



**A report on giving effect to the recommendations arising
from the *Investigation into the handling of complaints by the
Legal Services and Complaints Committee***

Ombudsman Western Australia

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Contact Details

Street Address

Level 2, 469 Wellington Street
PERTH WA 6000

Postal Address

PO Box Z5386 St Georges Terrace
PERTH WA 6831

Telephone: (08) 9220 7555 or 1800 117 000 (free from landlines)

Translating and Interpreting Service (TIS National): 131 450
(for people who need an interpreter)

National Relay Service: 1800 555 660 Quote 08 9220 7555
(for people with a voice or hearing impairment)

Facsimile: (08) 9220 7500

Email: mail@ombudsman.wa.gov.au

Web: www.ombudsman.wa.gov.au

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ABORIGINAL WESTERN AUSTRALIANS

The office of the Ombudsman acknowledges Aboriginal and Torres Strait Islander people of Australia as the traditional custodians of Australia. We recognise and respect the exceptionally long history and ongoing cultural connection Aboriginal and Torres Strait Islander people have to Australia, recognise the strength, resilience and capacity of Aboriginal and Torres Strait Islander people and pay respect to Elders past, present and future. We acknowledge the Whadjuk Noongar people as the traditional custodians of the land on which the office of the Ombudsman is located.

WE ARE PROUD OF DIVERSITY

We take pride in diversity and equal opportunity. The Ombudsman and the office of the Ombudsman stands with the LGBTQIA+ community. The Ombudsman's pronouns are he/him/his.

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1 Foreword

Following a request to me by the Honourable John Quigley MLA, Attorney General, to consider the handling of complaints by the Legal Profession Complaints Committee (**the LPCC**), I completed an investigation into the handling of complaints by the LPCC on 11 December 2020. As of 1 July 2022, the *Legal Profession Uniform Law Application Act 2022* (WA) established the Legal Services and Complaints Committee (**the LSCC**). The LSCC replaced the LPCC. As noted in correspondence from the LPCC, ‘... the LSCC is essentially the same body as the LPCC. All the former members of the LPCC have become members of the LSCC.’ All references in this report are, accordingly, to the LSCC (with the exception, of course, of quotations).

In the report of the investigation (**the Investigation Report**), I set out a series of opinions regarding the handling of complaints by the LSCC. Arising from these opinions, I made thirteen recommendations to the LSCC. The Investigation Report is reproduced at Appendix 3. This report sets out the steps taken by the LSCC to give effect to my recommendations.

The Investigation Report identified serious problems with the timeliness of the LSCC’s handling of complaints as well as its lack of key performance indicators, inadequate public reporting and lack of a modern electronic system for complaints management. Accordingly, it is pleasing that the response to the Investigation Report by the LSCC has been timely and effective.

Following over a decade of indications that the LSCC would institute an electronic complaints management system, in the Investigation Report I recommended (Recommendation 13) that the LSCC implement an electronic complaints management system by no later than the end of the financial year 2021-22 and should aim to do so by December 2021. The LSCC has given effect to my recommendation and implemented an electronic complaints management system, slightly ahead of the time I recommended, ending over a decade of delay. In the Investigation Report, I further recommended (Recommendation 2) that the LSCC achieved the closure of very aged complaints. Again, the LSCC has done so, and again ahead of the time that I recommended.

Overall, the LSCC has either given effect, taken steps to give effect, or steps have been proposed to give effect, to all thirteen recommendations in the Investigation Report.



Chris Field
OMBUDSMAN

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2 About this report

2.1 The Ombudsman

2.1.1 The role of the Ombudsman

The Ombudsman is an officer of the Western Australian Parliament. The Ombudsman is independent of the Government of the day and completely impartial. The Ombudsman has functions in relation to:

- The investigation of State Government departments, statutory authorities, boards and corporations, local governments and universities;
- The review of child deaths and family and domestic violence fatalities; and
- Several other investigatory, review and oversight functions, provided for in a range of legislation.

The Ombudsman can undertake investigations regarding the decision making of public agencies on reference by Parliament, arising from a complaint or on her or his own motion.

In undertaking an investigation, the Ombudsman has the rights, privileges and responsibilities prescribed in the Act and of a standing Royal Commission (in accordance with the *Royal Commissions Act 1968*).

At the completion of an investigation, the Ombudsman can form opinions and make recommendations.

2.2 Own motion investigations

Under section 16(1) of the Act, the Ombudsman can investigate, on her or his own motion, any administrative decision, recommendation or action by State government departments and authorities within his or her jurisdiction, as follows:

Without prejudice to the provisions of section 15 any investigation that the [Ombudsman] is authorised to conduct under this Act may be so conducted, either on [her or his] own motion or on a complaint ...

2.3 Giving effect to the recommendations of the Ombudsman

2.3.1 Monitoring the implementation of recommendations

The Ombudsman also actively monitors the implementation and effectiveness of recommendations arising from own motion investigations, in accordance with sections 25(4) and (5) of the Act, which state:

- (4) If under subsection (2) the [Ombudsman] makes recommendations to the principal officer of an authority he [or she] may request that officer to notify him [or her], within a specified time, of the steps that have been or are proposed to be taken to give effect to the recommendations, or, if no such steps have been, or are proposed to be taken, the reasons therefor.
- (5) Where it appears to the [Ombudsman] that no steps that seem to him [or her] to be appropriate have been taken within a reasonable time of his

[or her] making any report or recommendations under subsection (2), the [Ombudsman], after considering the comments (if any) made by or on behalf of the principal officer to whom the report or recommendations were made, may, if he [or she] thinks fit, send to the Premier of the State a copy of the report and the recommendations together with a copy of any such comments.

2.4 Investigation into the handling of complaints by the LSCC

Following a request to me by the Honourable John Quigley MLA, Attorney General, to consider the handling of complaints by the (then) LPCC (**the Investigation**), I completed the Investigation on 11 December 2020. To assist the reading of this report, the recommendations arising from the Investigation Report are reproduced in Appendix 1 and the full report is reproduced in Appendix 3.

2.5 A report on giving effect to the recommendations arising from the Investigation Report

2.5.1 Objectives

The Investigation Report made 13 recommendations to the LSCC regarding the handling of complaints by the LSCC.

The objectives of this report were to consider, in accordance with sections 25(4) and (5) of the Act:

- The steps that have been taken to give effect to the recommendations;
- The steps that are proposed to be taken to give effect to the recommendations; or
- If no such steps have been, or are proposed to be taken, the reasons therefor.
- If relevant, whether it appeared to the Ombudsman that no steps that seem to him to be appropriate have been taken within a reasonable time of his making of the Investigation Report and recommendations.

2.5.2 Methodology

On 23 July 2021, the Office wrote to the LSCC, requesting a report on the steps that have been taken, or were proposed to be taken, to give effect to the recommendations of the Investigation Report. Additionally, the Office:

- Reviewed and considered the information provided by the LSCC and the information, clarification or validation provided to the Office;
- Obtained further information from the LSCC, in order to clarify or validate information provided in the LSCC's report to the Office;
- Developed a preliminary view and provided it to the LSCC for its consideration and response; and
- Having fully considered the responses of the LSCC, developed this report.

3 Steps taken to give effect to the recommendations

3.1 Recommendation 1

Recommendation 1: That the LSCC retain a triaging and rapid resolution process but improve that process with a view to having 75% of matters subject to rapid resolution being resolved in less than 90 days, and 95% of matters subject to rapid resolution being resolved within 6 months, by no later than the end of the financial year 2020-21, with further improvements to those key performance indicators to be reviewed upon the introduction of the Uniform Law.

The LSCC is an independent statutory committee of the Legal Practice Board that derives its powers from the *Legal Profession Act 2008*. Under the *Legal Profession Act 2008*, the LSCC is responsible for receiving and dealing with complaints about legal practitioners in Western Australia.¹

The Investigation Report considered the LSCC's approach to receiving and dealing with complaints:

The LPCC refers all new contact to its Rapid Resolution Team (**RRT**) for assessment.

...

A matter brought to the attention of the LPCC is typically treated by the RRT as an 'inquiry' while it is assessed. During assessment, the RRT acquires further information from the legal practitioner and the person who contacted the LPCC in order to reach a 'preliminary view' on the matter. This preliminary view is conveyed to the inquirer and where no concern or conduct issue is identified, the inquirer can either withdraw their inquiry or proceed with lodging a formal complaint. Where a concern but not a conduct issue is identified, an opportunity is provided for the matter to be 'conciliated' with the legal practitioner, where, for example, an agreement may be reached between the inquirer and the legal practitioner for fees to be waived.²

Where a conduct issue is identified during the assessment process or if a formal complaint is lodged, the matter is dealt with by the LPCC's investigation team.

The LSCC is obliged to undertake expeditious and efficient resolution of complaints.³ The Investigation Report further observed that it is in the public interest for complaints to be resolved in a timely way and that unfairness to complainants, legal consumers and legal practitioners can result from complaints that are not expeditiously and efficiently resolved:

It is also important for the LPCC to consider that 'fairness' to complainants and legal practitioners is not simply procedural fairness (as is required in accordance with section 430 of the *Legal Profession Act 2008*) but the unfairness that can result to complainants from complaints that are not resolved expeditiously (indeed, it is apposite to note the legal axiom, justice delayed is justice denied), to the consumers of legal services from complaints that are not resolved efficiently (as to do so is more costly, a cost that is ultimately borne by the consumers of legal services) and the negative effects on legal practitioners.

¹ *Legal Profession Act 2008*, Part 13, Division 4. See now the *Legal Profession Uniform Law Application Act 2022* (WA).

² Legal Profession Complaints Committee, *2018 Annual Report*, pp. 12-13.

³ *Legal Profession Act 2008*, s. 431. See now the *Legal Profession Uniform Law Application Act 2022* (WA).

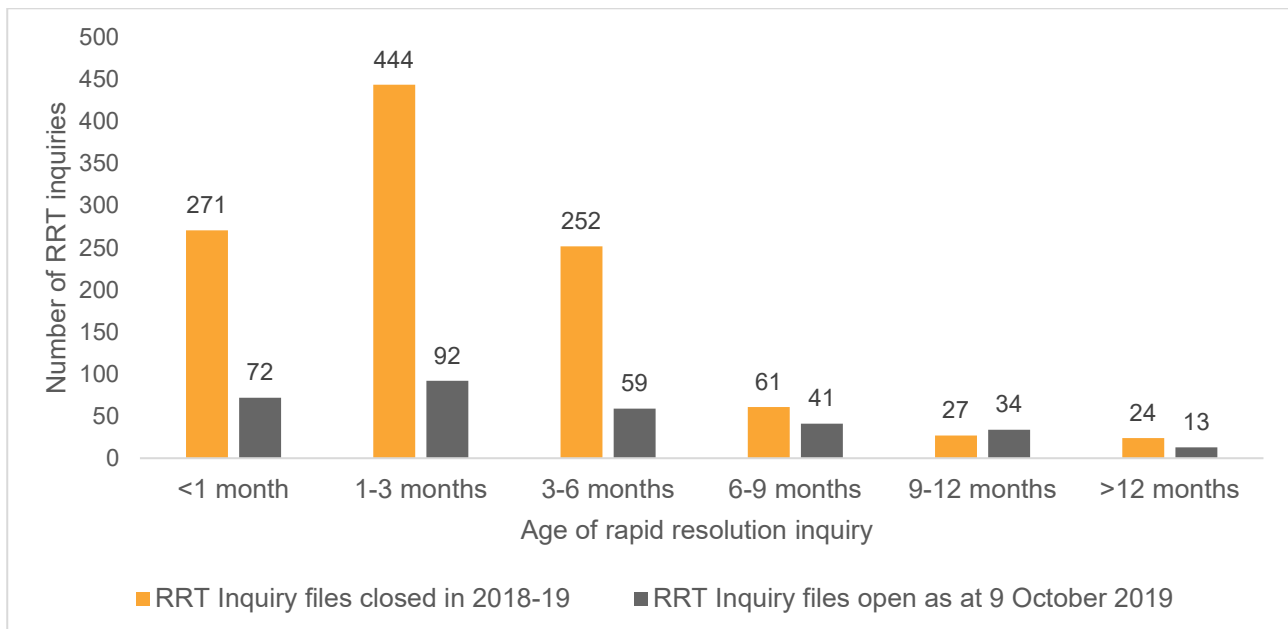
As part of the Investigation, the Office collected and analysed statistics provided by the LSCC on the age of rapid resolution inquiries that were closed in 2018-19 and that were open at the time of the request, namely 9 October 2019. The Office found:

The LPCC closed 1,079 rapid resolution inquiries between 1 July 2018 and 30 June 2019... two-thirds of rapid resolution inquiries were closed within three months. A small number of rapid resolution inquiries (24, 2.2%) took over 12 months to finalise. For the 24 rapid resolution inquiries that were more than 12 months old at the time of closure, the age of the inquiry ranged from 370 days to 1003 days, with a median age of 430 days.

...

...there was a higher proportion of open rapid resolution inquiries over six months old. Matters over six months old comprised 10.4% of rapid resolution inquiries closed in 2018-19 and 28.3% of open rapid resolution inquiries. For the 13 rapid resolution inquiries that were more than 12 months old as at 9 October 2019, the age of the inquiry ranged from 366 to 693 days, with a median age of 454 days.

Figure 1: Number of rapid resolution inquiries closed in 2018-19 and open cases, by age of matter



Source: Legal Profession Complaints Committee

The LSCC was provided the opportunity to comment on the preliminary report of the Investigation. On 30 November 2020, Mr John R B Ley SC, Chair, LSCC, wrote to the Ombudsman to respond to the preliminary report (**LSCC letter**). The LSCC letter stated:

The Committee’s experience is that, inevitably, the investigation and resolution of some complaints takes longer than the investigation and resolution of others, and that, equally, some own initiative investigations, pursuant to s 421 of the *Legal Profession Act 2008 (WA)*, take longer than others. That is because the conduct issues raised by some complaints, and encountered in some own initiative investigations, are extremely complex. That is not confined to the legal and factual issues. Often there are difficulties in obtaining evidence, or in dealing with the people involved. The Committee finds that both complainants and practitioners alike are prone to exhibit challenging behaviours in the course of the investigation and resolution of a complaint. On other occasions, the progress of the Committee’s investigation and resolution of a complaint, or the progress of an own initiative investigation are stifled by matters which are outside of the Committee’s control. In those circumstances, it is difficult to finalise matters as promptly as the Committee would like, no matter what resources are allocated to the task. Current examples include the investigation

of complaints in which the complainant or the practitioner the subject of the complaint is incapacitated, and the investigation of complaints where there are on foot court proceedings, the outcome of which will have a bearing on the further investigation and resolution of the complaint.

...

Quite apart from those generic and recurring difficulties, however, in the last two years, the Committee has endured an acute period of staff turnover, particularly in its Investigations Team. That has led, inevitably, to the disruption of the investigation of complaints and the unavoidable delay caused by a new member of the Team familiarising himself or herself with the facts of a matter. The Committee is currently endeavouring to rebuild its capacity in that regard.

The LSCC further suggested, in the LSCC letter, a staged implementation of improvements to the LSCC's timeliness of complaint handling to 'allow the Committee to better capture which matters are subject to a rapid resolution process' and to 'ensure that all but the most exceptional matters are finalised or escalated within 3 months'. The Ombudsman, in considering this suggestion by the LSCC, noted:

In my view, the staged implementation of improvements to the LPCC's timeliness of complaint handling, benchmarked to best performing jurisdictions, is consistent with good practice, likely to achieve permanent improvements more effectively and, in all the circumstances, an entirely reasonable suggestion.

The Ombudsman, in his opinion in the Investigation Report, stated:

In my opinion, it is a misnomer to describe the resolution of matters as rapid if:

1. As at 9 October 2019, 47 per cent of matters were more than 3 months old; and
2. As at 9 October 2019, 13 matters were more than 12 months old, with the age of the inquiry ranging from 366 to 693 days, with a median age of 454 days.

In the context of both the literature and good practice, and section 431 of the *Legal Profession Act 2008*, and having carefully considered the LPCC letter, in my opinion, the rapid resolution of complaints by the LPCC should be achieved in less than 90 days in the majority of cases, with an appropriate staging of that achievement.

For the above reasons, the Ombudsman made Recommendation 1.

The Office requested that the LSCC inform the Office of the steps taken to give effect to the recommendation. In response, the LSCC provided the following information:

The results for targets 1 and 2 were as follows:

1. 83.3%
2. 97.1%

...

Since receiving the Ombudsman's report in December 2020 each case handler in the Rapid Resolution Team now has a regular scheduled weekly case review meeting with the RRT manager, in which the strategy and timeline for resolution for each open case is discussed and agreed, focusing on timeliness, as well as proportionality and outcome. The manager also meets with the team fortnightly where these approaches are discussed. The manager reports case trends and movements to the Law Complaints Officer. The team (through the manager) also make recommendations to the LCO to formally close complaints that cannot

be resolved to the complainant's satisfaction but where there is no merit in taking them on to resource intensive formal investigation.

In addition to this, in the lead up to other initiatives...we have trialled a mix of a more diverse skill set in the RRT in particular, with a view to better complaint handling. This year we have begun to build a more multi-disciplinary team, including engaging two non-lawyer qualified investigators (Certificate IV) on 6 month secondments from Consumer Protection WA. We have also used the skills and experience of a further qualified investigator who also has extensive experience in consumer and customer facing teams (including in consumer facing roles under the Uniform Law in Victoria), who is also project managing the Uniform Law transition across the whole office.

...

The Uniform Law is expected to commence in 2022, and planning is underway concerning its implementation.

Careful analysis of the information provided by the LSCC indicates:

- It is pleasing to observe that the steps taken by the LSCC to give effect to the recommendations has improved the triaging and rapid resolution process. More specifically:
 - The LSCC has commenced, for each case handler in the RRT, a 'regular scheduled weekly case review meeting with the RRT manager, in which the strategy and timeline for resolution for each open case is discussed and agreed, focusing on timeliness, as well as proportionality and outcome';
 - The RRT manager now 'meets with the team fortnightly where these approaches are discussed' and reports 'case trends and movements to the Law Complaints Officer';
 - The LSCC has implemented a process whereby the RRT team (through the RRT manager) make recommendations to the Law Complaints Officer to 'formally close complaints that cannot be resolved to the complainant's satisfaction but where there is no merit in taking them on to resource intensive formal investigation'; and
 - The LSCC has commenced building a 'more multi-disciplinary team' including engaging 'two non-lawyer qualified investigators (Certificate IV) on 6 month secondments from Consumer Protection WA' and 'a further qualified investigator who also has extensive experience in consumer and customer facing teams (including in consumer facing roles under the Uniform Law in Victoria)'.
- It is particularly pleasing to observe that the steps taken by the LSCC to give effect to the recommendations have resulted in the LSCC exceeding the target of having 75% of matters subject to rapid resolution being resolved in less than 90 days, by no later than the end of the financial year 2020-21, by having 83.3% of matters subject to rapid resolution being resolved in less than 90 days in 2020-21;
- It is particularly pleasing to observe that the steps taken by the LSCC to give effect to the recommendations have resulted in the LSCC exceeding the target of having 95% of matters subject to rapid resolution being resolved within 6 months, by no later than the end of the financial year 2020-21, by having 97.1% of matters subject to rapid resolution being resolved within 6 months in 2020-21; and

- It is pleasing that the steps proposed to be taken by the LSCC to give effect to the recommendations are resulting in the necessary preparatory work in relation to improvements to the key performance indicators being reviewed upon the introduction of the Uniform Law, noting that '[t]he Uniform Law is expected to commence in 2022, and planning is underway concerning its implementation' including, a staff member with relevant experience 'project managing the Uniform Law transition across the whole office'.

Having carefully considered the information provided by the LSCC, Recommendation 1 has been given effect in part, steps have been taken and are proposed to be taken for the remainder of Recommendation 1.

3.2 Recommendation 2

Recommendation 2: That the LSCC immediately identify all investigations older than two years of age and ensure they are resolved as a matter of priority, with at least 50% of those investigations to be resolved by the end of the financial year 2020-21, another 25% by the end of the financial year 2021-22, and the remaining 25% by the end of the financial year 2022-23.

As set out in section 3.1 of this report, complaints, including the investigation of more serious conduct issues, are dealt with by the LSCC's investigation team. As further set out in section 3.1 of this report, the LSCC is obliged to undertake expeditious and efficient resolution of complaints under the *Legal Profession Act 2008*.⁴

As part of the Investigation, the Office collected and analysed statistics provided by the LSCC on the age of complaints/own initiative investigations that were closed in 2018-19 and that were open at the time of the request, namely 9 October 2019. The Office found:

The LPCC closed 76 complaints/own initiative investigations between 1 July 2018 and 30 June 2019... most complaints/own initiative investigations (42/76, 55.3%) took over 12 months to finalise. For the 42 complaints/own initiative investigations that were more than 12 months old at the time they were finalised, the age of the matter ranged from 368 to 1434 days, with a median age of 683 days.

