other matters involving solicitors

‘Other Matters’ brought to the attention of PSD include:

1. Matters arising from Trust Account inspections and investigations;
2. Disclosures by solicitors;
3. Matters referred by the Licensing Committee, or other parts of the Law Society (eg the Fidelity Fund);
4. Matters from external sources, ranging from courts, government agencies and members of the public.

PSD assess these “Other Matters” and decides what action to take.

In very serious matters, PSD will often determine that these should be dealt with as a conduct issue and a complaint is made to the OLSC. This may proceed in parallel with taking immediate action on the practising certificate – through either suspension or cancellation.

In most other cases, however, there is a range of regulatory tools available under the Uniform Law that can be used to respond to these Other Matters, without the need to make a complaint.

For those matters that do not justify the making of a complaint, other action focussed on education of the practitioner, and securing compliance in the future, will often be pursued. This could include working with the practitioner to voluntarily secure compliance going forward, through to more interventionist action including imposing conditions on practising certificates to require certain action to be taken by the practitioner, or external intervention.

OUR DECISION-MAKING PROCESS

We comply with the Uniform Law, and in deciding how to respond to a particular issue, we consider the principles outlined in “Our regulatory approach” set out above.

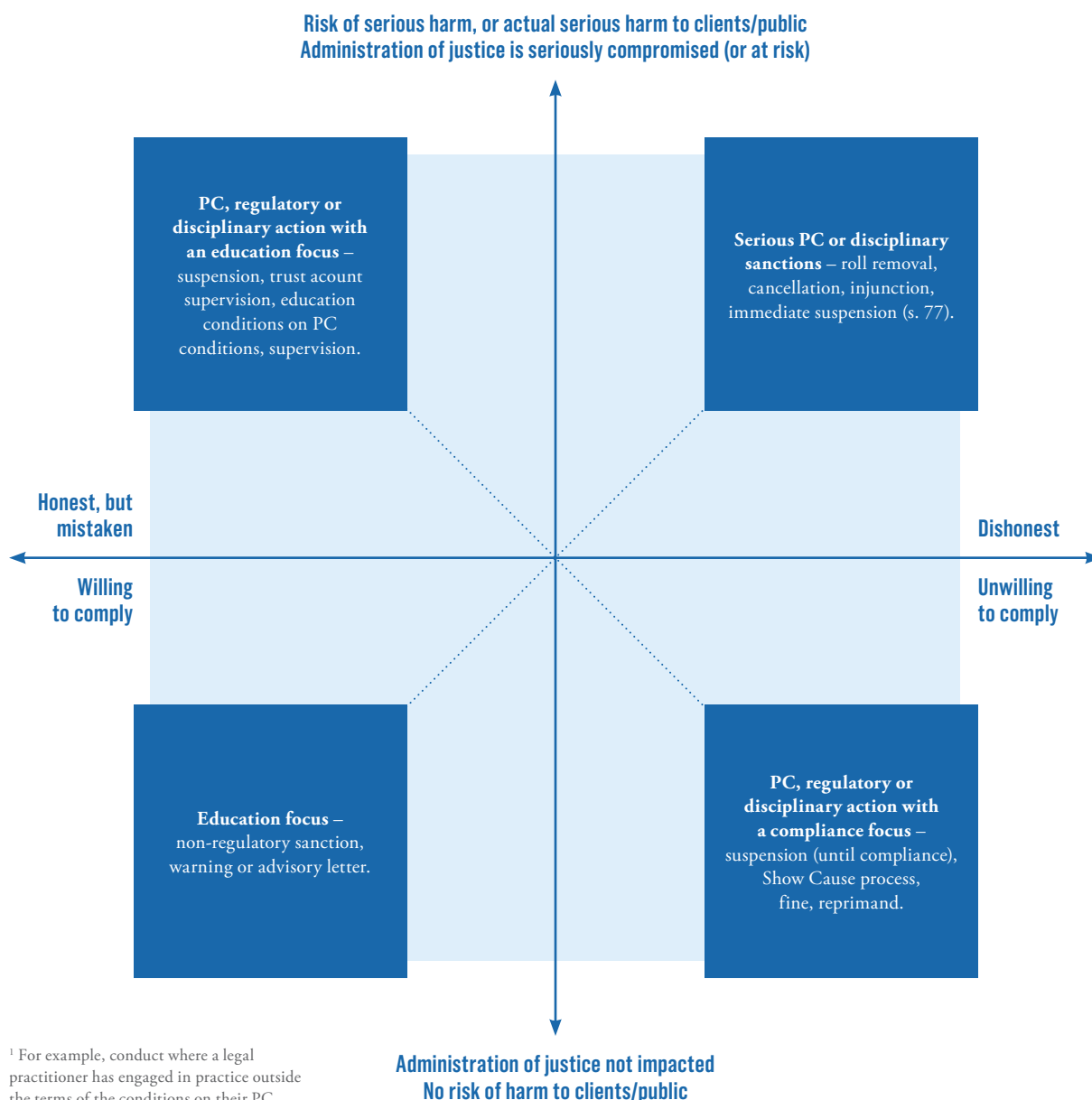
As is shown by the following matrix, serious disciplinary sanctions, or serious practising certificate sanctions will generally be sought where it is more likely there is a risk of serious harm or actual serious harm is caused (either to clients, the public or the administration of justice), and the conduct involves either dishonesty or an unwillingness to comply with the law.