The oldest complaint closed in 2018-19 was nearly four years old.

...

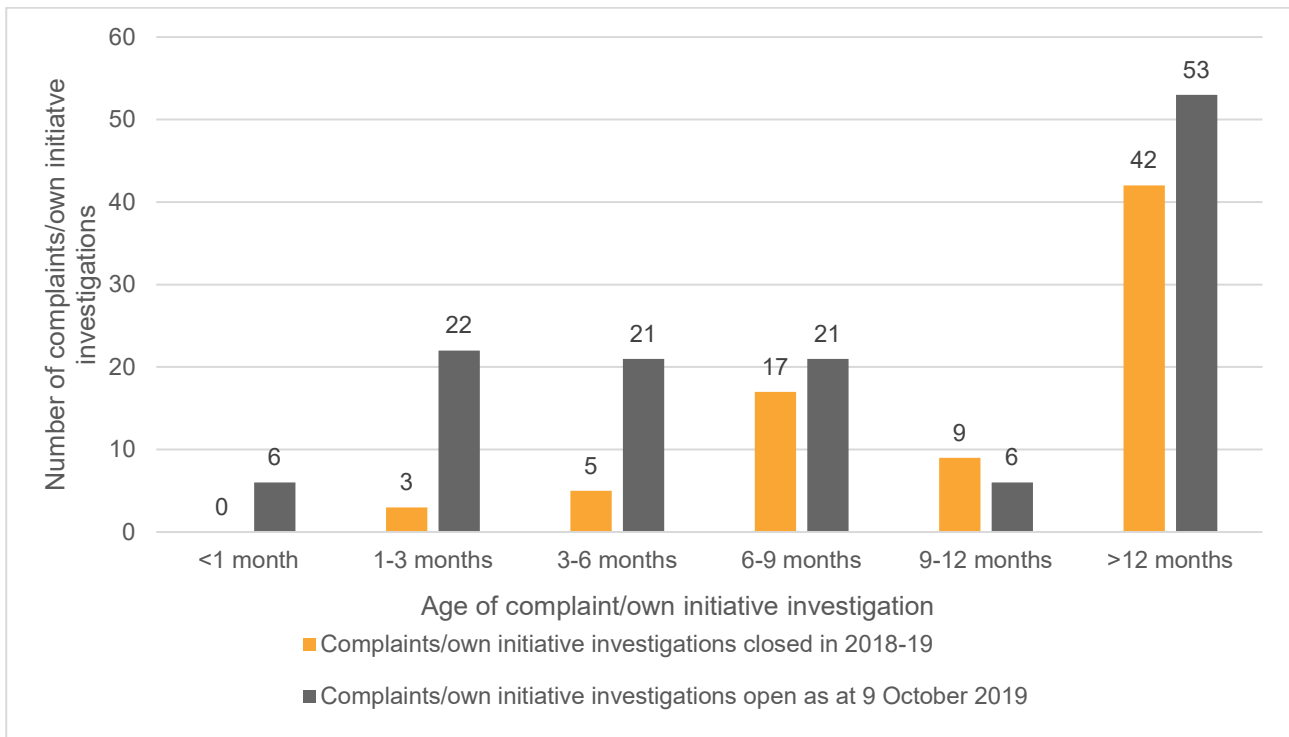
In 2018-19, the LPCC's aim to finalise investigations within 12 months was achieved in less than half (44.7%) of complaints/own initiative investigations.

...there was a high proportion of aged open complaints/own initiative investigations at the time of the request, with close to half (53, 41.1%) of open complaints/own initiative investigations open for over 12 months. For the 53 complaints/own initiative investigations that were more than 12 months old at 9 October 2019, the age of matters ranged from 366 to 2150 days, with a median age of 534 days.

The oldest open complaint/own initiative investigation was nearly six years old as at 9 October 2019.

⁴ *Legal Profession Act 2008*, s. 431. See now the *Legal Profession Uniform Law Application Act 2022* (WA).

Figure 2: Number of complaints/own initiative investigations closed in 2018-19 and open, by age of matter



Source: Legal Profession Complaints Committee

The Investigation Report observed that achieving changes to timeliness involve both practice changes and cultural change:

A complaints handling body is more likely to prioritise the timely resolution of complaints, effective communication with stakeholders and fair and reasonable decision making if such behaviours are supported by the underlying culture. The promotion of a positive and consumer-focused culture that values the timely resolution of complaints is therefore essential to the effectiveness of complaints handling.

In doing so, the Investigation Report noted improvements to complaint handling outcomes at the Victorian Legal Services Commissioner and the Office arising from both practice changes and cultural change.

The LSCC was provided the opportunity to comment on the preliminary report of the Investigation. The staged implementation of improvements to the LSCC’s timeliness of complaint handling, as suggested in the LSCC letter as set out in section 3.1 of this report, are further applicable to Recommendation 2. The Ombudsman noted in the Investigation Report:

The LPCC, for the reasons [outlined in the LPCC letter], suggested the staged implementation of improvements to the LPCC’s timeliness of complaint handling. This suggestion is, in my view, consistent with good practice, likely to achieve permanent improvements more effectively and, in all the circumstances, entirely reasonable.

The Ombudsman, in the Investigation Report, stated:

In 2018-19, the LPCC’s aim to finalise investigations within 12 months was achieved in less than half (44.7%) of complaints/own initiative investigations. For the 53 complaints/own initiative investigations that were more than 12 months old at 9 October 2019, the age of

matters ranged from 366 to 2150 days, with a median age of 534 days. The oldest open complaint/own initiative investigation was nearly six years old as at 9 October 2019.

In my opinion, these timeframes for investigating complaints are excessive and wrong. In the context of both literature and good practice and section 431 of the *Legal Profession Act 2008*, and having carefully considered the LPCC letter, the timeliness currently achieved by the LPCC is not expeditious or efficient. It is my view that change can be achieved [through practices changes and cultural change]. In so expressing this view, I note particularly that the complaint handling processes prescribed by the Uniform Law confer the [complaint handling body] with considerable additional flexibility to resolve matters efficiently, proportionally and fairly via determinative powers and the demarcation of consumer matters and disciplinary matters.

For the above reasons, the Ombudsman made Recommendation 2.

The Office requested that the LSCC inform the Office of the steps taken to give effect to the recommendation. In response, the LSCC provided the following information:

Ultimately, 42 investigations [older than two years of age] were identified, including a number that had been put 'on hold' because of ongoing proceedings or other reasons.

...

Of those 42 matters, 22 were closed – 52.4% of the cases

...

The 50% resolution target was met by active case management of those cases.

Work is continuing to reach the 2021-22 and 2022-3 targets, in tandem with Recommendations 3 to 5.

Careful analysis of the information provided by the LSCC indicates:

- The LSCC identified all investigations older than two years of age, of which there were 42;
- The LSCC exceeded the target of having at least 50% of those investigations resolved by the end of the financial year 2020-21 by resolving 22 of the 42 identified investigations (52.4%) through 'active case management of those cases'; and
- By exceeding the target of having at least 50% of those investigations resolved by the end of the financial year 2020-21 through 'active case management of those cases', the LSCC is undertaking the necessary preparatory work to resolve another 25% of those investigations by the end of the financial year 2021-22, and the remaining 25% by the end of the financial year 2022-23, noting '[w]ork is continuing to reach the 2021-22 and 2022-3 targets, in tandem with Recommendations 3 to 5'.

The Office requested that the LSCC provide further information to the Office regarding the steps taken to give effect to the recommendation. In response, the LSCC provided the following information in a letter dated 18 July 2022:

... that 81.1% of investigations which were older than 2 years at the time of the Ombudsman's Report, have been resolved ... [we expect] the balance of those investigations to be resolved by the end of June 2023.

Having carefully considered the information provided by the LSCC, Recommendation 2 has been given effect in part, steps have been taken and are proposed to be taken for the remainder of Recommendation 2.

3.3 Recommendation 3

Recommendation 3: That the LSCC retain a separate disciplinary investigation process but improve that process with a view to 75% of matters subject to disciplinary investigation being resolved in less than two years by the end of the financial year 2021-22.

As set out in section 3.1 of this report, complaints, including the investigation of more serious conduct issues, are dealt with by the LSCC's investigation team. As further noted in section 3.1 of this report, the LSCC is obliged to undertake expeditious and efficient resolution of complaints under the *Legal Profession Act 2008*.⁵

The staged implementation of improvements to the timeliness of complaint handling, as suggested in the LSCC letter that is set out in sections 3.1 and 3.2 of this report, and the Ombudsman's opinion regarding the LSCC's timeframes for investigating complaints, as set out in section 3.2 of this report, are further applicable to Recommendation 3. The Ombudsman, in the Investigation Report, stated:

In 2018-19, the LPCC's aim to finalise investigations within 12 months was achieved in less than half (44.7%) of complaints/own initiative investigations. For the 53 complaints/own initiative investigations that were more than 12 months old at 9 October 2019, the age of matters ranged from 366 to 2150 days, with a median age of 534 days. The oldest open complaint/own initiative investigation was nearly six years old as at 9 October 2019.

In my opinion, these timeframes for investigating complaints are excessive and wrong. In the context of both literature and good practice and section 431 of the *Legal Profession Act 2008*, and having carefully considered the LPCC letter, the timeliness currently achieved by the LPCC is not expeditious or efficient. It is my view that change can be achieved [through practices changes and cultural change]. In so expressing this view, I note particularly that the complaint handling processes prescribed by the Uniform Law confer the [complaint handling body] with considerable additional flexibility to resolve matters efficiently, proportionally and fairly via determinative powers and the demarcation of consumer matters and disciplinary matters.

For the above reasons, the Ombudsman made Recommendation 3.

The Office requested that the LSCC inform the Office of the steps taken to give effect to the recommendation. In response, the LSCC provided the following information:

Work is underway to reach the 2021-22 target, in combination with Recommendation 2, through active case management, monitoring, reporting and reviewing practices in tandem with Uniform Law implementation planning.

...

New electronic case management system (CMS), which is soon to be implemented, will also allow improved reporting in these matters, and in respect of other case timeliness targets.

Careful analysis of the information provided by the LSCC indicates:

- The LSCC informed the Office that '[w]ork is underway to reach the 2021-22 target, in combination with Recommendation 2';

⁵ *Legal Profession Act 2008*, s. 431. See now the *Legal Profession Uniform Law Application Act 2022* (WA).

- Reference to Recommendation 2 is directly relevant to Recommendation 3 given that both recommendations include a timeliness target of 75% of matters subject to disciplinary investigation being resolved in less than two years by the end of the financial year 2021-22;
- The steps taken to give effect to Recommendations 2 and 3 comprise a range of improvements to the LSCC's disciplinary investigation process, including 'active case management, monitoring, reporting and reviewing practices in tandem with Uniform Law implementation planning' and a '[n]ew electronic case management system...[which] will also allow improved reporting in these matters, and in respect of other case timeliness targets' (see also section 3.13 of this report); and
- The LSCC's improvements to its disciplinary investigation process and reporting are important steps in improving the timeliness of disciplinary investigations, and accordingly, the achievement of Recommendation 3 by the end of the financial year 2021-22.

The Office requested that the LSCC provide further information to the Office regarding the steps taken to give effect to the recommendation. In response, the LSCC provided the following information in a letter dated 18 July 2022:

... receiving the Report, the Committee has improved its disciplinary investigation process to the extent that 81% of disciplinary investigations finalised in 2021-22 were resolved within 2 years of being opened.

Having carefully considered the information provided by the LSCC, Recommendation 3 has been given effect.

3.4 Recommendation 4

Recommendation 4: Upon the achievement of Recommendation 3, the LSCC seek to have 75% of disciplinary investigations resolved in less than 12 months, and 90% of disciplinary investigations resolved within two years by end of the financial year 2022-23 with no investigation open after two years by 2023-24 unless there are circumstances beyond the control of the LSCC.

As set out in section 3.1 of this report, complaints, including the investigation of more serious conduct issues, are dealt with by the LSCC's investigation team. As further noted in section 3.1 of this report, the LSCC is obliged to undertake expeditious and efficient resolution of complaints under the *Legal Profession Act 2008*.⁶

The staged implementation of improvements to the timeliness of complaint handling, as suggested in the LSCC letter that is set out in sections 3.1 and 3.2 of this report, and the Ombudsman's opinion regarding the LSCC's timeframes for investigating complaints, as set out in section 3.2 of this report, are further applicable to Recommendation 4. The Ombudsman, in his opinion in the Investigation Report, stated:

In 2018-19, the LPCC's aim to finalise investigations within 12 months was achieved in less than half (44.7%) of complaints/own initiative investigations. For the 53 complaints/own initiative investigations that were more than 12 months old at 9 October 2019, the age of matters ranged from 366 to 2150 days, with a median age of 534 days. The oldest open complaint/own initiative investigation was nearly six years old as at 9 October 2019.

In my opinion, these timeframes for investigating complaints are excessive and wrong. In the context of both literature and good practice and section 431 of the *Legal Profession Act 2008*, and having carefully considered the LPCC letter, the timeliness currently achieved by the LPCC is not expeditious or efficient. It is my view that change can be achieved [through practices changes and cultural change]. In so expressing this view, I note particularly that the complaint handling processes prescribed by the Uniform Law confer the [complaint handling body] with considerable additional flexibility to resolve matters efficiently, proportionally and fairly via determinative powers and the demarcation of consumer matters and disciplinary matters.

For the above reasons, the Ombudsman made Recommendation 4.

The Office requested that the LSCC inform the Office of the steps taken to give effect to the recommendation. In response, the LSCC provided the following information:

Work on Recommendations 2 and 3 is preparatory to achieving this target.

Careful analysis of the information provided by the LSCC indicates:

- It is noted that Recommendation 4 is enlivened by the achievement of Recommendation 3, with the timeframe for the achievement of Recommendation 3 being by the end of the financial year 2021-22;
- As set out in section 3.3 of this report, the LSCC has given effect to Recommendation 3, with 81% of disciplinary investigations finalised in 2021-22 resolved within 2 years of being opened;

⁶ *Legal Profession Act 2008*, s. 431. See now the *Legal Profession Uniform Law Application Act 2022* (WA).

- The LSCC further identified, correctly in my view, that '[w]ork on Recommendations 2 and 3 is preparatory to achieving [Recommendation 4]';
- As set out in sections 3.2 and 3.3 of this report, steps have been taken, and are proposed to be taken, to give effect to Recommendations 2 and 3, including the identification of all investigations older than two years of age and the implementation of a range of improvements to its disciplinary investigation process and reporting; and
- Consistent with the staged implementation of improvements to the timeliness of the LSCC's complaint handling, as suggested in the LSCC letter, the timeliness targets set out in Recommendations 2 and 3 would be achieved prior to the timeliness targets set out in Recommendation 4 and the steps taken to give effect to Recommendations 2 and 3 will contribute to, and are a necessary prerequisite for, the achievement of Recommendation 4.

Having carefully considered the information provided by the LSCC, steps have been taken, and are proposed to be taken, to give effect to Recommendation 4.

3.5 Recommendation 5

Recommendation 5: The LSCC have 85% of disciplinary investigations resolved within 12 months by the end of the financial year 2023-24 and maintain that timeliness of resolution.

As set out in section 3.1 of this report, complaints, including the investigation of more serious conduct issues, are dealt with by the LSCC's investigation team. As further noted in section 3.1 of this report, the LSCC is obliged to undertake expeditious and efficient resolution of complaints under the *Legal Profession Act 2008*.⁷

The staged implementation of improvements to the timeliness of complaint handling, as suggested in the LSCC letter that is set out in sections 3.1 and 3.2 of this report, and the Ombudsman's opinion regarding the LSCC's timeframes for investigating complaints, as set out in section 3.2 of this report, are further applicable to Recommendation 5. The Ombudsman, in the Investigation Report, stated:

In 2018-19, the LPCC's aim to finalise investigations within 12 months was achieved in less than half (44.7%) of complaints/own initiative investigations. For the 53 complaints/own initiative investigations that were more than 12 months old at 9 October 2019, the age of matters ranged from 366 to 2150 days, with a median age of 534 days. The oldest open complaint/own initiative investigation was nearly six years old as at 9 October 2019.

In my opinion, these timeframes for investigating complaints are excessive and wrong. In the context of both literature and good practice and section 431 of the *Legal Profession Act 2008*, and having carefully considered the LPCC letter, the timeliness currently achieved by the LPCC is not expeditious or efficient. It is my view that change can be achieved [through practices changes and cultural change]. In so expressing this view, I note particularly that the complaint handling processes prescribed by the Uniform Law confer the [complaint handling body] with considerable additional flexibility to resolve matters efficiently, proportionally and fairly via determinative powers and the demarcation of consumer matters and disciplinary matters.

For the above reasons, the Ombudsman made Recommendation 5.

The Office requested that the LSCC inform the Office of the steps taken to give effect to the recommendation. In response, the LSCC provided the following information:

Work on Recommendations 2 and 3 is preparatory to achieving this target.

Careful analysis of the information provided by the LSCC indicates:

- The timeframe for the achievement of Recommendation 5 is by the end of the financial year 2023-24;
- The LSCC has identified that '[w]ork on Recommendations 2 and 3 is preparatory to achieving this target';
- As set out in sections 3.2 and 3.3 of this report, steps have been, and are proposed to be, taken to give effect to Recommendations 2 and 3, including the identification of all

⁷ *Legal Profession Act 2008*, s. 431. See now the *Legal Profession Uniform Law Application Act 2022* (WA).

investigations older than two years of age and the implementation of a range of improvements to its disciplinary investigation process and reporting; and

- Consistent with the staged implementation of improvements to the timeliness of the LSCC's complaint handling, as suggested in the LSCC letter, the timeliness targets set out in Recommendations 2 and 3 would be achieved prior to the timeliness target set out in Recommendation 5 and the steps taken to give effect to Recommendations 2 and 3 will contribute to, and are a prerequisite for, the achievement of Recommendation 5.

Having carefully considered the information provided by the LSCC, steps have been taken, and are proposed to be taken, to give effect to Recommendation 5.

3.6 Recommendation 6

Recommendation 6: That the LSCC optimise their funding through the achieving of complaint handling efficiencies.

The NSW Law Reform Commission regarded ‘Proper Funding and Resources’ as a good practice principle, noting that a complaint handling system:

...requires an adequate level of resourcing, including decent (professional and support) staffing levels, salaries which attract officers with the appropriate levels of expertise, computer hardware and software, and so on. A proper system involves not only the thorough investigation of complaints, but the timely investigation and processing of complaints, as well as a range of support and ancillary services and sufficient checks and balances to inspire public confidence.⁸

Best practice guidance developed by Australian ombudsmen similarly states the importance of a complaint management system being adequately resourced, with the adequacy of resourcing reflected in outcomes such as timeliness and quality of service.⁹ Best practice guidance further indicates the need for resourcing to be regularly reviewed by management to ensure it is sufficient to achieve desired outcomes.¹⁰

The Investigation Report observed that the passage of the Uniform Law provided an opportunity for the LSCC to consider its resourcing requirements. In this context, the Investigation Report considered the LSCC’s resourcing:

The potential for an increased workload arising from the commencement of the Uniform Law is of concern given that the LPCC has consistently reported significant workload pressures in their annual reports...

...

The LPCC reported that these workload pressures have impacted its capacity to undertake proactive and preventative work, namely audits of incorporated legal practices and the assessment of whether risk alert letters should be sent out to firms that have been the subject of multiple inquiries or complaints of substance against their practitioners.

As noted in section 3.2 of this report, improvements to complaint handling outcomes at the Victorian Legal Services Commissioner and the Office arose because of practice changes and cultural change, with the Investigation Report outlining the improved complaint handling efficiencies that were achieved at the office of the Western Australian Ombudsman:

...in 2007-08, the office of the Western Australian Ombudsman commenced a major complaint handling improvement program. Following the implementation of a range of strategies to improve complaint handling and the establishment of a culture that placed a high value on the timely resolution of complaints (without compromising quality), the average age of complaints went from 173 days as at 30 June 2007 to 47 days as at 30 June 2020, complaints older than 6 months have decreased by 80% and all investigations are finalised within 12 months.¹¹

⁸ NSW Law Reform Commission, *Scrutiny of the legal profession: Complaints against lawyers*, Report 70 (1993), p. 56.

⁹ Commonwealth Ombudsman, *Better Practice Guide to Complaint Handling*, April 2009, p. 8; Ombudsman SA, *Complaint management framework*, March 2016, p. 8.

¹⁰ International Organization for Standardization, *Quality management – Customer satisfaction – Guidelines for complaints handling in organizations*, ISO 10002:2018(E), p. 8.

¹¹ *Ombudsman Western Australia Annual Report 2019-20*, p. 29.

The result of this improvement program was that the cost of handling complaints reduced by 37%. More specifically, the cost per finalised complaint to the office of the Ombudsman in 2007-08 was \$2,941, compared to \$1,858 in 2019-20.

The Ombudsman, in the Investigation Report, stated:

In my opinion, it is wrong for the LPCC not to be as efficient as practicable in dealing with complaints and the complaints handling improvements the subject of Recommendations 2 to 5 will result in efficiencies.

For the above reasons, the Ombudsman made Recommendation 6.

The Office requested that the LSCC inform the Office of the steps taken to give effect to the recommendation. In response, the LSCC provided the following information:

Current work included but not limited to Uniform Law implementation, commencement of the [electronic complaints management system], subsequent management reporting and more active case management, strategic direction planning, and overall workforce/service model review.

...

The Board has developed a new strategic direction which is soon to be formally launched. The new strategic direction is particularly important with the upcoming introduction of the Uniform Law, and will inform business planning, priorities and initiatives going forward for the Board and its committees and staff...

We have also commenced a workforce/service model review where the Board's Management Committee selected a preferred high-level model (developed by external consultants after consultation with senior management), on 24 June 2021. The Management Committee then endorsed this model for full development on 26 August 2021.

The new workforce model is being designed to respond to the imminent Uniform Law and strategic direction launch, and the expectation that the Board will, in due course, become a respondent to the Public Sector CSA General Agreement. It also aims to build on learnings from the Ombudsman's review, provide greater flexibility and reduce duplication, use best practice initiatives generally, and consolidate the benefits from the co-location of the two former offices in the one location in mid-2017.

Careful analysis of the information provided by the LSCC indicates:

- The LSCC has various initiatives underway to optimise its funding through the achievement of complaint handling efficiencies, including, but not limited to 'Uniform Law implementation, commencement of the [electronic complaints management system], subsequent management reporting and more active case management, strategic direction planning, and overall workforce/service model review'. More specifically:
 - A new workforce/service model has been 'developed by external consultants after consultation with senior management';
 - The Management Committee of the Legal Practice Board 'selected a preferred high-level model...on 24 June 2021' and then 'endorsed this model for full development on 26 August 2021'; and
 - The endorsed workforce/service model is 'designed to respond to the imminent Uniform Law and [launch of the Legal Practice Board's strategic direction]' and, particularly relevant to the optimisation of funding through the achievement of

complaint handling efficiencies, is intended to provide 'greater flexibility and reduce duplication, use best practice initiatives generally, and consolidate the benefits from the co-location of the two former offices in the one location in mid-2017'.

- The initiatives underway by the LSCC are consistent with areas of improvement identified in the Investigation Report, including comments relating to the LSCC's resourcing, systems, processes and overall culture; and
- The initiatives underway by the LSCC are important steps in improving the complaint handling outcomes and the concomitant optimisation of funding through the achieving of complaint handling efficiencies, as was observed at the Victorian Legal Services Commissioner and the Office when similar changes to resourcing, systems, processes and overall culture were implemented.

Having carefully considered the information provided by the LSCC, steps have been taken, and are proposed to be taken, to give effect to Recommendation 6.

3.7 Recommendation 7

Recommendation 7: That the LSCC identify a series of key performance indicators regarding timeliness of complaint handling.

The Investigation Report identified that the development, measurement, reporting and review of key performance indicators is central to the transparency, accountability and overall effectiveness of a legal regulatory body. Lord Hunt, in his review of the legal regulatory system in England and Wales, noted:

The existence of effective performance measures is an important factor in delivering outcomes, and essential to enhancing transparency and accountability.

...

Measuring outcomes enables everyone to know what impact enforcement activities are having, and whether these have improved compliance, or remedied harm caused by non-compliance. Reporting on these measures, through existing channels to stakeholders and/or Parliament, helps keep both the regulated community and the general public appropriately apprised of what regulators are up to and whether they are effectively discharging their statutory duties, holding them to account.¹²

The Office found that the LSCC does not have, nor report on, key performance indicators. The LSCC was provided the opportunity to comment on the preliminary report of the Investigation. In the LSCC letter, the LSCC suggested that the collection, measurement and publishing of results of key performance indicators be subject to a staged implementation approach:

With 2021-22 expected to be the first year of operation of Uniform Law, I would also respectfully suggest that the target date in Recommendation 9 and Recommendation 10 be extended or amended. The data should still be collected and the performance measured, but, given the changeover expected between legislative regimes, publishing the results may be confusing and onerous.

The Ombudsman, in considering this suggestion by the LSCC, noted:

In my view, this respectful suggestion is entirely reasonable and appropriate.

The Ombudsman, in the Investigation Report, stated:

In my opinion it is wrong for the LPCC not to have key performance indicators. In the context of both literature and good practice and assisting the LPCC's compliance with section 431 of the *Legal Profession Act 2008* (insofar as the LPCC's obligations to undertake expeditious and efficient complaint handling can be analysed and understood optimally against objectively measured and benchmarked indicators of what constitutes expeditious and efficient complaint handling), and having carefully considered the LPCC letter, the LPCC would benefit from identifying, publishing, measuring against and improving over time, a series of key performance indicators. Overall, the lack of key performance indicators is detrimental to the LPCC's transparency, accountability and effectiveness.

Furthermore, the lack of timeliness key performance indicators is particularly relevant given that:

¹² Lord Hunt of Wirral, *The Hunt Review of the Regulation of Legal Services*, October 2009, pp. 52-53.

- Research indicates that timeliness is the single most important driver of consumer satisfaction with services;¹³
- The measurement of timeliness is consistent with complaint handling good practice;¹⁴
- What is measured, controlled and paid attention to contributes to the underlying culture of an organisation;¹⁵ and
- There is room for improvement in the LPCC's timeliness of complaint resolution with over half of complaints closed in 2018-19 being over 12 months old and the oldest open complaint being six years old...

The Uniform Law provides an opportunity for the LPCC to benchmark their performance with other Uniform Law jurisdictions. In undertaking this Investigation, the Office notes the difficulty in assessing the performance of the LPCC relative to other jurisdictions given different operationalisations of complaints. Developing a consistent approach to the measurement of performance in consultation with other Uniform Law jurisdictions permits the LPCC to benchmark their performance and provides an impetus for the sharing of good practice.

For the above reasons, the Ombudsman made Recommendation 7. The Office requested that the LSCC inform the Office of the steps taken to give effect to the recommendation. In response, the LSCC provided the following information:

Initial KPIs as per Recommendations 1 and 2.

Careful analysis of the information provided by the LSCC indicates:

- The LSCC informed the Office that '[i]nitial KPIs as per Recommendations 1 and 2';
- Recommendations 1 and 2 contain a series of key performance indicators regarding timeliness of complaint handling, including:
 - 75% of matters subject to rapid resolution being resolved in less than 90 days;
 - 95% of matters subject to rapid resolution being resolved within 6 months;
 - 50% of investigations identified to be older than two years of age resolved by the end of the financial year 2020-21;
 - 75% of investigations identified to be older than two years of age resolved by the end of the financial year 2021-22; and
 - All investigations identified to be older than two years of age resolved by the end of the financial year 2022-23.

Having carefully considered the information provided by the LSCC, Recommendation 7 has been given effect.

¹³ Ombudsman SA, *Complaint management framework*, March 2016, p. 5.

¹⁴ Commonwealth Ombudsman, *Better Practice Guide to Complaint Handling*, April 2009, p. 28; Ombudsman SA, *Complaint management framework*, March 2016, p. 25.

¹⁵ Edgar H. Schein, *The corporate culture survival guide*, 2009, Jossey-Bass, San Francisco, p. 131.

3.8 Recommendation 8

Recommendation 8: That the LSCC identify a series of key performance indicators regarding the cost of complaint handling.

The Investigation Report identified that the development, measurement, reporting and review of key performance indicators is central to the transparency, accountability and overall effectiveness of a legal regulatory body. The Investigation Report further identified that the LSCC does not have, nor report on, key performance indicators. The Ombudsman, in the Investigation Report, stated:

In my opinion it is wrong for the LPCC not to have key performance indicators. In the context of both literature and good practice and assisting the LPCC's compliance with section 431 of the *Legal Profession Act 2008* (insofar as the LPCC's obligations to undertake expeditious and efficient complaint handling can be analysed and understood optimally against objectively measured and benchmarked indicators of what constitutes expeditious and efficient complaint handling), and having carefully considered the LPCC letter, the LPCC would benefit from identifying, publishing, measuring against and improving over time, a series of key performance indicators. Overall, the lack of key performance indicators is detrimental to the LPCC's transparency, accountability and effectiveness.

For the above reasons, the Ombudsman made Recommendation 8. The Office requested that the LSCC inform the Office of the steps taken to give effect to the recommendation. In response, the LSCC provided the following information:

Work on recommendations 2, 3, and 6 is preparatory to achieving this target.

The Office subsequently made a further request, on 1 July 2022, that the LSCC inform the Office of the steps taken to give effect to the recommendation. The LSCC provided the following information:

In your letter, you seek inter alia the key performance indicators (KPIs) regarding the cost of complaint handling, which were the subject of Recommendation 8 in the Report. I regret to say that, while considerable work has been done towards the development of those KPIs, that work is not yet complete and the KPIs have not been finalised. Accordingly, the Committee will not be in a position to provide you with those KPIs until later this year.

Careful consideration has been given to the statement of the LSCC that "considerable work has been done towards the development of [the] KPIs" and that the LSCC has stated it will be in a position to provide the KPIs later in 2022. It is further noted that this current timeline for implementing the key performance indicators will mean that the LSCC is able to achieve the deadlines required by Recommendation 9 (see discussion in the next section of this report). In a letter dated 5 August 2022, the LSCC stated:

In 2021, the Legal Practice Board (**Board**), which is required to ensure that the Committee is provided with the "services and facilities that are reasonably necessary to enable the Committee to perform its functions" (*Legal Profession Uniform Law Application Act 2022 (WA)*, section 60), from which the members of the Committee are drawn, and which is the designated local regulatory authority (**DLRA**) for most aspects of the Uniform Law, including professional discipline, retained external consultants to conduct a workforce/service model review of both itself and the Committee (**Review**). The Review was commissioned following a recognition by the Board that it would be made a respondent to the *Public Services and Government Officers CSA General Agreement 2019*, and would be required to comply with the requirements thereof. The Review was also commissioned in an endeavour to enable the Board and the Committee

to meet the progressive objectives outlined in the Board's previously developed strategic direction, and to allow both the Board and the Committee to become more efficient and effective, and to operate more collaboratively. The Review was completed towards the end of 2021 and, on 21 March 2022, a new organisational structure for the Board and the Committee commenced. The introduction of the new organisational structure and the introduction, on 1 July 2022, of the Uniform Law has made it necessary for the Board to conduct a comprehensive assessment of the cost of regulating the profession under the Uniform Law. Part of that process has been the assessment of the cost of complaint handling by the Committee and that work is well advanced. It is considered that when that work is complete, it will be possible to identify the KPIs regarding the cost of complaint handling and to refine them over time in preparation for their publication in the Committee's annual report in 2022/23. I should also mention that, although the Board is the DLRA for "dispute resolution and professional discipline" under Chapter 5 of the Uniform Law, on 17 June 2022, the Board resolved to delegate all its powers and functions under Chapter 5 to the Committee.

It is clear that actions have been taken to introduce the key performance indicators that are the subject of Recommendation 8 and that the time taken to do so is reasonable and consistent with the timeframe required by Recommendation 9.

Having carefully considered the information provided by the LSCC, steps have been taken and are proposed to be taken to give effect to Recommendation 8.

3.9 Recommendation 9

Recommendation 9: That the LSCC publish these key performance indicators in their annual report in 2022-23.

The Ombudsman, in the Investigation Report, stated:

In my opinion it is wrong for the LPCC not to have key performance indicators. In the context of both literature and good practice and assisting the LPCC's compliance with section 431 of the *Legal Profession Act 2008* (insofar as the LPCC's obligations to undertake expeditious and efficient complaint handling can be analysed and understood optimally against objectively measured and benchmarked indicators of what constitutes expeditious and efficient complaint handling), and having carefully considered the LPCC letter, the LPCC would benefit from identifying, publishing, measuring against and improving over time, a series of key performance indicators. Overall, the lack of key performance indicators is detrimental to the LPCC's transparency, accountability and effectiveness.

For the above reasons, the Ombudsman made Recommendation 9.

The Office requested that the LSCC inform the Office of the steps taken to give effect to the recommendation. The LSCC provided the following information:

To do in 2023.

The LSCC subsequently provided the following information:

Recommendation 9 was that the Committee publish in its annual report in 2022-23 the KPIs which it had identified regarding the timeliness and cost of complaint handling...

The Legal Profession Uniform Law is expected to be introduced during the current financial year, with 2022-23, therefore, likely to be the first full year of its operation. During 2022-23, the Committee will be assessing its performance in line with your recommendations (including against identified KPIs), as it works under the new legislative regime, utilising the [electronic complaints management system].

Accordingly, the Committee will be measuring its performance against the identified KPIs before it publishes the KPIs in its annual report for 2022-23. The work that is already underway, and which will be ongoing, will enable ready compliance with [Recommendation 9 at the relevant time].

It is clear that actions have been taken to introduce the key performance indicators that are the subject of Recommendation 8 and that the time taken to do so is reasonable and consistent with the timeframe required by Recommendation 9.

Having carefully considered the information provided by the LSCC, steps have been taken, and are proposed to be taken, to give effect to Recommendation 9.

3.10 Recommendation 10

Recommendation 10: That the LSCC publish their performance against these key performance indicators in their annual report for the financial year 2023-24 and then each annual report thereafter.

As set out in section 3.7 of this report, the Investigation Report identified that the development, measurement, reporting and review of key performance indicators is central to the transparency, accountability and overall effectiveness of a legal regulatory body. The Investigation Report further identified that the LSCC does not have, nor report on, key performance indicators.

The staged implementation approach to the collection, measurement and publishing of results of key performance indicators, as suggested in the LSCC letter that is set out in section 3.7 of this report, and the Ombudsman's opinion regarding key performance indicators, also set out in section 3.7 of this report, are further applicable to Recommendation 10. The Ombudsman, in the Investigation Report, stated:

In my opinion it is wrong for the LPCC not to have key performance indicators. In the context of both literature and good practice and assisting the LPCC's compliance with section 431 of the *Legal Profession Act 2008* (insofar as the LPCC's obligations to undertake expeditious and efficient complaint handling can be analysed and understood optimally against objectively measured and benchmarked indicators of what constitutes expeditious and efficient complaint handling), and having carefully considered the LPCC letter, the LPCC would benefit from identifying, publishing, measuring against and improving over time, a series of key performance indicators. Overall, the lack of key performance indicators is detrimental to the LPCC's transparency, accountability and effectiveness.

For the above reasons, the Ombudsman made Recommendation 10.

The Office requested that the LSCC inform the Office of the steps taken to give effect to the recommendation. The LSCC provided the following information:

To do in 2024.

The LSCC subsequently provided the following information:

Recommendation 10 was that the Committee publish its performance against the KPIs in its annual report in 2023-24 and then in each of its annual reports thereafter.

The Legal Profession Uniform Law is expected to be introduced during the current financial year, with 2022-23, therefore, likely to be the first full year of its operation. During 2022-23, the Committee will be assessing its performance in line with your recommendations (including against identified KPIs), as it works under the new legislative regime, utilising the [electronic complaints management system].

Accordingly, the Committee will be measuring its performance against the identified KPIs before it publishes the KPIs in its annual report for 2022-23. The work that is already underway, and which will be ongoing, will enable ready compliance with [Recommendation 10 at the relevant time].

Careful analysis of the information provided by the LSCC indicates:

- That the achievement of this recommendation is predicated upon the LSCC publishing their performance against key performance indicators in their annual report in 2023-24 (and each annual report thereafter);¹⁶
- As set out in sections 3.7 and 3.8 of this report, the LSCC has identified a series of key performance indicators regarding the timeliness of complaint handling, has informed the Office that work on Recommendations 2, 3, and 6 is preparatory to the identification of a series of key performance indicators regarding the cost of complaint handling and has provided the Office further information on the considerable work that has been done towards the development of those key performance indicators; and
- The LSCC has indicated that the electronic complaints management system will allow for improved management reporting and easier measurement of the LSCC's performance against key performance indicators. The implementation of the electronic complaints management system is also an important step towards identifying and developing key performance indicators beyond the initial targets set in the Investigation Report, and to give effect to Recommendation 10.

Having carefully considered the information provided by the LSCC, steps have been taken, and are proposed to be taken, to give effect to Recommendation 10.

¹⁶ Section 571(1) of the *Legal Profession Act 2008* provides 'The chairperson of the Complaints Committee must on or before 31 December in each year cause an annual report in relation to the activities of the Complaints Committee in the year ending on the preceding 30 June to be made and submitted to the Attorney General'. The *Legal Profession Uniform Law Application Act 2022 (WA)* has a consistent requirement. Accordingly, the LSCC has until the 31 December 2024 to submit its 2023-24 annual report.

3.11 Recommendation 11

Recommendation 11: That the LSCC adjust these key performance indicators in line with the timeliness to be achieved through the implementation of recommendations 2-5.

As set out in section 3.7 of this report, the Investigation Report identified that the development, measurement, reporting and review of key performance indicators is central to the transparency, accountability and overall effectiveness of a legal regulatory body. The Investigation Report further identified that the LSCC does not have, nor report on, key performance indicators.

The staged implementation approach to the collection, measurement and publishing of results of key performance indicators, as suggested in the LSCC letter that is set out in section 3.7 of this report, and the Ombudsman's opinion regarding key performance indicators, also set out in section 3.7 of this report, are further applicable to Recommendation 11. The Ombudsman, in the Investigation Report, stated:

In my opinion it is wrong for the LPCC not to have key performance indicators. In the context of both literature and good practice and assisting the LPCC's compliance with section 431 of the *Legal Profession Act 2008* (insofar as the LPCC's obligations to undertake expeditious and efficient complaint handling can be analysed and understood optimally against objectively measured and benchmarked indicators of what constitutes expeditious and efficient complaint handling), and having carefully considered the LPCC letter, the LPCC would benefit from identifying, publishing, measuring against and improving over time, a series of key performance indicators. Overall, the lack of key performance indicators is detrimental to the LPCC's transparency, accountability and effectiveness.

For the above reasons, the Ombudsman made Recommendation 11.

The Office requested that the LSCC inform the Office of the steps taken to give effect to the recommendation. In response, the LSCC provided the following information:

As we work through each recommendation (here specifically recommendations 2 to 5) we are examining how we will monitor and assess our performance - that is, how we measure our performance against those targets. These targets are acting as our initial KPI's until further KPI's are developed in line with the recommendations 7 to 12.

Careful analysis of the information provided by the LSCC indicates:

- The achievement of this recommendation is predicated on the identification of key performance indicators and the timeliness achieved through the implementation of Recommendations 2 to 5;
- As set out in sections 3.7 and 3.8 of this report, the LSCC has identified a series of key performance indicators regarding the timeliness of complaint handling, has informed the Office that work on Recommendations 2, 3, and 6 is preparatory to the identification of a series of key performance indicators regarding the cost of complaint handling and has provided the Office further information on the considerable work that has been done towards the development of those key performance indicators;
- As set out in sections 3.2 and 3.3 of this report, the LSCC has taken steps to give effect to Recommendations 2 and 3, including the identification of all investigations older than two years of age and the implementation of a range of strategies to improve its disciplinary investigation process;

- As set out in sections 3.4 and 3.5 of this report, the LSCC has identified that '[w]ork on Recommendations 2 and 3 is preparatory to achieving [Recommendations 4 and 5]'; and
- The LSCC is undertaking the necessary preparatory work to achieve this recommendation and has indicated that key performance indicators will be adjusted in line with the timeliness to be achieved through the implementation of Recommendations 2 to 5, stating '[a]s we work through [Recommendations 2 to 5] we are examining how we will monitor and assess our performance - that is, how we measure our performance against those targets', and that '[t]hese targets are acting as our initial KPI's until further KPI's are developed in line with the recommendations 7 to 12'.

Having carefully considered the information provided by the LSCC, steps have been taken, and are proposed to be taken, to give effect to Recommendation 11.

3.12 Recommendation 12

Recommendation 12: That the LSCC seek to improve their key performance indicators over time.

As set out in section 3.7 of this report, the Investigation Report identified that the development, measurement, reporting and review of key performance indicators is central to the transparency, accountability and overall effectiveness of a legal regulatory body. The Investigation Report further identified that the LSCC does not have, nor report on, key performance indicators.