Where risks or harm to clients, the public or the administration of justice are low (and the harm is not significant), and there is a willingness to comply

with the law, we take an approach focussed more on education and on securing an outcome and/or compliance which is consistent with the Uniform Law. In some cases, identification of an alternative regulatory outcome might support closing a Chapter 5 complaint in the public interest.

The matrix should not be applied rigidly and each case needs to be considered on its merits. That said, it provides guidance to the profession and the public on how we will generally approach our regulatory task.

Regardless of which approach is taken, PSD ensures that it affords procedural fairness as required by the Uniform Law or the common law.



REGULATORY OUTCOMES

There are a range of regulatory outcomes PSD is able to seek under the Uniform Law. These are described below.

Removal from the Roll of the Supreme Court	The most serious action which can be taken against a practitioner. Would generally be sought where a practitioner is permanently unfit to practise, such as in cases of dishonesty.
Cancellation of a Practising Certificate	This would generally be sought where the practitioner is indefinitely unfit to practise, and the Council or the NSW Civil and Administrative Tribunal (NCAT) is unable to determine when they are likely to be fit.
Suspension of a practising certificate	Suspension may be used where: 1. A practitioner is unfit on a temporary basis (eg. due to health conditions) or conduct demonstrates a lack of fitness. This may be able to be addressed through education. 2. The practitioner has failed to comply with their obligations under the Uniform Law (eg to co-operate with the regulator). Suspension may be appropriate until such time as they comply. 3. Serious allegations have been made, and it is not in the public interest for them to remain practising while those issues are resolved.
Injunctions	Where conduct that has the potential to cause serious harm continues despite other regulatory action, it is open to the Council to seek an injunction in the Supreme Court.
Variation of a practising certificate – imposition of conditions	Variation of a PC may be used to restrict a practitioner to a particular type of PC, only engage (or not engage) in certain areas or practice, to not handle trust money, to undertake further education, to seek health treatment or to report to the Council. This may be temporary or permanent.
External intervention – Appointment of a Manager or Receiver	A manager or receiver may be appointed where there is no principal overseeing a practice, there are issues with the handling of trust money or clients' affairs are not being managed.
Disciplinary action – Finding of unsatisfactory professional conduct by the Professional Conduct Committee	After a complaint is investigated PCC can make a finding of unsatisfactory professional conduct, and impose a range of sanctions including a reprimand, a fine, a caution, order an apology, or require further education (amongst other things).
Disciplinary action – Tribunal proceedings – Professional misconduct or UPC	After a complaint is investigated, PCC may refer the matter to NCAT for disciplinary proceedings. This may result in a recommendation to the Supreme Court to remove the practitioner's name from the Roll or one of the sanctions which may be imposed by PCC.
Civil Penalty provisions	Trust account breaches can be pursued before NCAT, without the need to make a complaint with a view to imposing a fine.
External intervention – Appointment of a Trust Supervisor	Similar to a manager or receiver, except the supervisor only controls the trust account. This can be used to educate the practitioner over a period of time.
Compliance audits and management system directions	These can be used to require a practice to improve systems or processes to protect consumers from harm.

In addition, PSD also uses tools that deliver a compliance outcome, such as educating a practitioner or the profession more generally, without the need to take formal action under the Uniform Law. Where minor conduct issues might be involved, the following approaches provide a more immediate outcome (such as securing compliance with the Uniform Law) and may be more effective than pursuing a formal sanction/outcome as set out above. These include the following.

Advisory letters	PSD may issue advice to a practitioner or firm regarding compliance with the Uniform Law, with a view to securing compliance in the future.
Negotiated outcomes – Undertakings	Where conduct is low risk, an undertaking not to engage in certain conduct going forward may be sufficient to protect the public from harm.
Self - resolution – minor conduct issues	Although some matters or complaints technically involve a breach of Conduct rules (eg payment to third parties) giving the practitioner early notice of the issue may assist them in resolving the issue with the complainant. This is likely to be a more efficient way to resolve less serious matters without pursuing disciplinary action.

OUR LONGER-TERM FOCUS

To deliver on the objectives of the Uniform Law, including ensuring an efficient and effective Australian Legal Profession, PSD is continually working to improve the way it regulates in the public interest. We do this by adopting the following approach.

We are data-driven and evidence based	We will use data and evidence to inform our decision making, and to set priorities in the future. We are working to improve the quality of our reporting to improve transparency and to identify trends.
We aim to be pro-active	We will work to identify approaches that address problems before they arise. In particular, we will look for opportunities to use the learnings from our regulatory work to develop pro-active education strategies.
We collaborate with our partners	As part of a co-regulatory system, we collaborate with the OLSC and our other partners in NSW, including other parts of the Law Society, the NSW Bar Association, the Prothonotary, and the Legal Profession Admission Board.
We promote consistency under the Uniform Law	Consistency across jurisdictions is essential to ensure an efficient Australian legal market. We work with our Uniform Law partners, including the Legal Services Council, the VLSB+C, but also other jurisdictions.

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