The staged implementation approach to the collection, measurement and publishing of results of key performance indicators, as suggested in the LSCC letter that is set out in section 3.7 of this report, and the Ombudsman's opinion regarding key performance indicators, also set out in section 3.7 of this report, are further applicable to Recommendation 12. The Ombudsman, in the Investigation Report, stated:

In my opinion it is wrong for the LPCC not to have key performance indicators. In the context of both literature and good practice and assisting the LPCC's compliance with section 431 of the *Legal Profession Act 2008* (insofar as the LPCC's obligations to undertake expeditious and efficient complaint handling can be analysed and understood optimally against objectively measured and benchmarked indicators of what constitutes expeditious and efficient complaint handling), and having carefully considered the LPCC letter, the LPCC would benefit from identifying, publishing, measuring against and improving over time, a series of key performance indicators. Overall, the lack of key performance indicators is detrimental to the LPCC's transparency, accountability and effectiveness.

For the above reasons, the Ombudsman made Recommendation 12.

The Office requested that the LSCC inform the Office of the steps taken to give effect to the recommendation. In response, the LSCC provided the following information:

Other KPIs (including but not limited to those contemplated by Recommendation 8) to be developed.

...

I refer to the [information provided by the LSCC in relation to Recommendation 11]. In brief, further development [of key performance indicators] will take place building on what is set out in [the information provided by the LSCC in relation to Recommendations 1, 6 and 11].

Careful analysis of the information provided by the LSCC indicates:

- The achievement of this recommendation is predicated on the identification of key performance indicators and the implementation of processes to identify improvements to key performance indicators over time;
- As set out in sections 3.7 and 3.8 of this report, the LSCC has identified a series of key performance indicators regarding the timeliness of complaint handling, has informed the Office that work on Recommendations 2, 3, and 6 is preparatory to the identification of a series of key performance indicators regarding the cost of complaint handling and has provided the Office further information on the considerable work that has been done towards the development of those key performance indicators; and

- The LSCC has indicated that the achievement of Recommendation 12 will comprise the adjustment of key performance indicators in line with the timeliness to be achieved through the implementation of Recommendations 2 to 5 (as set out in section 3.11 of this report) and the development of '[o]ther KPIs (including but not limited to those contemplated by Recommendation 8)', noting 'further development [of key performance indicators] will take place building on what is set out in [the information provided by the LSCC in relation to Recommendations 1, 6 and 11]'

Having carefully considered the information provided by the LSCC, steps have been taken, and are proposed to be taken, to give effect to Recommendation 12.

3.13 Recommendation 13

Recommendation 13: That the LSCC implement an electronic complaints management system by no later than the end of the financial year 2021-22 and should aim to do so by December 2021.

The Investigation Report identified that an electronic complaints management system is vital to the efficient and effective operations of a modern complaint handling body:

The benefits of a fit-for-purpose electronic complaints management system include more timely and efficient data entry, improved data accuracy, improved mechanisms for quality assurance and enhanced monitoring and reporting functionality.

...

The strategic decisions that can be informed through the analysis of data entered into an electronic complaints management system may include:

- Individual practitioners, firms or areas of legal practice that may require further capacity building or proactive investigation as a result of their complaint or complainant profile, consistent with a risk-informed regulatory approach;
- Areas of the community that are over-represented in terms of complaint numbers and may require further assistance and support; and
- Opportunities for continuous improvement in the complaint handling body's practices or allocation of resources.

Section 557(5) of the *Legal Profession Act 2008* provides that the Legal Practice Board 'must ensure that the [Committee] is provided with such services and facilities as are reasonably necessary to enable the [Committee] to perform its functions'. The *Legal Profession Uniform Law Application Act 2022* (WA) has a consistent requirement.

The Investigation Report found that the LSCC does not have an electronic complaints management system. The Investigation Report further identified that the LSCC had expressed an 'urgent' need for an electronic complaints management system in annual reports since 2005-06 and had regularly noted detrimental impacts on administrative efficiency, complaint monitoring and reporting arising from the lack of an electronic complaints management system.

In correspondence to the Office as part of the Investigation, the LSCC noted:

The operations of the Committee are funded entirely by the Legal Practice Board (**Board**). Under s 557(5) of the *Legal Profession Act 2008* (WA), the Board "must ensure that (Committee) is provided with such services and facilities as are reasonably necessary to enable the (Committee) to perform its functions". Accordingly, before an electronic complaints management system (**ECMS**) can be introduced, the Management Committee of the Board must approve the expenditure. It is for the Committee to persuade the Management Committee that an ECMS is necessary, and for the Management Committee to decide whether it is affordable.

The Committee has no doubt that an ECMS is necessary, and has been agitating for its introduction for many years.

...

The Committee first asked the Board to approve the implementation of an ECMS in June 2013. The Board agreed in principle and planning for the implementation proceeded until May 2015, but then stalled.

The Committee raised the matter with the Board again in late 2016, when the Board again agreed to investigate it, and identified potential suppliers from which it obtained proposals to provide and install an ECMS.

...

However, in January 2017 the Convenor of the Management Committee of the Board directed that there be no more work done in relation to the introduction of the ECMS until further notice. The reason given by the Convenor was that the Management Committee wanted to assess further the needs of the Board as a whole, before considering the implementation of an ECMS. Since that time, the Board has not revisited the issue.

The Ombudsman, in the Investigation Report, stated:

In my opinion, it is wrong that the LPCC does not have an electronic complaints management system. This is compounded by the fact that the LPCC itself has identified an 'urgent' need for such a system for nearly 15 years. To achieve modern and good practice for complaint handling bodies, including bodies that handle complaints about legal practitioners, and to assist compliance with section 431 of the *Legal Profession Act 2008* and proposed legislation to adopt the Uniform Law in Western Australia in an optimal way, the LPCC requires an electronic complaints management system...

Put simply, it is not possible to undertake the most timely, efficient complaint handling without an electronic complaints management system. For example, every Ombudsman in Australia and New Zealand has such a system and each for well over a decade. It is anticipated, as per the experience of the South Australian Legal Profession Conduct Commissioner, that this will lead to improvements in the efficiency and expeditiousness of its complaint handling and will facilitate more strategic decision making.

For the above reasons, the Ombudsman made Recommendation 13.

The Office requested that the LSCC inform the Office of the steps taken to give effect to the recommendation. In response, the LSCC provided the following information:

On 29 October 2020 the Management Committee approved the engagement of a preferred provider to scope the development of a tailored [electronic complaints management system], using provisions that existed in the approved budget for that financial year (and previous years), to allow this development work. At the completion of the development work further approval was provided by the Management Committee on 29 April 2021 to approve expenditure (also from the approved budget) to develop and implement the [electronic complaints management system] as scoped...

The first iteration of the [electronic complaints management system] is overdue to be launched, however migration of legacy data has occurred and final testing is taking place prior to staff training and the system going live. This is expected to occur within the month.

Careful analysis of the information provided by the LSCC indicates:

- The timeframe for the achievement of this recommendation is by the end of the financial year 2021-22 (with an aim to do so by December 2021);

- On 29 October 2020, the Management Committee of the Legal Practice Board approved the ‘engagement of a preferred provider to scope the development of a tailored [electronic complaints management system]’;
- On 29 April 2021, the Management Committee of the Legal Practice Board approved expenditure to ‘develop and implement the [electronic complaints management system] as scoped’;
- The LSCC has indicated that it is on track to implement an electronic complaints management system within the timeframes specified by Recommendation 13, stating ‘migration of legacy data has occurred and final testing is taking place prior to staff training and the system going live’, which was expected to be on 16 November 2021; and
- The LSCC subsequently confirmed that the system came into effect in November 2021.

Having carefully considered the information provided by the LSCC, Recommendation 13 has been given effect.

Appendix 1: Recommendations arising from the Investigation Report

Recommendation 1: That the LSCC retain a triaging and rapid resolution process but improve that process with a view to having 75% of matters subject to rapid resolution being resolved in less than 90 days, and 95% of matters subject to rapid resolution being resolved within 6 months, by no later than the end of the financial year 2020-21, with further improvements to those key performance indicators to be reviewed upon the introduction of the Uniform Law.

Recommendation 2: That the LSCC immediately identify all investigations older than two years of age and ensure they are resolved as a matter of priority, with at least 50% of those investigations to be resolved by the end of the financial year 2020-21, another 25% by the end of the financial year 2021-22, and the remaining 25% by the end of the financial year 2022-23.

Recommendation 3: That the LSCC retain a separate disciplinary investigation process but improve that process with a view to 75% of matters subject to disciplinary investigation being resolved in less than two years by the end of the financial year 2021-22.

Recommendation 4: Upon the achievement of Recommendation 3, the LSCC seek to have 75% of disciplinary investigations resolved in less than 12 months, and 90% of disciplinary investigations resolved within two years by end of the financial year 2022-23 with no investigation open after two years by 2023-24 unless there are circumstances beyond the control of the LSCC.

Recommendation 5: The LSCC have 85% of disciplinary investigations resolved within 12 months by the end of the financial year 2023-24 and maintain that timeliness of resolution.

Recommendation 6: That the LSCC optimise their funding through the achieving of complaint handling efficiencies.

Recommendation 7: That the LSCC identify a series of key performance indicators regarding timeliness of complaint handling.

Recommendation 8: That the LSCC identify a series of key performance indicators regarding the cost of complaint handling.

Recommendation 9: That the LSCC publish these key performance indicators in their annual report in 2022-23.

Recommendation 10: That the LSCC publish their performance against these key performance indicators in their annual report for the financial year 2023-24 and then each annual report thereafter.

Recommendation 11: That the LSCC adjust these key performance indicators in line with the timeliness to be achieved through the implementation of recommendations 2-5.

Recommendation 12: That the LSCC seek to improve their key performance indicators over time.

Recommendation 13: That the LSCC implement an electronic complaints management system by no later than the end of the financial year 2021-22 and should aim to do so by December 2021.

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Appendix 2: Summary of steps taken to give effect to recommendations

Recommendation	View
1	Recommendation has been given effect in part, steps have been taken and are proposed to be taken for the remainder of the Recommendation.
2	Recommendation has been given effect in part, steps have been taken and are proposed to be taken for the remainder of the Recommendation.
3	Recommendation has been given effect.
4	Steps have been taken and are proposed to be taken.
5	Steps have been taken and are proposed to be taken.
6	Steps have been taken and are proposed to be taken.
7	Recommendation has been given effect.
8	Steps have been taken and are proposed to be taken.
9	Steps have been taken and are proposed to be taken.
10	Steps have been taken and are proposed to be taken.
11	Steps have been taken and are proposed to be taken.
12	Steps have been taken and are proposed to be taken.
13	Recommendation has been given effect.

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Appendix 3: Investigation Report



Investigation into the handling of complaints by
the Legal Profession Complaints Committee

Ombudsman Western Australia
Serving Parliament – Serving Western Australians

Contact Details

Street Address

Level 2, 469 Wellington Street
PERTH WA 6000

Postal Address

PO Box Z5386 St Georges Terrace
PERTH WA 6831

Telephone: (08) 9220 7555 or 1800 117 000 (free from landlines)

Translating and Interpreting Service (TIS National): 131 450

National Relay Service 1800 555 660 (Quote 08 9220 7555)

Facsimile: (08) 9220 7500

Email: mail@ombudsman.wa.gov.au

Web: www.ombudsman.wa.gov.au

Investigation into the handling of complaints by the Legal Profession Complaints Committee

The office of the Ombudsman acknowledges Aboriginal and Torres Strait Islander people of Australia as the traditional custodians of Australia. We recognise and respect the exceptionally long history and ongoing cultural connection Aboriginal and Torres Strait Islander people have to Australia, recognise the strength, resilience and capacity of Aboriginal and Torres Strait Islander people and pay respect to Elders past, present and future.

We acknowledge the Whadjuk Noongar people as the traditional custodians of the land on which the office of the Ombudsman is located.

Investigation into the handling of complaints by the Legal Profession Complaints Committee

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Investigation into the handling of complaints by the Legal Profession Complaints Committee

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Investigation into the handling of complaints by the Legal Profession Complaints Committee

Foreword

On 2 April 2020, I initiated an investigation into the handling of complaints by the Legal Profession Complaints Committee (**LPCC**).

As a result of the COVID-19 pandemic, I adjusted the timeframe of certain work to ensure agencies could focus their efforts on service delivery and staff well-being. The investigation is now complete.

As a result of my investigation, I have formed a series of opinions regarding the handling of complaints by the LPCC. Arising from these opinions, I have made thirteen recommendations to the LPCC.

In my view, these recommendations, when implemented, will improve the handling of complaints by the LPCC. This is important as the LPCC provides an essential service to consumers of legal services in Western Australia and contributes to confidence in our legal system. Furthermore, the LPCC's processes impact a range of stakeholders, particularly legal practitioners and consumers of legal services.

I will actively monitor the steps taken by the LPCC to give effect to my recommendations.

In providing my report, it is important to note that the LPCC has been highly professional, respectful, cooperative and timely in response to my investigation.



Chris Field
Ombudsman

Investigation into the handling of complaints by the Legal Profession Complaints Committee

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1 Introduction

1.1 About the Ombudsman

1.1.1 The Ombudsman

The Ombudsman is an independent and impartial officer of the Parliament.

1.1.2 The role of the Ombudsman

The Ombudsman has functions in relation to the investigation of state government departments, statutory authorities, boards and corporations, local governments and universities, the review of certain child deaths and family and domestic violence fatalities and other functions provided for in legislation. Investigations may arise from complaints received by the Ombudsman, or the Ombudsman's own motion or by reference from Parliament. In undertaking investigations, the Ombudsman has all of the investigatory powers provided under the *Parliamentary Commissioner Act 1971* and all of the powers, rights and privileges specified in the *Royal Commissions Act 1968*.

At the completion of an investigation the Ombudsman can form opinions and recommendations.

1.2 About the investigation

1.2.1 Rationale

This investigation followed a request to me to consider the handling of complaints by the LPCC by the Honourable John Quigley MLA, Attorney General.

1.2.2 Methodology

On 2 April 2020, I notified Mr J B Ley SC, Chair, LPCC, I had initiated an investigation regarding the handling of complaints by the LPCC. To undertake the investigation, I:

- Considered the legislative and regulatory requirements underpinning the handling of complaints against the legal profession in Western Australia;
- Conducted a literature review of models for the handling of complaints against the legal profession;
- Collected and analysed quantitative and qualitative information from the LPCC regarding its handling of complaints;
- Consistent with my decision to pause any non-urgent investigations during the COVID-19 pandemic to ensure that any agency the subject of an investigation could focus their efforts on service delivery and staff welfare, I paused the investigation;
- I recommenced the investigation, developed a preliminary view and provided it to the LPCC for its consideration and response; and
- Considered the LPCC's response to the preliminary view and prepared a final report.

Investigation into the handling of complaints by the Legal Profession Complaints Committee

1.2.2.1 Legislative and regulatory requirements

The Office of the Ombudsman (**Office**) examined the legislative and regulatory requirements underpinning the handling of complaints about the legal profession in Western Australia, in particular, the *Legal Profession Act 2008*. Legislative and regulatory requirements in other States and Territories in Australia were also examined including the Legal Profession Uniform Law (**Uniform Law**) that has been in place in New South Wales and Victoria since 2015 and is proposed to be introduced in Western Australia.¹

1.2.2.2 Literature review

The Office conducted a review of relevant State, national and international literature regarding the handling of complaints about the legal profession. This included a review of models of regulation for the legal profession and handling of complaints about legal practitioners.

1.2.2.3 Information collection and analysis

The Office reviewed complaints received about the LPCC's handling of complaints that had been investigated by the Office as well as published materials regarding complaint handling by the LPCC.

1.2.2.4 Preliminary report

The Office provided the LPCC with a preliminary report for its consideration and response.

1.2.2.5 Final report

Having considered the LPCC's response to the preliminary report, the Office prepared this final report.

¹ At the time of writing, the Legal Profession Uniform Law Application Bill 2020 (WA) had been read a second time in the Legislative Council. The Bill was referred to, and is subject of a report by, the Standing Committee on Uniform Legislation and Statutes Review.

2 Regulation of the handling of complaints about legal practitioners in Western Australia

2.1 Background

The *Legal Practitioners Act 1893* sought to:

...consolidate and amend the Law relating to the Admission of Practitioners in the Supreme Court, and to regulate their Conduct and their Remuneration in certain cases.²

The *Legal Practitioners Act 1893* provided for the regulation of legal practitioner admission, costs, and conduct, including complaints by those ‘...aggrieved by reason of the alleged illegal or unprofessional conduct of any practitioner...’.³ The constituent elements of regulation have changed relatively little since the assent of the *Legal Practitioners Act 1893*, with the Hon. Wayne Martin, former Chief Justice of Western Australia, summarising the elements of contemporary legal regulation as follows:

- (a) regulation of entry into the profession;
- (b) the identification of appropriate standards of professional conduct, and the encouragement of adherence to those standards;
- (c) the investigation of complaints and the administration of discipline with respect to legal practitioners, including expulsion from legal practice; and
- (d) the regulation and supervision of arrangements relating to trust accounts, public liability insurance, and fidelity funds.⁴

The regulation of the legal profession is in the public interest.⁵ Regulation protects consumers by ensuring that appropriately qualified people can practise law, that appropriate standards are set and adhered to and that there is a means of redress if a consumer has been adversely affected by the services provided by a legal practitioner.

More broadly, regulation seeks to protect consumers by addressing the information asymmetry that exists, in many cases, between a legal practitioner and a consumer. In this context, information asymmetry refers to the highly specialised knowledge of the law, legal systems and processes held by a legal practitioner but not a consumer, thereby creating an imbalance of power.⁶ Consumer detriment can arise as a consequence of this information asymmetry as consumers may be unable to judge the quality or value of legal services provided.⁷

² *The Legal Practitioners Act 1893*.

³ *The Legal Practitioners Act 1893*, s. 20.

⁴ The Hon. Wayne Martin, *The Future of Regulating the Legal Profession: Is the Profession Over Regulated?* Paper presented at the Conference of Regulatory Officers, Perth, Western Australia, 16 September 2009, pp. 3-4.

⁵ Law Council of Australia, *Legal Futures Summit – Background Paper*, 13 September 2018, p. 42; The Law Society of England and Wales, *UCL Review of Legal Services Regulation: The Law Society Position Paper*, February 2019, p. 8; Adam Dodek & Emily Alderson, Risk regulation for the legal profession, *Alberta Law Review*, 2018, 55(3), p. 623; The Hon. Wayne Martin, *The Future of Regulating the Legal Profession: Is the Profession Over Regulated?* Paper presented at the Conference of Regulatory Officers, Perth, Western Australia, 16 September 2009, p. 4.

⁶ Law Council of Australia, *Legal Futures Summit – Background Paper*, 13 September 2018, p. 43.

⁷ The Law Society of England and Wales, *UCL Review of Legal Services Regulation: The Law Society Position Paper*, February 2019, p. 14. Information asymmetry is a term more frequently utilised in economics to describe the imbalance of power held by a provider of goods and services and the consumer of goods and services.

Investigation into the handling of complaints by the Legal Profession Complaints Committee

Lord Hunt, in his review of the regulation of legal services in England and Wales, noted:

The case for regulation is predicated upon an assumption that significant consumer detriment exists in its absence, but the degree of consumer detriment self-evidently varies according to a number of factors, such as the buying power of the consumer, the degree of knowledge asymmetry between buyer and seller, and the complexity of the work involved.

...

...activities, such as medicine, financial services and the law, are so inherently complicated and specialised, and require so much specific knowledge on the part of the practitioner, that significant asymmetry of information and understanding inevitably exists, between provider and patient, customer or client. Regulation must artificially restore the balance.⁸

The regulation of the legal profession is further justified in terms of its role in protecting and promoting the rule of law and the administration of justice.⁹ Sir David Clementi, in his review of the regulatory framework for legal services in England and Wales, noted:

The rule of law embodies the basic principles of equal treatment of all people before the law, fairness, and a guarantee of basic human rights. A predictable and proportionate legal system with fair, transparent, and effective judicial institutions is essential to the protection of citizens against any arbitrary use of state authority and lawless acts of both organisations and individuals. Those charged with regulating the legal service providers have an important part to play in ensuring the rule of law by creating conditions necessary for the delivery of a strong, independent and effective legal services industry.¹⁰

The rule of law also underpins, and is critical to, the continuation of economic development, trade and investment and the concomitant benefits to citizens that development, trade and investment bring.

2.2 The system for handling complaints about the legal profession in Western Australia

2.2.1 Legal Practice Board of Western Australia

The Legal Practice Board (**LPB**) is the statutory body that regulates the legal profession in Western Australia. The LPB is established under section 534 of the *Legal Profession Act 2008* as a body corporate with perpetual succession and section 536 of the *Legal Profession Act 2008* provides that its membership consists of:

- (a) the Attorney General; and
 - (b) the Solicitor General or, if there is no Solicitor General, the State Solicitor; and
 - (c) subject to section 538, each Queen's Counsel, and each Senior Counsel —
 - (i) whose principal place of practice is in this State;
- and
- (ii) who is not a full-time judicial officer; and

⁸ Lord Hunt of Wirral, *The Hunt Review of the Regulation of Legal Services*, October 2009, p. 14.

⁹ Stephen Mayson, *Independent review of legal services regulation: Findings, propositions and consultation*, September 2019, p. 23; John Briton & Scott McClean, *Lawyer regulation, consciousness-raising and social science*, International Legal Ethics Conference IV, Stanford Law School, 15-17 July 2010, p. 1; The Hon. Wayne Martin, *The Future of Regulating the Legal Profession: Is the Profession Over Regulated?* Paper presented at the Conference of Regulatory Officers, Perth, Western Australia, 16 September 2009, p. 5.

¹⁰ Sir David Clementi, *Review of the regulatory framework for legal services in England and Wales: A consultation paper*, March 2004, p. 19.

Investigation into the handling of complaints by the Legal Profession Complaints Committee

(iii) who has, in writing, nominated himself or herself as a member;
and

(d) 12 local legal practitioners of at least 3 years' standing and practice who are elected as members.¹¹

At the end of the 2018-19 financial year, the LPB comprised 52 members, including 39 Queen's Counsel and Senior Counsel.¹²

The LPB has statutory responsibility for the regulation of legal practitioners in Western Australia, including admission to practise, monitoring of continuing professional development and the monitoring of legal practice structures and trust accounts.¹³ The LPB has been completely self-funded since 1 July 2016.¹⁴ Fees received by the LPB for practising certificate applications, admissions and charges related to continuing professional development are used to fund the LPB's operational costs and its accommodation and other expenses.

In 2018-19, the LPB employed 42 full-time equivalent staff to support its daily operations and the work of its five key committees: Management Committee, Professional Development Committee, Professional Affairs Committee, Admissions and Registrations Committee and Legal Profession Complaints Committee (LPCC).¹⁵

The LPB reports annually to the Attorney General in relation to its operations and financial position in accordance with section 551 of the *Legal Profession Act 2008*.

2.2.2 Legal Profession Complaints Committee

2.2.2.1 Structure of the LPCC

The LPCC is an independent statutory committee of the LPB that derives its powers from the *Legal Profession Act 2008*. Under the *Legal Profession Act 2008*, the LPCC is responsible for receiving and dealing with complaints about legal practitioners in Western Australia.¹⁶

Section 555 of the *Legal Profession Act 2008* establishes the LPCC and section 556 provides that its membership consists of:

- (a) a chairperson, and not less than 6 other legal practitioners, appointed by the Board from amongst its members from time to time; and
- (b) not less than 2 representatives of the community, none of whom is to be a person who is or has been an Australian lawyer.

According to section 556 of the *Legal Profession Act 2008*, the LPCC must consist of no more than one quarter community representatives as part of its total membership. The Attorney General is responsible for appointing community representatives after consulting with the Minister for Commerce. The Attorney General's community appointees are permitted to hold office for a maximum of two terms of three years' tenure.¹⁷

¹¹ *Legal Profession Act 2008*, s 536(1).

¹² Legal Practice Board of Western Australia, *Annual Report 2018-2019*, p. 12.

¹³ Legal Practice Board of Western Australia, *Annual Report 2018-2019*, p. 23.

¹⁴ Legal Practice Board of Western Australia, *Annual Report 2018-2019*, p. 19.

¹⁵ Legal Practice Board of Western Australia, *Annual Report 2018-2019*, p. 23.

¹⁶ *Legal Profession Act 2008*, Part 13, Division 4.

¹⁷ *Legal Profession Act 2008*, s 558.

Investigation into the handling of complaints by the Legal Profession Complaints Committee

While the LPCC is a committee of, and funded by, the LPB, it undertakes its functions independently, as provided by section 557(4) of the *Legal Profession Act 2008*:

The Board must not direct or impose any requirement on the Complaints Committee as to the performance of its functions.

The Law Complaints Officer is a statutory office established by section 572 of the *Legal Profession Act 2008*. The Law Complaints Officer and the staff of the office of the Law Complaints Officer assist the LPCC in the exercise of the LPCC's functions, with the LPCC able to delegate a number of its powers and duties to the Law Complaints Officer. Only Australian legal practitioners with experience in the conduct of a legal practice may be appointed by the LPB to the position of Law Complaints Officer.¹⁸

2.2.2.2 Resourcing of the LPCC

Section 557(5) of the *Legal Profession Act 2008* provides that the LPB must adequately resource the LPCC:

The Board must ensure that the Complaints Committee is provided with such services and facilities as are reasonably necessary to enable the Complaints Committee to perform its functions.

The *Legal Profession Act 2008* further specifies that the LPB can employ staff for the purpose of assisting the Complaints Committee and the Law Complaints Officer:

The Board may employ or engage staff for the purpose of assisting the Complaints Committee and the Law Complaints Officer in their functions.¹⁹

The LPCC's expenditure was \$3.55 million in 2018-19.²⁰ These expenses primarily comprised salaries (\$2.66 million) and legal costs (\$434,318).²¹

2.2.2.3 Staffing levels of the LPCC

Consistent with the *Legal Profession Act 2008*, the LPCC consists of a Chair, no less than six other legal practitioners appointed by the LPB and no less than two community representatives.²² Day to day operations of the LPCC are conducted by the office of the Law Complaints Officer.

In 2018-19, the office of the Law Complaints Officer consisted of 17.0 full-time equivalent (FTE) employees. Employees are allocated to three operational areas - Rapid Resolution (5.6 FTE), Investigation (7.8 FTE) and Litigation (3.6 FTE).²³

The Rapid Resolution team is responsible for triaging all complaints and resolving those that are less complex while the investigation and litigation teams are responsible for investigating more complex conduct issues and where necessary, pursuing litigation against legal practitioners (for further information, see section 2.2.2.7). An overview of the LPCC's structure is shown in Figure 1 below.

¹⁸ *Legal Profession Act 2008*, s 572(2).

¹⁹ *Legal Profession Act 2008*, s 574.

²⁰ Legal Practice Board of Western Australia, *Annual Report 2018-19*, December 2019, p. 106.

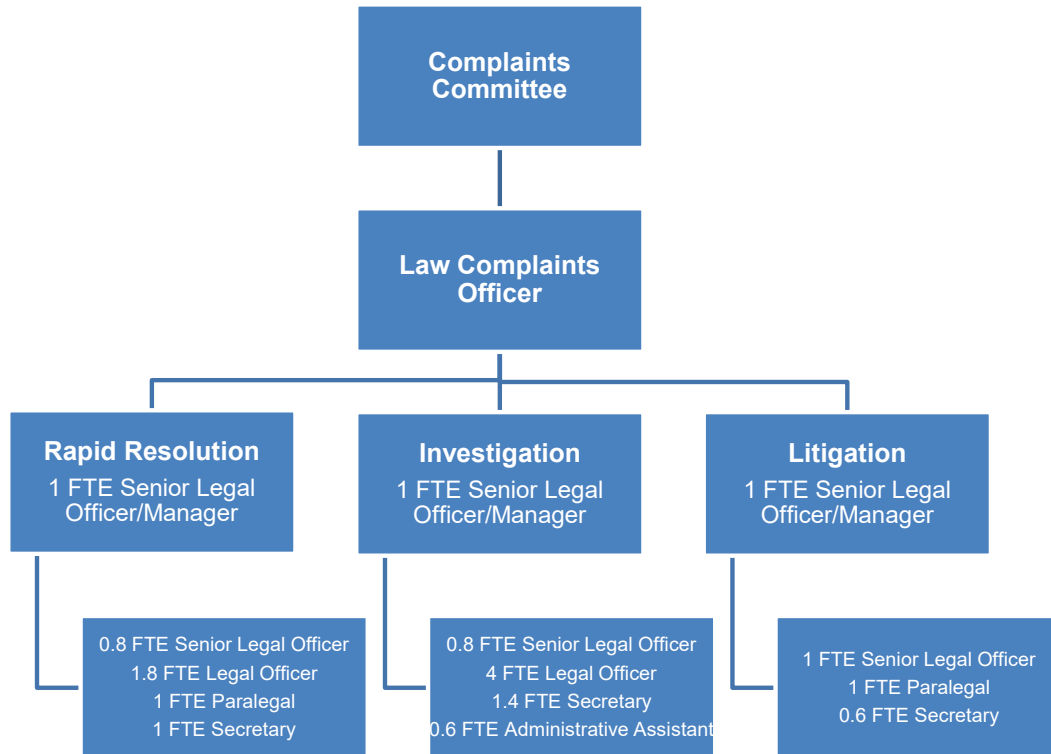
²¹ Legal Practice Board of Western Australia, *Annual Report 2018-19*, December 2019, p. 106.

²² Legal Profession Complaints Committee, *2019 Annual Report*, December 2019, pp. 8-9.

²³ A Trust Account Inspector is located within the LPB and serves both the LPB and the LPCC. See Legal Profession Complaints Committee, *2019 Annual Report*, December 2019, p. 9.

Investigation into the handling of complaints by the Legal Profession Complaints Committee

Figure 1: Organisational structure of the LPCC in 2018-19



Source: Legal Profession Complaints Committee²⁴

The number of FTE in the office of the Law Complaints Officer has increased from 16.2 FTE in 2014-15 to 17.0 FTE in 2018-19. All operational areas demonstrated an increase in staffing levels over this time period. It is however noted that for most of 2018-19, the LPCC was without a permanent Law Complaints Officer, with the previous Law Complaints Officer resigning in December 2018 and not being replaced until February 2020.

2.2.2.4 Functions of the LPCC

The functions are established by the *Legal Profession Act 2008* and consist of the following:

- (a) to supervise the conduct of legal practitioners; and
- (b) to inquire into complaints received under Part 13 Division 4 and, where the Complaints Committee so determines whether for cause or not and whether the Complaints Committee has received a complaint or not, any —
 - (i) conduct on the part of a legal practitioner; or
 - (ii) matters relating to legal practice, for the purpose of determining whether it may constitute unsatisfactory professional conduct or professional misconduct; and
- (c) if the Complaints Committee considers it appropriate to do so, to institute professional disciplinary proceedings against a legal practitioner in the State Administrative Tribunal; and

²⁴ Legal Profession Complaints Committee, *2019 Annual Report*, December 2019, pp. 8-9.

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(d) to supervise and direct the Law Complaints Officer in the performance of the functions of that officer; and

(e) to comment upon, and make recommendations in respect of, this Act, the regulations and the legal profession rules insofar as they may affect the functions of the Complaints Committee.²⁵

2.2.2.5 *Conduct that may become the subject of a complaint to the LPCC*

Part 13 of the *Legal Profession Act 2008* is concerned with complaints and discipline. Section 401 sets out the purposes of Part 13 as follows:

(a) to provide for the discipline of the legal profession in this jurisdiction, in the interests of the administration of justice and for the protection of consumers of the services of the legal profession and the public generally;

(b) to promote and enforce the professional standards, competence and honesty of the legal profession; and

(c) to provide a means of redress for complaints about lawyers.

Part 13 of the *Legal Profession Act 2008* provides for two categories of conduct that may become the subject of a complaint to the LPCC – unsatisfactory professional conduct and professional misconduct. The *Legal Profession Act 2008* defines unsatisfactory professional conduct as including:

...conduct of an Australian legal practitioner occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.²⁶

The more serious category of professional misconduct is defined in the *Legal Profession Act 2008* as including:

(a) unsatisfactory professional misconduct of an Australian legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and

(b) conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring otherwise in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.²⁷

Without limiting the conduct defined above, the *Legal Profession Act 2008* provides that the following types of conduct are capable of constituting unsatisfactory professional conduct and professional misconduct:

(a) conduct consisting of a contravention of this Act or a previous Act;

(b) charging of excessive legal costs in connection with the practice of law;

(c) conduct in respect of which there is a conviction for —

(i) a serious offence; or

(ii) a tax offence; or

(iii) an offence involving dishonesty;

²⁵ *Legal Profession Act 2008*, s 557(2).

²⁶ *Legal Profession Act 2008*, s 402.

²⁷ *Legal Profession Act 2008*, s 403(1).

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- (d) conduct of an Australian legal practitioner as or in becoming an insolvent under administration;
- (e) conduct of an Australian legal practitioner in becoming disqualified from managing or being involved in the management of any corporation under the Corporations Act;
- (f) conduct of an Australian legal practitioner consisting of a failure to comply with an order of the Complaints Committee, or the State Administrative Tribunal or Supreme Court exercising jurisdiction under this Act or an order of a corresponding disciplinary body made under a corresponding law (including but not limited to a failure to pay wholly or partly a fine imposed under this Act, a previous Act or a corresponding law);
- (g) conduct of an Australian legal practitioner in failing to comply with a compensation order made under this Act or a corresponding law.²⁸

2.2.2.6 Lodging a complaint with the LPCC

Section 410 of the *Legal Profession Act 2008* outlines who may make a complaint about an Australian legal practitioner and how to lodge a complaint. Complaints may be made by:

- (a) the Attorney General; or
- (b) the Board; or
- (c) the Executive Director of the Law Society in respect of matters where the making of the complaint has been authorised by a resolution of the Council of the Law Society; or
- (d) any legal practitioner; or
- (e) any other person who has or had a direct personal interest in the matters alleged in the complaint.²⁹

A complaint may be made directly to the LPCC or through the Law Complaints Officer and, where the complaint is not made in writing, the Law Complaints Officer may make a written record of an oral complaint that has been received.³⁰ The complaint must identify the complainant and, if possible, the Australian legal practitioner about whom the complaint is made. The complaint must also describe the alleged conduct the subject of the complaint.³¹

The *Legal Profession Act 2008* does not require a complainant to make their complaint personally and permits a complainant to authorise an Australian legal practitioner to make the complaint on their behalf or, where the complainant has died or is otherwise unable to act, a personal representative or relative of the complainant may make the complaint.³²

2.2.2.7 The LPCC's complaint handling process

The LPCC refers all new contact to its Rapid Resolution Team (**RRT**) for assessment. The LPCC encourages the public to make contact by telephone as:

[t]elephone contact enables the RRT's legal officers to discuss the caller's concerns in detail ... It also allows the legal officer to gain a real understanding of what the caller hopes to achieve by calling the Committee. Sometimes it transpires that the caller's expectations about the Committee's role are not correct.³³

²⁸ *Legal Profession Act 2008*, s 404.

²⁹ *Legal Profession Act 2008*, s 410(1).

³⁰ *Legal Profession Act 2008*, ss 410(2) and (3).

³¹ *Legal Profession Act 2008*, s 410(4).

³² *Legal Profession Act 2008*, s 410(5).

³³ Legal Profession Complaints Committee, *2017 Annual Report*, p. 11.

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A matter brought to the attention of the LPCC is typically treated by the RRT as an ‘inquiry’ while it is assessed. During assessment, the RRT acquires further information from the legal practitioner and the person who contacted the LPCC in order to reach a ‘preliminary view’ on the matter. This preliminary view is conveyed to the inquirer and where no concern or conduct issue is identified, the inquirer can either withdraw their inquiry or proceed with lodging a formal complaint. Where a concern but not a conduct issue is identified, an opportunity is provided for the matter to be ‘conciliated’ with the legal practitioner, where, for example, an agreement may be reached between the inquirer and the legal practitioner for fees to be waived.³⁴

Where a conduct issue is identified during the assessment process or if a formal complaint is lodged, the matter is dealt with by the LPCC’s investigation team. Under section 421(2) of the *Legal Profession Act 2008*, the LPCC must investigate each complaint. The *Legal Profession Act 2008* also empowers the LPCC to initiate an investigation on its own-initiative if the LPCC has reasonable cause to suspect the practitioner has been guilty of unsatisfactory professional conduct or professional misconduct.³⁵ An investigation may involve the LPCC seeking a written submission from the practitioner, the practitioner being invited to undertake certain mitigating actions and the collection of further evidence, including through the use of the LPCC’s powers to summons documents or written information.³⁶ Section 421(2) however, does not apply if the complaint is referred to SAT, is dismissed or withdrawn or is the subject of mediation.³⁷

When the LPCC has completed an investigation, section 424 of the *Legal Profession Act 2008* outlines the three options that are available to the LPCC. The LPCC must exercise one of the following three options (unless the complaint has been withdrawn under section 416 of the *Legal Profession Act 2008*):

- (a) in the case of the investigation of a complaint, dismiss the complaint under section 425 or, in the case of an investigation on the initiative of the Complaints Committee, decide to take no further action; or
- (b) take action under section 426; or
- (c) refer the matter to the State Administrative Tribunal under section 428.

Before dismissing a complaint under section 425 of the *Legal Profession Act 2008*, the LPCC must satisfy itself that there is no reasonable likelihood that SAT would find the practitioner in question guilty of either unsatisfactory professional conduct or professional misconduct or that it is in the public interest to dismiss the complaint.³⁸

SAT has considered the meaning of ‘reasonable likelihood’ in the context of section 425 of the *Legal Profession Act 2008* and has found that it:

...is synonymous with the phrase ‘reasonably likely’. The meaning of that phrase was discussed in *Department of Agriculture and Rural Affairs v Binnie ...* in the following passage:

³⁴ Legal Profession Complaints Committee, *2018 Annual Report*, pp. 12-13.

³⁵ *Legal Profession Act 2008*, s 421(1).

³⁶ Legal Profession Complaints Committee, *2018 Annual Report*, p. 13.

³⁷ The LPCC may suggest a mediation process to the parties involved in a complaint, either for the whole complaint or for parts thereof that are capable of resolution by mediation. The LPCC cannot suggest mediation if it considers that the practitioner would be likely to be found guilty of professional misconduct if proceedings were instituted in SAT with respect to the complaint. Any order that the LPCC may make following a successful mediation process is final and binding on the parties and may be enforced as if it were an order of SAT. See *Legal Profession Act 2008*, Part 13, Division 5.

³⁸ *Legal Profession Act 2008*, ss 425(a) and (b).

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“The relevant expression here is ‘reasonably likely’ ... In its ordinary use, it speaks of a chance of an event occurring or not occurring which is real – not fanciful or remote. It does not refer to a chance which is more likely than not to occur, that is, one which is ‘odds on’ or where between nil and certainty it should be placed. A chance which in common parlance is described as ‘reasonable’ is one that is ‘fair’, ‘sufficient’ or ‘worth noting’.”

Those observations are equally apt to describe the meaning of ‘reasonable likelihood’ in s 425 of the LP Act.³⁹

The LPCC, in determining whether SAT would find the practitioner guilty of unsatisfactory professional conduct or professional misconduct, must therefore ensure that ‘clear and cogent evidence’ could be provided to SAT to make a finding of either unsatisfactory professional conduct or professional misconduct.⁴⁰

Section 426 of the *Legal Profession Act 2008* provides for the LPCC to exercise summary conclusion powers following an investigation into the conduct of a legal practitioner if it is satisfied that there is a reasonable likelihood that the practitioner would be found guilty by SAT of unsatisfactory professional conduct (but not professional misconduct). In exercising its summary conclusion powers, the LPCC must be satisfied that the practitioner is generally competent and diligent and that the taking of action is justified having regard to all the circumstances of the case (including the seriousness of the conduct concerned) and to whether any other substantiated complaints have been made against the practitioner.⁴¹

If the practitioner in question consents to the exercise of the LPCC’s summary conclusion powers, the LPCC may:

- (a) publicly reprimand the practitioner or, if there are special circumstances, privately reprimand the practitioner;
- (b) order the practitioner to pay to the Board a fine of a specified amount not exceeding \$2500;
- (c) make a compensation order;
- (d) order that the practitioner seek and implement, within a period specified in the order, advice from the Board, or from a person specified in the order, in relation to the management and conduct of the practitioner’s practice, or the specific part or aspect of the practice specified in the order.⁴²

The final option available to the LPCC under section 424 of the *Legal Profession Act 2008* following an investigation of a complaint is to refer the matter to SAT. SAT has jurisdiction to make a finding that an Australian legal practitioner has engaged in unsatisfactory professional conduct or professional misconduct and may, if satisfied that the practitioner is guilty of unsatisfactory professional conduct or professional misconduct, make and transmit a report on the finding to the Supreme Court (full bench). The report to the Supreme Court may include a recommendation that the name of the practitioner be removed from the local roll. Alternatively, SAT may make one or more orders prescribed by the *Legal Profession Act 2008*.⁴³

The LPCC’s complaints handling process is summarised in Figure 2.⁴⁴

³⁹ *Lund and Legal Profession Complaints Committee* [2019] WASAT 108 at para 57, quoting from *Greenwood and Legal Profession Complaints Committee* [2010] WASAT 31 at paras 26-28.

⁴⁰ *Lund and Legal Profession Complaints Committee* [2019] WASAT 108 at 58.

⁴¹ *Legal Profession Act 2008*, s 425(b).

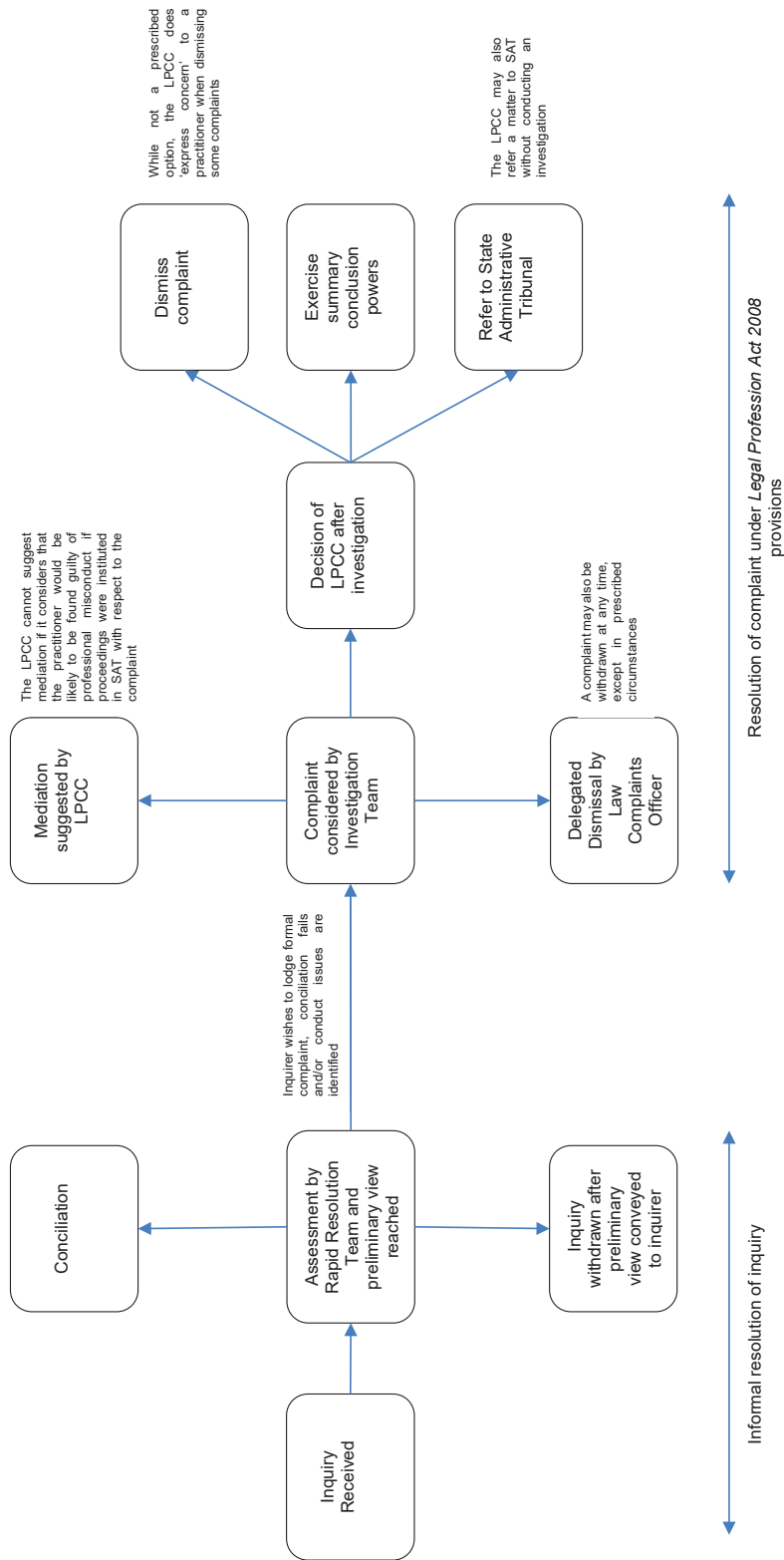
⁴² *Legal Profession Act 2008*, ss 426(2) (a)-(d).

⁴³ *Legal Profession Act 2008*, s 438.

⁴⁴ *Legal Profession Complaints Committee, 2017 Annual Report*, pp. 11-13.

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Figure 2: The LPCC's inquiry and complaint handling process



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2.2.2.8 *Time limits on making a complaint*

Under section 411(1) of the *Legal Profession Act 2008*, a complaint may be made about conduct of an Australian legal practitioner irrespective of when the conduct is alleged to have occurred. The Explanatory Memorandum for the Legal Profession Bill 2007 further provides that 'there is no final time limit on when a complaint can be made after the alleged conduct occurred'.⁴⁵

The *Legal Profession Act 2008* does not, however, oblige the LPCC to act on a complaint made more than six years after the conduct is alleged to have occurred, unless the LPCC determines that:

- (a) it is just and fair to deal with the complaint having regard to the delay and the reasons for the delay; or
- (b) the complaint involves an allegation of professional misconduct and it is in the public interest to deal with the complaint.⁴⁶

Any determination that the LPCC makes to deal with, or not to deal with, a complaint made more than six years after the conduct is alleged to have occurred is final and cannot be challenged in any proceedings by either the complainant or the legal practitioner concerned.⁴⁷

2.2.2.9 *Procedural matters when the LPCC considers a complaint*

Part 13, Division 8 of the *Legal Profession Act 2008* outlines general procedural matters that apply during the complaint resolution process.

Section 430 of the *Legal Profession Act 2008* specifies that the rules of procedural fairness, to the extent that they are not inconsistent with the provisions of the *Legal Profession Act 2008*, apply in relation to the LPCC's procedures. Procedural fairness in the handling of complaints is supported through a range of provisions in Part 13, Division 8 of the *Legal Profession Act 2008*, including the LPCC being required to give reasons for its decisions, the right to a hearing and to legal representation, privacy of proceedings and the right to appeal to SAT for a review of the LPCC's decisions.⁴⁸

Along with the other general procedural matters, Part 13, Division 8 of the *Legal Profession Act 2008* also refers to the amount of time that the LPCC should take when it considers a complaint. Section 431 imposes a positive duty on the LPCC to deal with complaints 'as efficiently and expeditiously as is practicable.' The Explanatory Memorandum to the Legal Profession Bill 2007 notes in relation to section 431 that:

It is in the interests of all parties that complaints be dealt with quickly and the Complaints Committee is obliged to do so as far as practicable.⁴⁹

⁴⁵ Legal Profession Bill 2007, *Explanatory Memorandum*, p 53.

⁴⁶ *Legal Profession Act 2008*, s 411(2). The LPCC may instead only dismiss or refer the complaint to mediation if it has found that the complaint is more than six years old and has not met the requirements in section 411(2) of the *Legal Profession Act 2008*.

⁴⁷ *Legal Profession Act 2008*, s 411(3).

⁴⁸ *Legal Profession Act 2008*, s 430 - 435.

⁴⁹ Legal Profession Bill 2007, *Explanatory Memorandum*, p. 55.

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2.2.3 Other functions of the LPCC relating to the conduct of legal practitioners

2.2.3.1 Supervision of conduct – auditing incorporated legal practices

Section 118 of the *Legal Profession Act 2008* empowers the LPCC and the LPB to undertake an audit to determine the compliance of an incorporated legal practice (and of its officers and employees) with certain prescribed requirements.⁵⁰ These audits can be undertaken in the absence of a complaint being made against an Australian lawyer with respect to the provision of legal services by the incorporated legal practice.⁵¹

An audit of an incorporated legal practice can result in SAT, on application by either the LPCC or the LPB, disqualifying the practice from providing legal services in Western Australia for a period SAT considers appropriate.⁵² For this to occur, SAT must be satisfied that the disqualification is justified and that a ground for disqualification has been established, including:

that the Board or the Complaints Committee is satisfied, after conducting an audit of the incorporated legal practice, that the incorporated legal practice has failed to implement satisfactory management and supervision of its provision of legal services.⁵³

2.2.3.2 Supervision of conduct – trust account investigations

Part 9 of the *Legal Profession Act 2008* outlines the obligations of a law practice when it holds money on trust in the course of or in connection with the provision of legal services. The LPB and LPCC have oversight powers in respect of ensuring that a law practice meets its trust account obligations and may, in writing, appoint a suitably qualified person to investigate 'the affairs or specified affairs of a law practice'.⁵⁴ Such an appointment may be general or specifically for the law practice that is named in the investigator's instrument of appointment. The instrument appointing the investigator may specify one or both of the following authorisations:

- (a) routine investigations on a regular or other basis;
- (b) investigations in relation to particular allegations or suspicions regarding trust money, trust property, trust accounts or any other aspect of the affairs of the law practice.⁵⁵

Section 231(2) of the *Legal Profession Act 2008* further provides that:

The principal purposes of an investigation are to ascertain whether the law practice has complied with or is complying with the requirements of this Part and to detect and prevent fraud and defaults (as defined in section 334), but this subsection does not limit the scope of the investigation or the powers of the investigator.

⁵⁰ *Legal Profession Act 2008*, s 118. An 'incorporated legal practice' means a corporation that engages in legal practice in Western Australia, whether or not it also provides services that are legal services: *Legal Profession Act 2008*, s 99. There are exceptions for corporations that provide free legal advice or in-house legal services, amongst others: *Legal Profession Act 2008*, s 99(2).

⁵¹ *Legal Profession Act 2008*, s. 118(4).

⁵² SAT also has the power to disqualify an individual from managing an incorporated legal practice, on application by the LPB: *Legal Profession Act 2008*, s 120.

⁵³ SAT may impose conditions on the ban as it thinks appropriate, including in relation to the conduct of the incorporated legal practice and when the ban will take effect. SAT may also make orders 'to safeguard the interests of clients of the incorporated legal practice' and the practice's employees: *Legal Profession Act 2008*, ss 119(2)(a)-(c).

⁵⁴ *Legal Profession Act 2008*, s 230(1).

⁵⁵ *Legal Profession Act 2008*, s 231(1).

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The entity that appoints the investigator, either the LPB or the LPCC, must notify the other when an investigator that it has appointed is investigating the affairs of a law practice.⁵⁶ The report that an investigator completes in relation to a trust account must be given to the LPB or the LPCC (depending on which entity appointed them) 'as soon as is practicable' after the investigation is complete.⁵⁷

2.3 Systems for handling complaints about the legal profession in other jurisdictions

2.3.1 Australia

The *Legal Profession Act 2008* is based on a 'National Model Law' developed by the Standing Committee of Attorneys-General. All Australian jurisdictions, with the exception of South Australia, introduced legislation based on the National Model Law between 2004 and 2008.⁵⁸ Accordingly, there are similarities between Western Australia and other National Model Law jurisdictions in the handling of complaints about legal practitioners.

On 1 July 2015, the Uniform Law commenced in Victoria and New South Wales, replacing legislation based on the National Model Law in these jurisdictions. In March 2020, legislation was introduced into the Western Australian Parliament to repeal the *Legal Profession Act 2008* and similarly adopt the Uniform Law in Western Australia (see section 2.4).

Both the National Model Law and the Uniform Law accommodate local variations in the way in which participating jurisdictions operate, and accordingly, each jurisdiction's legal profession complaints body is constituted differently.

2.3.1.1 Victoria

Victoria adopted the Uniform Law via the enactment of the *Legal Profession Uniform Law Application Act 2014* (Vic) and is the host jurisdiction for the Uniform Law. The Victorian Legal Services Commissioner leads the system for investigating complaints against lawyers and is also the Chief Executive Officer of the Legal Services Board in Victoria.⁵⁹ The Legal Services Commissioner and the Legal Services Board operate as a single regulator although they are established as independent statutory authorities.

The Victorian Legal Services Commissioner has delegated functions relating to the investigation of complaints about barristers to the Victorian Bar and refers some complaints to the Victorian Bar.⁶⁰

2.3.1.2 New South Wales

New South Wales adopted the Uniform Law via the enactment of the *Legal Profession Uniform Law Application Act 2014* (NSW). The Office of the Legal Services Commissioner in New South Wales (**OLSC**) operates as an independent entity in a co-regulatory system under the Uniform Law.

As compared to the Victorian Legal Services Commissioner, the OLSC delegates a greater array of functions relating to the investigation and determination of complaints to professional associations. The OLSC refers complaints as appropriate to the New South

⁵⁶ *Legal Profession Act 2008*, s 230(3).

⁵⁷ *Legal Profession Act 2008*, s 233(1).

⁵⁸ David Robertson, 'An overview of the Legal Profession Uniform Law', *Bar News*, 2015 (Summer), p. 36.

⁵⁹ *Legal Profession Uniform Law Application Act 2014* (Vic), ss 49-50.

⁶⁰ Victorian Legal Services Board and Commission, *Annual Report 2019*, p. 105.

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Wales Law Society and New South Wales Bar Council as delegated local regulatory authorities.⁶¹

2.3.1.3 Queensland

The Legal Services Commissioner is the independent officer appointed under the *Legal Profession Act 2007* (Qld) and is the sole body authorised to receive and manage complaints about legal practitioners in Queensland.⁶² The Queensland Legal Services Commissioner can refer complaints to the Queensland Law Society or the Bar Association of Queensland for investigation, however, their role is limited to making a recommendation to the Commission as to whether disciplinary action should proceed against the subject of the complaint.⁶³

2.3.1.4 Tasmania

The *Legal Profession Act 2007* (Tas) governs the legal profession in Tasmania. The Legal Profession Board of Tasmania is the independent statutory body established by the Act to 'receive, investigate and determine' complaints against lawyers.⁶⁴

2.3.1.5 South Australia

The Legal Profession Conduct Commissioner is an independent statutory officer established by the *Legal Practitioners Act 1981* (SA) with responsibility for overseeing the conduct of legal practitioners, including the handling of complaints.⁶⁵ The Legal Practitioners Disciplinary Tribunal was also established by the *Legal Practitioners Act 1981* (SA).

2.3.1.6 Australian Capital Territory

The ACT Law Society and ACT Bar Association are responsible for investigating complaints against legal practitioners according to the *Legal Profession Act 2006* (ACT).⁶⁶

2.3.1.7 Northern Territory

Complaints about legal practitioners must be made to the Law Society Northern Territory, an entity established by the *Legal Profession Act 2006* (NT) and managed by the Council of the Law Society Northern Territory.⁶⁷

The Statutory Supervisor⁶⁸ also monitors any complaint investigations carried out by the Law Society Northern Territory according to the *Legal Profession Act 2006* (NT), with

⁶¹ Legal Services Council and Commissioner for Uniform Legal Services Regulation, *Local Designated Regulatory Authorities' Registers of Delegation*, Viewed 9 July 2020, <<http://www.legalservicescouncil.org.au/Documents/dlra/dlra-registration-delegation%2029052020.pdf>>

⁶² Legal Services Commission Queensland, *About the Legal Services Commission*, Viewed 1 July 2020, <<https://www.lsc.qld.gov.au/the-commission/the-role-of-the-legal-services-commission>>

⁶³ *Legal Profession Act 2007* (QLD), s. 439.

⁶⁴ *Legal Profession Act 2007* (Tas), ss 427(2) and 591.

⁶⁵ *Legal Practitioners Act 1981* (SA), s 72.

⁶⁶ *Legal Profession Act 2006* (ACT), s 3 and Dictionary.

⁶⁷ *Legal Profession Act 2006* (NT), ss 638-9.

⁶⁸ The Statutory Supervisor is the independent office created by the *Legal Profession Act 2006* (NT), held by the Northern Territory Solicitor-General unless an appointment is made pursuant to section 679 of the *Legal Profession Act 2006* (NT).

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assistance provided by the Law Society Northern Territory through a compulsory statutory arrangement between the two regulators.⁶⁹

2.3.2 International

2.3.2.1 United Kingdom

The *Legal Services Act 2007* (UK) was introduced following a 2004 review of the regulatory framework for legal services in England and Wales by Sir David Clementi.⁷⁰ The legislation was intended to address concerns that the regulatory system at the time was 'outdated, inflexible, over-complex and not accountable or transparent enough'.⁷¹

The *Legal Services Act 2007* (UK) established the Legal Services Board, comprising a lay chair and a lay majority, as an overarching regulator overseeing ten front-line regulators. The *Legal Services Act 2007* (UK) further established the Office for Legal Complaints, similarly comprising a lay chair and majority, with responsibility for administering a Legal Ombudsman scheme as a single point of entry for complaint resolution and redress.⁷² The Office for Legal Complaints is empowered to investigate complaints and provide redress in certain circumstances but is unable to undertake disciplinary action against legal practitioners, which is the responsibility of front-line regulators.

The *Legal Services Act 2007* (UK) shifted the regulatory system away from a largely self-regulatory model and sought to increase the independence of legal regulation by enshrining the separation of representative and regulatory arms of front-line regulators such as the Law Society and the Bar Council. This led to the creation of the Solicitor's Regulation Authority and the Bar Standards Board as the regulatory arms of the Law Society and Bar Council respectively.⁷³

The role of professional bodies in legal regulation in the United Kingdom, however, remains contested, with the most recent review of legal services regulation in England and Wales recommending the end of professional body involvement in the regulation of legal services.⁷⁴

2.3.2.2 New Zealand

The *Lawyers and Conveyancers Act 2006* (NZ) regulates the legal profession (as well as the conveyancing industry) in New Zealand and establishes the various regulatory bodies that oversee the registration of lawyers and conveyancers and their activities in New Zealand.

The *Lawyers and Conveyancers Act 2006* (NZ) establishes its law society as the primary regulatory body for its complaint handling system. The New Zealand Law Society is defined as the 'regulatory society' for the purposes of regulating the activities of lawyers in New

⁶⁹ *Legal Profession Act 2006* (NT), s 490(2).

⁷⁰ Sir David Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales – Final Report*, December 2004.

⁷¹ Sir David Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales – Final Report*, December 2004, p. 1.

⁷² *Legal Services Act 2007* (UK), Part 6: Legal Complaints.

⁷³ Professor Stephen Mayson, *Reforming legal service: Regulation beyond the echo chambers*, Final report of the independent review of legal services regulation, Centre for Ethics & Law, University College London, June 2020, p. 42.

⁷⁴ Professor Stephen Mayson, *Reforming legal service: Regulation beyond the echo chambers*, Final report of the independent review of legal services regulation, Centre for Ethics & Law, University College London, June 2020, p. 211.

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Zealand, including admission, issuing practising certificates and handling complaints made against lawyers. Section 121 of the *Lawyers and Conveyancers Act 2006* (NZ) provides that:

- (1) The New Zealand Law Society must establish a complaints service to receive complaints about –
- (a) lawyers and former lawyers; and
 - (b) incorporated law firms and former incorporated law firms; and
 - (c) employees and former employees of lawyers and incorporated law firms. establish a complaints service to receive complaints about lawyers, former lawyers, incorporated law firms and former incorporated law firms and employees and former employees.

The Lawyers Standards Committee (**LSC**) operates as the complaints service established by the New Zealand Law Society pursuant to section 121 of the *Lawyers and Conveyancers Act 2006* (NZ). The *Lawyers and Conveyancers Act 2006* (NZ) further establishes a Legal Complaints Review Officer to provide independent oversight and review of decisions made by the LSC. The Legal Complaints Review Officer must not be a lawyer or conveyancing practitioner to be appointed to the position.⁷⁵

2.4 Complaint handling system in the Legal Profession Uniform Law

The latest uniform system for regulating the legal profession, the Uniform Law, commenced in Victoria and New South Wales on 1 July 2015.⁷⁶

Thus far, only New South Wales and Victoria have enacted statutes to apply the Uniform Law to their jurisdictions. Victoria is the host jurisdiction for the Uniform Law and the *Legal Profession Uniform Law Application Amendment Act 2019* (Vic), which commenced in September 2019, contains legislative changes which allow Western Australia to draft enabling legislation to join the uniform scheme.⁷⁷

Western Australia agreed to the terms of an intergovernmental agreement to extend the Uniform Law to the State in 2019 and drafted legislation to implement the agreement: the Legal Profession Uniform Law Application Bill 2020 (**Bill**).⁷⁸ The Bill was introduced into the Legislative Assembly on 18 March 2020 by the Western Australian Attorney General and at the time of writing, had been read a second time in the Legislative Council. The Bill was referred to, and is subject of a report by, the Standing Committee on Uniform Legislation and Statutes Review.⁷⁹

⁷⁵ *Lawyers and Conveyancers Act 2006* (NZ), s 190(1).

⁷⁶ In Victoria, Schedule 1 of the *Legal Profession Uniform Law Application Act 2014* (Vic) contains the Uniform Law. New South Wales applies Schedule 1 of Victoria's legislation as a law of New South Wales and calls it the *Legal Profession Uniform Law (NSW) 2014*. Together with the *Legal Profession Uniform Law Application Act 2014* (NSW), those statutes comprise NSW's uniform law scheme.

⁷⁷ Part 2 of Victoria's amending statute will commence on a date fixed by proclamation, 'in order to synchronise with the passage of the Western Australian Application legislation': Legal Services Council, *Uniform framework: recent changes*. Viewed 13 January 2020, <<http://www.legalservicescouncil.org.au/Pages/uniform-framework/Recent-changes.aspx>>.

⁷⁸ Parliament of Western Australia, '*Legal Profession Uniform Law Application Bill 2020*', Viewed 24 June 2020, <<https://www.parliament.wa.gov.au/parliament/bills.nsf/BillProgressPopup?openForm&ParentUNID=B3DFC715EBAF44CC4825852F00F85BF>>.

⁷⁹ Western Australian Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, *Legal Profession Uniform Law Application Bill 2020 and Legal Profession Uniform Law Application (Levy) Bill 2020*, Report 129, September 2020. The Standing Committee on Uniform Legislation and Statutes Review did not raise any specific matters relating to the handling of complaints in their report.

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2.4.1 New regulatory and disciplinary body to deal with complaints

The Uniform Law's host jurisdiction is Victoria, but the legislation provides that the host jurisdiction for the purposes of the Legal Services Council (**Council**) and the Uniform Legal Services Commissioner (**Commissioner**) is New South Wales.⁸⁰ The Uniform Law also requires the primary offices of the Council and the Commissioner to be based in New South Wales.⁸¹

The Uniform Law provides that the Council is responsible for monitoring the overall operation of the Uniform Law framework. The Commissioner is responsible for compliance with the Uniform Law, which includes complaint handling and awareness raising. There is overlap between the Council's and Commissioner's functions, as the Commissioner is also the Chief Executive Officer of the Council.⁸²

The Uniform Law creates a new defined term: a 'designated local regulatory authority' (**DLRA**). A DLRA is a person or body specified by legislation that exercises particular functions, as outlined in the Uniform Law.⁸³ Functions relevant to consumer complaints, dispute resolution and professional discipline are outlined in Chapter 5 of the Uniform Law and are referred to in the Bill and in other Uniform Law jurisdictions as 'Chapter 5 functions'. The DLRAs for Chapter 5 functions in New South Wales and Victoria are:

- Victorian Legal Services Commissioner;
- New South Wales Legal Services Commissioner; and
- New South Wales Law Society and Bar Councils.

In Western Australia, the Bill designates the LPB as the State's DLRA for Chapter 5 functions. The Bill further designates the LPB as the DLRA for trust account investigations and compliance audits.⁸⁴

The Bill provides for the LPB to delegate its Chapter 5 functions to the Legal Services and Complaints Committee (**LSCC**) or the Legal Services and Complaints Officer (**LSCO**).⁸⁵ The LPB may also delegate any of its other functions under the Law to a person, or class of persons, prescribed by the local regulations.⁸⁶

In summary, while the *Legal Profession Act 2008* empowers both the LPB and the LPCC to conduct audits and trust accounts investigations and provides the LPCC with exclusive responsibility for the receipt and handling of complaints about legal practitioners, the Bill places these functions within the remit of the LPB, with only complaint handling functions (that is, what are now classed as Chapter 5 functions) able to be delegated to the LSCC.

2.4.2 Structure of the LPB and LSCC under the Uniform Law

Section 265 of the Bill provides that the LPB is the same entity as, and a continuation of, the LPB established under the *Legal Profession Act 2008*. The Bill similarly specifies that the

⁸⁰ Uniform Law, ss 5(2)-(5).

⁸¹ Uniform Law, s 5(6).

⁸² Legal Services Council, *About Us: Commissioner*, May 2019, Viewed 13 January 2020, <<http://www.legalservicescouncil.org.au/Pages/about-us/about-us.aspx>>.

⁸³ Uniform Law, s 6.

⁸⁴ Legal Profession Uniform Law Application Bill 2020, s. 20. Bill as passed by Legislative Assembly. Compliance audits in the Legal Profession Uniform Law Application Bill 2020 replace the audits of incorporated legal practices in the *Legal Profession Act 2008*.

⁸⁵ Legal Profession Uniform Law Application Bill 2020, s. 36. Bill as passed by the Legislative Assembly.

⁸⁶ Legal Profession Uniform Law Application Bill 2020, s. 36. Bill as passed by the Legislative Assembly.

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LSCC is the same entity as, and a continuation of, the LPCC and that the LSCO is a continuation of the Law Complaints Officer.⁸⁷

The membership of the LPB remains largely unchanged in the Bill, with the only difference being the Bill increases the membership of the LPB to include a current or former judge of the Supreme Court appointed by the Attorney General.⁸⁸ The LSCC similarly continues to consist of at least seven legal practitioners and at least two representatives of the community, with the number of community representatives remaining at no more than one quarter of the total membership of the LSCC. Community representatives also continue to be empowered to report independently to the Attorney General on matters relating to the activities of the LSCC and the LSCO under the Bill.

The Bill provides that the LSCC has ‘...all the powers it needs to perform its functions’.⁸⁹ Accordingly, the Bill maintains that the LSCC derives its powers directly from legislation rather than from the LPB. The requirement for the LPB to provide the LSCC with the ‘...services and facilities that are reasonably necessary to enable the [LSCC] to perform its functions’ has similarly been maintained.⁹⁰

This consistency, in many cases, between the *Legal Profession Act 2008* and the Bill was acknowledged by the Attorney General during the Bill’s Second Reading speech:

Although the bill will repeal the Legal Profession Act 2008 of Western Australia, many of the existing features of the Legal Profession Act have been retained to the extent that those provisions are compatible with the Legal Profession Uniform Law. This is because the uniform law scheme accommodates local variations in the way in which participating jurisdictions operate.⁹¹

2.4.3 Functions of the LSCC and LSCO under the Uniform Law

The LSCC’s functions under the Bill are more narrowly defined compared to the *Legal Profession Act 2008* and consist of the following:

- (a) to carry out a Chapter 5 function delegated to the Committee by the Board under section 36(a)(i); and
- (b) to supervise and direct the Legal Services and Complaints Officer in the performance of the functions of that office; and
- (c) to comment on, and make recommendations in respect of, this Act and *the Legal Profession Uniform Law (WA)* to the extent that they may affect the functions of the Legal Services and Complaints Committee.⁹²

Consistent with the *Legal Profession Act 2008*, the Bill provides for the LSCC to delegate a power or duty of the LSCC to the LSCO.⁹³ The Bill outlines the functions of the LSCO as follows:

- (a) carrying out a Chapter 5 function delegated to the Officer by the Board under section 36(a)(ii);

⁸⁷ Legal Profession Uniform Law Application Bill 2020, s. 267, 270. Bill as passed by the Legislative Assembly.

⁸⁸ Legal Profession Uniform Law Application Bill 2020, s. 37. Bill as passed by the Legislative Assembly.

⁸⁹ Legal Profession Uniform Law Application Bill 2020, s. 36. Bill as passed by the Legislative Assembly.

⁹⁰ Legal Profession Uniform Law Application Bill 2020, s. 58. Bill as passed by the Legislative Assembly.

⁹¹ Legal Profession Uniform Law Application Bill 2020, s. 59. Bill as passed by the Legislative Assembly.

⁹² Hon. John Quigley MLA, Attorney General, Legislative Assembly, *Parliamentary Debates (Hansard)*, 18 March 2020, p.1563c-1566a.

⁹³ Legal Profession Uniform Law Application Bill 2020, s. 57(2). Bill as passed by the Legislative Assembly.

⁹⁴ Legal Profession Uniform Law Application Bill 2020, s. 80(1). Bill as passed by the Legislative Assembly.

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- (b) carrying out any power or duty delegated to the Officer under section 60;
- (c) another function conferred on the Officer by this Act, the *Legal Profession Uniform Law (WA)* or another Act.⁹⁴

2.4.4 Resolution of complaints under the Uniform Law

The Uniform Law demarcates complaints as a 'consumer matter', a 'disciplinary matter', or a mixed complaint (a complaint containing both a consumer matter and a disciplinary matter). The Uniform Law defines a consumer matter as follows:

A **consumer matter** is so much of a complaint about a lawyer or a law practice as relates to the provision of legal services to the complainant by the lawyer or law practice and as the designated local regulatory authority determines should be resolved by the exercise of functions relating to consumer matters.⁹⁵

In practice, a consumer matter may include cost disputes, service issues and other more minor concerns that do not reach the threshold for misconduct charges.⁹⁶

Disciplinary matters refer to more serious allegations and may reflect conduct that falls short of expected standards or conduct which may call in question a practitioner's fitness to engage in legal practice. The Uniform Law defines disciplinary matters as follows:

A **disciplinary matter** is so much of a complaint about a lawyer or a law practice as would, if the conduct concerned were established, amount to unsatisfactory professional conduct or professional misconduct.⁹⁷

Unsatisfactory professional conduct may include conduct such as threatening or abusive behaviour, non-disclosure of costs or poor advice and representation. Professional misconduct may include conduct such as gross overcharging, conflicts of interest and misappropriation of trust money and is the most serious type of conduct.⁹⁸

Where a complaint contains elements of both a consumer matter and a disciplinary matter, the Uniform Law gives priority to resolving the consumer matter first and, 'if necessary and appropriate, separately from the disciplinary matter'.⁹⁹

In resolving consumer matters, the Uniform Law provides that the DLRA should attempt to resolve a consumer matter by informal means as soon as practicable and includes provisions pertaining to informal dispute resolution, namely mediation and settlement agreements.¹⁰⁰ Importantly, and in contrast to the *Legal Profession Act 2008*, where a satisfactory resolution is unable to be reached between parties, the DLRA is empowered to resolve a consumer matter by making a determination, that, in the DLRA's view, is fair and reasonable in all the circumstances.¹⁰¹ The determinations that the DLRA may make to resolve a consumer matter include:

- (a) an order cautioning the respondent or a legal practitioner associate of the respondent law practice;

⁹⁴ Legal Profession Uniform Law Application Bill 2020, s. 80(1). Bill as passed by the Legislative Assembly.

⁹⁵ Uniform Law, s 269.

⁹⁶ Office of the Legal Services Commissioner (NSW), *Types of Complaints*, Viewed 29 June 2020, <http://www.olsc.nsw.gov.au/Pages/lsc_complaint/olsc_type_complaint.aspx>

⁹⁷ Uniform Law, s 270.

⁹⁸ Office of the Legal Services Commissioner (NSW), *Types of Complaints*, Viewed 29 June 2020, <http://www.olsc.nsw.gov.au/Pages/lsc_complaint/olsc_type_complaint.aspx>

⁹⁹ Uniform Law, s 271.

¹⁰⁰ Uniform Law, ss 287 – 289.

¹⁰¹ Uniform Law, s 290(1).

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- (b) an order requiring an apology from the respondent or a legal practitioner associate of the respondent law practice;
- (c) an order requiring the respondent to redo the work that is the subject of the complaint at no cost or to waive or reduce the fees for the work;
- (d) an order requiring—
 - (i) the respondent Australian legal practitioner; or
 - (ii) the respondent law practice to arrange for a legal practitioner associate of the law practice—
to undertake training, education, counselling or be supervised;
- (e) a compensation order against the respondent in accordance with Part 5.5.¹⁰²

The Uniform Law further provides for the DLRA to make binding determinations in relation to consumer matters involving cost disputes up to prescribed amounts.¹⁰³

In relation to disciplinary matters, where the DLRA finds that the legal practitioner has engaged in unsatisfactory professional conduct it is empowered to determine the disciplinary matter by making any of the following orders:

- (a) an order cautioning the respondent or a legal practitioner associate of the respondent law practice;
- (b) an order reprimanding the respondent or a legal practitioner associate of the respondent law practice;
- (c) an order requiring an apology from the respondent or a legal practitioner associate of the respondent law practice;
- (d) an order requiring the respondent or a legal practitioner associate of the respondent law practice to redo the work that is the subject of the complaint at no cost or to waive or reduce the fees for the work;
- (e) an order requiring—
 - (i) the respondent lawyer; or
 - (ii) the respondent law practice to arrange for a legal practitioner associate of the law practice—
to undertake training, education or counselling or be supervised;
- (f) an order requiring the respondent or a legal practitioner associate of the respondent law practice to pay a fine of a specified amount (not exceeding \$25 000) to the fund referred to in section 456;
- (g) an order recommending the imposition of a specified condition on the Australian practising certificate or Australian registration certificate of the respondent lawyer or a legal practitioner associate of the respondent law practice.¹⁰⁴

In making a determination, the DLRA is required to invite written submissions from the complainant and the respondent to the complaint and to take into consideration any written submissions received.¹⁰⁵

¹⁰² Uniform Law, s 290(2).

¹⁰³ Uniform Law, ss 291 - 292.

¹⁰⁴ Uniform Law, s 299(1).

¹⁰⁵ Uniform Law, s 299(2).

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The DLRA may also initiate and prosecute proceedings against a legal practitioner in a designated tribunal. The Bill provides that SAT is the relevant designated tribunal in Western Australia.¹⁰⁶ The DLRA may undertake such action if it is of the opinion that:

- (a) the alleged conduct may amount to unsatisfactory professional conduct that would be more appropriately dealt with by the designated tribunal; or
- (b) the alleged conduct may amount to professional misconduct.¹⁰⁷

The designated tribunal is empowered to make any orders it thinks fit, including any of the orders a DLRA can make and other specified orders such as recommending the removal of a lawyer's name from the roll of practitioners.¹⁰⁸

Consistent with the *Legal Profession Act 2008*, the Uniform Law outlines a range of obligations of the DLRA in dealing with complaints, including a duty to deal with complaints (including the conduct of any investigations) as efficiently and expeditiously as is practicable and to act in a fair manner, having regard to the respective interests of the complainant and the respondent and to the public interest. The rules of procedural fairness, to the extent that they are not inconsistent with the provisions of the Uniform Law or the Uniform Rules, also apply in prescribed circumstances in dealing with complaints.¹⁰⁹

¹⁰⁶ Legal Profession Uniform Law Application Bill 2020, s. 22. Bill as passed by the Legislative Assembly.

¹⁰⁷ Uniform Law, s 300(1).

¹⁰⁸ Uniform Law, s 302.

¹⁰⁹ Uniform Law, Part 5.7.

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3 The handling of complaints about legal practitioners by the LPCC

3.1 Number of complaints handled by the LPCC

As shown in Table 1 below, the number of new complaints, conduct investigations and rapid resolution inquiries received by the LPCC has declined over the past five years, from 1,515 in 2014-15 to 1,229 in 2018-19.

The number of rapid resolution inquiries received decreased from 1,413 in 2014-15 to 1,146 in 2018-19. Bearing in mind the increased variability and lower number of complaints, the number of complaints received decreased from 77 in 2014-15 to 59 in 2018-19. The number of conduct investigations received did not demonstrate any increasing or decreasing trend over the previous five years.

Table 1: Number of new complaints, conduct investigations and rapid resolution inquiries received by the LPCC, 2014-15 – 2018-19

Year	Complaints	Conduct Investigations	Rapid Resolution Inquiries	Total
2014-15	77	25	1413	1515
2015-16	64	18	1366	1448
2016-17	56	10	1479	1545
2017-18	37	25	1337	1399
2018-19	59	24	1146	1229

Source: Legal Profession Complaints Committee¹¹⁰

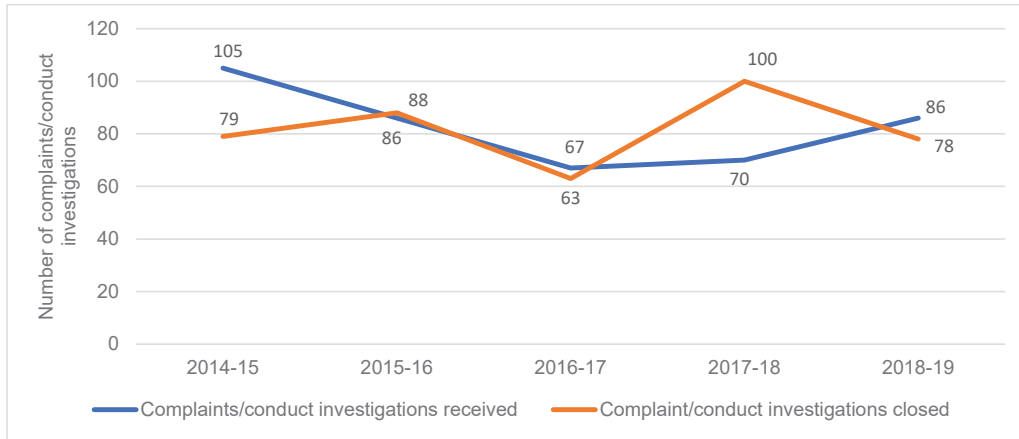
The Office analysed the number of complaints/conduct investigations received, closed and outstanding over the previous five years, from 2014-15 to 2018-19. Complaints and conduct investigations were considered together due to the small number of conduct investigations.

As shown in Figure 3, the number of complaints/conduct investigations closed each year was generally similar or fewer than the number of complaints received. The exception to this is in 2017-18, where 100 complaints/conduct investigations were closed compared to the 70 that were received.

¹¹⁰ Legal Profession Complaints Committee, *2015 Annual Report*, August 2015, p. 57; Legal Profession Complaints Committee, *2016 Annual Report*, August 2016, p. 58; Legal Profession Complaints Committee, *2017 Annual Report*, December 2017, p. 53; Legal Profession Complaints Committee, *2018 Annual Report*, December 2018, p. 54; Legal Profession Complaints Committee, *2019 Annual Report*, December 2019, p. 69.

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Figure 3: Number of complaints/conduct investigations received and closed, 2014-15 – 2018-19



Source: Legal Profession Complaints Committee¹¹¹

As shown in Figure 4, the higher number of complaints/conduct investigation closed in 2017-18 and the decline in new complaints/conduct investigations received in that year was associated with a decline in the number of outstanding complaints/conduct investigations, from 127 in 2016-17 to 97 in 2017-18.

The number of outstanding matters increased to 106 in 2018-19.

Figure 4: Number of outstanding complaints/conduct investigations, 2014-15 – 2018-19



Source: Legal Profession Complaints Committee¹¹²

¹¹¹ Legal Profession Complaints Committee, *2015 Annual Report*, August 2015, p. 19; Legal Profession Complaints Committee, *2016 Annual Report*, August 2016, p. 19; Legal Profession Complaints Committee, *2017 Annual Report*, December 2017, p. 17; Legal Profession Complaints Committee, *2018 Annual Report*, December 2018, p. 15; Legal Profession Complaints Committee, *2019 Annual Report*, December 2019, p. 14.

¹¹² Legal Profession Complaints Committee, *2015 Annual Report*, August 2015, p. 19; Legal Profession Complaints Committee, *2016 Annual Report*, August 2016, p. 19; Legal Profession Complaints Committee,

3.2 Timeliness of complaint handling

3.2.1 Public interest in the handling of complaints

An overarching principle to the handling of complaints about legal practitioners is the key objective of protecting the public interest. The public interest is a multifaceted concept.¹¹³ In considering the complaints handling system for legal practitioners, Michael McGarvie, the former Victorian Legal Services Commissioner, relevantly notes:

There are many competing demands in the task of legal regulation. Lawyers expect regulation to be reasonable and sensible in light of what is required to maintain the high standards they expect of their own profession. Consumers of legal services expect from the profession a high level of trustworthiness and competent, valuable service, and they want their grievances redressed where they believe these standards have not been met. Society as a whole recognises the importance of the integrity of the legal profession, and expects the regulator to maintain the standards. Regulation of the profession is therefore a complex task; a living and dynamic activity.¹¹⁴

It is in the public interest for complaints to be resolved in a timely way.

3.2.2 Types of complaints about legal practitioners

The research literature suggests that a significant proportion of complaints about legal practitioners can be described as ‘consumer matters’.¹¹⁵ These are complaints at the lower end of the seriousness spectrum and may relate to communication failures, unclear advice or delays and overall reflect ‘the breakdown of the advisor-client relationship’.¹¹⁶ Comparatively fewer complaints relate to what the Uniform Law defines as ‘disciplinary matters’, matters that may include more serious allegations of unlawful behaviour that calls into question a lawyer’s continued fitness to engage in legal practice. As John Briton notes:

The bulk of complaints describe everyday mistakes, errors of judgement, stuff ups and poor standards of service rather than misconduct as that term is ordinarily understood, and very often conduct of kinds that in the context of an employment relationship would be seen in a performance management rather than a disciplinary context.¹¹⁷

3.2.3 Triaging of complaints

Historically, legal complaint handling systems have focused on serious disciplinary matters to the detriment of consumer matters, or have attempted to resolve both types of complaint using the same approach.¹¹⁸ In Victoria, such an approach was the subject of a critical report by the Victorian Ombudsman in 2008 that led to the Victorian Legal Services Commission

2017 Annual Report, December 2017, p. 17; Legal Profession Complaints Committee, *2018 Annual Report*, December 2018, p. 15; Legal Profession Complaints Committee, *2019 Annual Report*, December 2019, p. 14.

¹¹³ Adam Dodek & Emily Alderson, *Risk Regulation for the Legal Profession*, pp. 626-627.

¹¹⁴ Michael McGarvie, *A pragmatic approach to legal regulation*, Paper presented at the International Legal Ethics Conference V, Banff, Canada, 14 July 2012, p 1.

¹¹⁵ Michael McGarvie, *A pragmatic approach to legal regulation*, Paper presented at the International Legal Ethics Conference V, Banff, Canada, 14 July 2012, p 4.

¹¹⁶ Michael McGarvie, *A pragmatic approach to legal regulation*, Paper presented at the International Legal Ethics Conference V, Banff, Canada, 14 July 2012, p 4.

¹¹⁷ John Briton, *National Legal Profession Reform and the Regulation of the Future*, St Vincents’ 48th Annual Queensland Law Society Symposium, 27 March 2010, p 16.

¹¹⁸ John Briton, *National Legal Profession Reform and the Regulation of the Future*, St Vincents’ 48th Annual Queensland Law Society Symposium, 27 March 2010, p. 16; Michael McGarvie, *A pragmatic approach to legal regulation*, Paper presented at the International Legal Ethics Conference V, Banff, Canada, July 14 2012, p. 5; Gael Roberts, *Complaint handling*, Presentation to LegalWise Seminar, 15 June 2012, p. 3.

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making significant changes to its approach to the handling of complaints.¹¹⁹ In that report, the Victorian Ombudsman observed:

Over the past year I received 95 complaints about the Legal Services Commissioner, which replaced the former Legal Ombudsman in December 2005. There were recurring themes in the complaints which pointed to a systemic failure by the Legal Services Commissioner to adequately undertake its statutory role. For example, complainants alleged that:

- complaints were inadequately investigated or not investigated at all
- there were significant delays – sometimes in excess of three years – in finalising complaints
- documentation practices were poor and failed to provide complainants with information about the Legal Services Commissioner’s internal review process and external review mechanisms
- investigations lacked procedural fairness.

...

I also conducted an own motion investigation into the Legal Services Commissioner and its decision-making processes under section 14 of the Ombudsman Act because of the number of complaints I had received. My investigation identified a lack of understanding by staff of the Legal Services Commissioner’s statutory powers and a restricted skills-set to conduct investigations. The Legal Services Commissioner’s investigators showed limited knowledge of the basic techniques of investigative processes. Case files lacked:

- investigation plans
- thorough and professional approaches to gathering evidence
- follow-up on serious allegations
- substantiating documents such as practitioners’ files
- timely conclusions
- verification of practitioners’ responses
- reasons for decisions.¹²⁰

The LPCC also made changes to its approach to the handling of complaints in 2010-11 based on learnings from the Victorian Legal Services Commission.¹²¹

Legislation and practice across Australia has evolved over the past decade to better categorise and proportionally respond to the types of complaints received by legal practitioner complaint handling bodies. Legal practitioner complaint handling bodies now typically triage complaints, whereby complaints assessed as requiring complex and lengthy investigations are handled by one team while less serious consumer matters that may be resolved relatively quickly and informally are handled by another team.¹²² Michael McGarvie, the former Victorian Legal Services Commissioner, notes that the triage system leads to more efficient and effective resolution of complaints:

A proven strategy for the best management of complaints is to establish a triage system...Teams within the office are organised into specialities and include the Rapid Resolution Team (for complaint conciliations), the Dispute Resolution Team (for the mediation of costs disputes), two investigations & prosecutions teams (for the sharp end of

¹¹⁹ Michael McGarvie, *A pragmatic approach to legal regulation*, Paper presented at the International Legal Ethics Conference V, Banff, Canada, 14 July 2012, p 5.

¹²⁰ Ombudsman Victoria, *Annual Report 2008-09*, September 2009, pp. 21-23.

¹²¹ Legal Profession Complaints Committee, *Annual Report 2011*, December 2011, p. 3.

¹²² Michael McGarvie, *A pragmatic approach to legal regulation*, Paper presented at the International Legal Ethics Conference V, Banff, Canada, 14 July 2012, p 10; Legal Profession Complaints Committee, *Annual Report 2011*, December 2011, p. 3; John Teerds, Regulation refresh – LSC seeks a better approach, *Proctor*, November 2014, p. 19.

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misconduct), and a regulation and litigation team (to enforce compliance for the Legal Services Board outside complaints).

A significant benefit of the use of a triage system is the reduction in the volume of complaints set aside for full investigation. We still get 5,000 enquiries and 2,000 complaints per year. Fewer of them however, end up being subjected to full blown investigations. Accordingly, each investigator now carries around 30 open matters, down from over 100 two years ago. Investigations staff are now able to dedicate more time to ensuring thorough investigations are done faster. With a lighter file load, investigations staff are better able to communicate more frequently with parties and direct their “heavier” investigative skills towards more serious disciplinary issues. The benefit of this approach has been evident in the immediate and continuing drop in the numbers of open complaints since April 2010...¹²³

The use of a triage system is also consistent with complaint handling best practice more generally, with the Commonwealth Ombudsman noting:

A complaint handling system should be efficient. Methods of dealing with a complaint will differ from one complaint to another. Simple complaints should usually be resolved quickly on first contact ... More complex or sensitive matters may take longer to resolve and might need specialist attention. A guiding principle is that complaints should be handled in a way that is proportionate and appropriate to the matter being complained about.¹²⁴

3.2.4 Early and informal resolution of complaints

In the resolution of complaints, the research literature advocates the use of informal means, including alternative dispute resolution approaches (for example, mediation) where possible and appropriate.¹²⁵ The research literature further indicates that alternative dispute resolution approaches may be particularly beneficial for people experiencing disadvantage.¹²⁶ The informal resolution of complaints can simply involve the complaint handling body calling the legal practitioner to see if a matter can be resolved quickly without proceeding to a formal investigation.¹²⁷ Robert Brittan describes this approach as a highly efficient in resolving many complaints:

When an inquiry is received which suggests that it can be addressed promptly and informally without the need for written complaint, it is handled by the commission’s dispute resolution team (DRT) ... The DRT uses direct discussions with the lawyer and the consumer over the phone, in person or by email, to resolve the dispute. For example, in August alone we handled 305 of this type of inquiry...

We believe that there is nothing to be gained by asking people who ring or contact us online or by email to complain about a lawyer to go to the trouble of opening a complaint file and commencing a formal investigation if we are able to resolve them informally and perhaps with a few quick telephone calls.

This saves costs, limits inconvenience to all parties to that process, and lessens anxiety.¹²⁸

¹²³ Michael McGarvie, *A pragmatic approach to legal regulation*, Paper presented at the International Legal Ethics Conference V, Banff, Canada, 14 July 2012, p 10.

¹²⁴ Commonwealth Ombudsman, *Better Practice Guide to Complaint Handling*, April 2009, p. 14.

¹²⁵ NSW Law Reform Commission, *Scrutiny of the legal profession: Complaints against lawyers*, Report 70 (1993), p. 60, 73, 90; Esther Robertson, *Fit for the Future: Report of the Independent Review of Legal Services Regulation in Scotland*, p. 43.

¹²⁶ Law Council of Australia, *The Justice Project – Final Report – Part 2: Dispute Resolution Mechanisms*, August 2018, p. 9.

¹²⁷ John Teerds, Regulation refresh – LSC seeks a better approach, *Proctor*, November 2014, p. 19; Gael Roberts, Complaint handling, Presentation to LegalWise Seminar, 15 June 2012, p. 3.

¹²⁸ John Teerds, Regulation refresh – LSC seeks a better approach, *Proctor*, November 2014, p. 19

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The triaging of complaints and use of informal complaint resolution approaches is prescribed in legislation to varying extents, with the research literature indicating that the Uniform Law is a considerable improvement on previous legislation.¹²⁹ The Uniform Law demarcates 'consumer matters' and 'disciplinary matters' and provides mechanisms for the efficient resolution of consumer matters through informal means, including through mediation.¹³⁰ Importantly, where mediation fails, the regulatory body is empowered to make a determination that may include orders cautioning a legal practitioner, requiring an apology, the redoing of work, a reduction in fees, the undertaking of training or a compensation order.¹³¹ Determinative powers are also available for cost disputes (up to prescribed amounts) and unsatisfactory professional conduct.¹³² These mechanisms promote flexible, proportionate and informal approaches to the resolution of complaints and are described by John Briton as sparing those involved:

...considerable time and trouble and cost, not least in the case of respondent lawyers the costs of defending themselves in a hearing before a disciplinary body, costs which not infrequently exceed any financial penalty that is ultimately imposed.¹³³

Finally, where a complaint involves a combination of consumer matters and more serious disciplinary matters, the research literature indicates that these matters should be considered separately, with the resolution of consumer matters not to be held up by any investigation into disciplinary matters.¹³⁴ This good practice is a prescribed requirement under the Uniform Law.¹³⁵

Overall, the research literature indicates that complaints should be resolved in a manner that is efficient and proportionate to the severity of the allegations. This will involve the assessment and triaging of complaints, the use of informal, alternative dispute resolution techniques where possible and appropriate to do so and the separate consideration of complaints involving a mixture of consumer matters and more serious disciplinary matters.

3.2.5 Rapid resolution of complaints by the LPCC

The Ombudsman requested the LPCC provide statistics on the age of rapid resolution inquiries and complaints/own initiative investigations that were closed in 2018-19 and that were open at the time of the request, namely 9 October 2019.

¹²⁹ John Briton described the system for dealing with complaints as 'a great advance on the Queensland Law and the other LPAs...' and the LPCC noted that an advantage of the Uniform Law was that it provided the legislative imprimatur for its existing triage processes. See John Briton, *Between the idea and the reality lies the shadow*, Edited version of a paper presented at the Australian and New Zealand Legal Ethics Colloquium, Melbourne, 4 December 2015, p. 20; Legal Profession Complaints Committee, *2018 Annual Report*, December 2018, p. 2.

¹³⁰ See *Legal Profession Uniform Law* (NSW), Part 5.3 Consumer Matters. Notably, section 287 of the Uniform Law states: 'The designated local regulatory authority must attempt to resolve a consumer matter by informal means as soon as practicable.'

¹³¹ *Legal Profession Uniform Law* (NSW), s. 288-290.

¹³² *Legal Profession Uniform Law* (NSW), s. 291-294, 299.

¹³³ John Briton, *Between the idea and the reality lies the shadow*, Edited version of a paper presented at the Australian and New Zealand Legal Ethics Colloquium, Melbourne, 4 December 2015, p. 20

¹³⁴ Esther Robertson, *Fit for the Future: Report of the Independent Review of Legal Services Regulation in Scotland*, p. 43; The Office of the Legal Services Commissioner (NSW), *Annual Report 2018-19*, p. 9.

¹³⁵ *Legal Profession Uniform Law* (NSW), s. 271.

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The LPCC does not have key performance indicators (see section 3.4.1.4) but does state on its website that it aims to finalise all investigations within one year.¹³⁶ The LPCC has also stated that it aims to finalise most rapid resolution inquiries within 2-3 months.¹³⁷

The LPCC closed 1,079 rapid resolution inquiries between 1 July 2018 and 30 June 2019. As shown in Table 2 and Figure 5 below, two-thirds of rapid resolution inquiries were closed within three months. A small number of rapid resolution inquiries (24, 2.2%) took over 12 months to finalise. For the 24 rapid resolution inquiries that were more than 12 months old at the time of closure, the age of the inquiry ranged from 370 days to 1003 days, with a median age of 430 days.

Table 2: Number of rapid resolution inquiries closed in 2018-19 and open cases, by age of matter

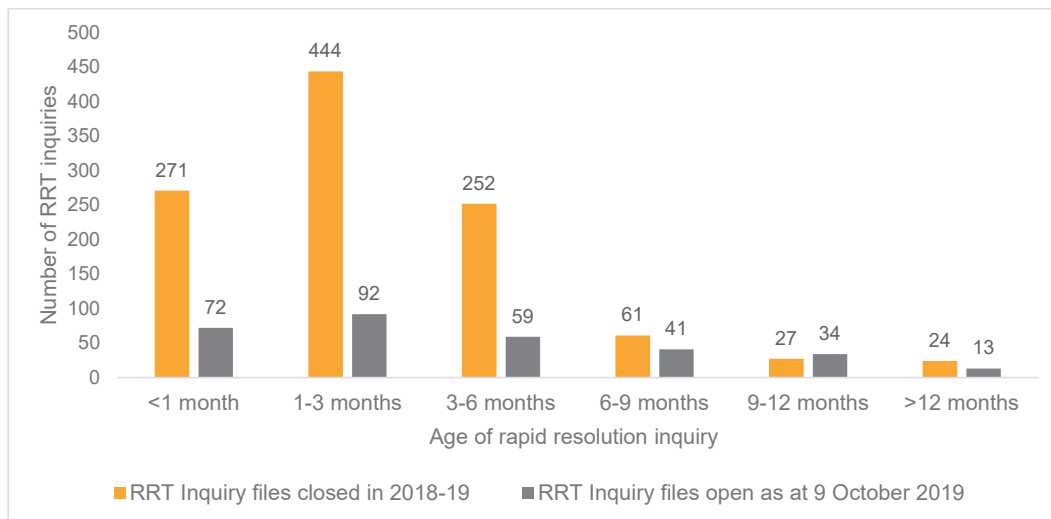
Age	Closed in 2018-19	Open Cases
< 1 month	271 (25.1%)	72 (23.2%)
1 -3 months	444 (41.1%)	92 (29.6%)
3 – 6 months	252 (23.4%)	59 (19.0%)
6 – 9 months	61 (5.7%)	41 (13.2%)
9 – 12 months	27 (2.5%)	34 (10.9%)
> 12 months	24 (2.2%)	13 (4.2%)
Total	1,079	311

¹³⁶ Legal Practice Board of Western Australia, *The Committee's Services*, Accessed 5 February 2020 at <<https://www.lpbwa.org.au/Complaints/The-Committee-s-Services>>

¹³⁷ The LPCC's website states that 'The majority of matters which don't require a full investigation and are capable of being resolved are completed within a few months' while presentations by LPCC staff have stated that the RRT 'aims to conclude most matters within 2 months'. See Legal Practice Board of Western Australia, *The Committee's Services*, Accessed 5 February 2020 at <<https://www.lpbwa.org.au/Complaints/The-Committee-s-Services>>; Nick Pope, *Dealing with Complaints*, Presented on 11 September 2014 to Legalwise Seminars, p. 11.

Investigation into the handling of complaints by the Legal Profession Complaints Committee

Figure 5: Number of rapid resolution inquiries closed in 2018-19 and open cases, by age of matter



Source: Legal Profession Complaints Committee

As further shown in Table 2, there was a higher proportion of open rapid resolution inquiries over six months old. Matters over six months old comprised 10.4% of rapid resolution inquiries closed in 2018-19 and 28.3% of open rapid resolution inquiries. For the 13 rapid resolution inquiries that were more than 12 months old as at 9 October 2019, the age of the inquiry ranged from 366 to 693 days, with a median age of 454 days.

3.2.6 Legislative obligation of the LPCC to be expeditious in the resolution of complaints

The LPCC is obliged to undertake expeditious and efficient resolution of complaints under the *Legal Profession Act 2008*.¹³⁸

3.2.7 Opportunity for the LPCC to comment on the preliminary report of the investigation

The LPCC were provided the opportunity to comment on the preliminary report of my investigation. On 30 November 2020, Mr John R B Ley SC, Chair, LPCC, wrote to me to respond to my preliminary report (**LPCC letter**). The LPCC letter states:

The Committee's experience is that, inevitably, the investigation and resolution of some complaints takes longer than the investigation and resolution of others, and that, equally, some own initiative investigations, pursuant to s 421 of the *Legal Profession Act 2008* (WA), take longer than others. That is because the conduct issues raised by some complaints, and encountered in some own initiative investigations, are extremely complex. That is not confined to the legal and factual issues. Often there are difficulties in obtaining evidence, or in dealing with the people involved. The Committee finds that both complainants and practitioners alike are prone to exhibit challenging behaviours in the course of the investigation and resolution of a complaint. On other occasions, the progress of the Committee's investigation and resolution of a complaint, or the progress of an own initiative investigation are stifled by matters which

¹³⁸ *Legal Profession Act 2008*, s. 431.

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are outside of the Committee's control. In those circumstances, it is difficult to finalise matters as promptly as the Committee would like, no matter what resources are allocated to the task. Current examples include the investigation of complaints in which the complainant or the practitioner the subject of the complaint is incapacitated, and the investigation of complaints where there are on foot court proceedings, the outcome of which will have a bearing on the further investigation and resolution of the complaint.

I have carefully considered these observations by the LPCC. In my view, many investigatory and complaint resolution bodies:

1. Routinely investigate and resolve extremely complex matters. This is not to say, of course, that any given body may not, as a proportion of all complaints, have to deal with a larger number of extremely complex matters than other bodies. It is also not to say that some bodies will, as a matter of course, need to deal with matters which generally are more complex than other bodies. On this point, it is, in my view, entirely appropriate to accept the expertise and experience of very senior counsel, as presented in the LPCC letter, that legal professional complaints can be extremely complex;
2. Will need, from time to time, to deal with difficulties in evidence gathering and unreasonable and challenging behaviours from parties to a complaint; and
3. Will need, from time to time, to deal with a range of external exigencies and other less urgent, but still material, matters that impact investigations.

Ultimately, however, the aim of any investigatory and complaints resolution body (or regulated requirement, as it is with the LPCC) is to resolve matters as expeditiously as practicable. To do so, it must have the culture, capacity and processes to ensure this occurs.

The LPCC also stated:

Quite apart from those generic and recurring difficulties, however, in the last two years, the Committee has endured an acute period of staff turnover, particularly in its Investigations Team. That has led, inevitably, to the disruption of the investigation of complaints and the unavoidable delay caused by a new member of the Team familiarising himself or herself with the facts of a matter. The Committee is currently endeavouring to rebuild its capacity in that regard.

I have carefully considered this observation by the LPCC. I acknowledge that staffing capacity is obviously relevant to the timeliness of complaint handling and, in my view, may in the case of the LPCC properly provide a level of context for past and present timeliness. It should not, however, derogate from the timeliness that should be achieved in the future (and, it is important to note, there is no suggestion from the LPCC that it should, rather it is looking to rebuild capacity).

Finally, in the LPCC letter, the LPCC noted:

The relevant annual reports for the last two financial years indicate that, looking at all complaints, New South Wales resolves 51% within 90 days, and Victoria resolves 74% within 90 days. In those circumstances, and in line with your Recommendations 7 and 12, in which you suggest the introduction and improvement of key performance indicators over time, I would suggest a staged implementation which would also allow the Committee to better capture which matters are subject to a rapid resolution process. With the aim being to ensure that all but the most exceptional matters are finalised or escalated within 3 months.

I have carefully considered this suggestion by the LPCC. In my view, the staged implementation of improvements to the LPCC's timeliness of complaint handling, benchmarked to best performing jurisdictions, is consistent with good practice, likely to

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achieve permanent improvements more effectively and, in all the circumstances, an entirely reasonable suggestion.

3.2.8 Opinion

In my opinion, it is a misnomer to describe the resolution of matters as rapid if:

1. As at 9 October 2019, 47 per cent of matters were more than 3 months old; and
2. As at 9 October 2019, 13 matters were more than 12 months old, with the age of the inquiry ranging from 366 to 693 days, with a median age of 454 days.

In the context of both the literature and good practice, and section 431 of the *Legal Profession Act 2008*, and having carefully considered the LPCC letter, in my opinion, the rapid resolution of complaints by the LPCC should be achieved in less than 90 days in the majority of cases, with an appropriate staging of that achievement.

3.2.9 Recommendation

Recommendation 1: That the LPCC retain a triaging and rapid resolution process but improve that process with a view to having 75% of matters subject to rapid resolution being resolved in less than 90 days, and 95% of matters subject to rapid resolution being resolved within 6 months, by no later than the end of the financial year 2020-21, with further improvements to those key performance indicators to be reviewed upon the introduction of the Uniform Law.

3.2.10 Investigations

The LPCC closed 76 complaints/own initiative investigations between 1 July 2018 and 30 June 2019. As shown in Table 3 and Figure 6 below, most complaints/own initiative investigations (42/76, 55.3%) took over 12 months to finalise. For the 42 complaints/own initiative investigations that were more than 12 months old at the time they were finalised, the age of the matter ranged from 368 to 1434 days, with a median age of 683 days.

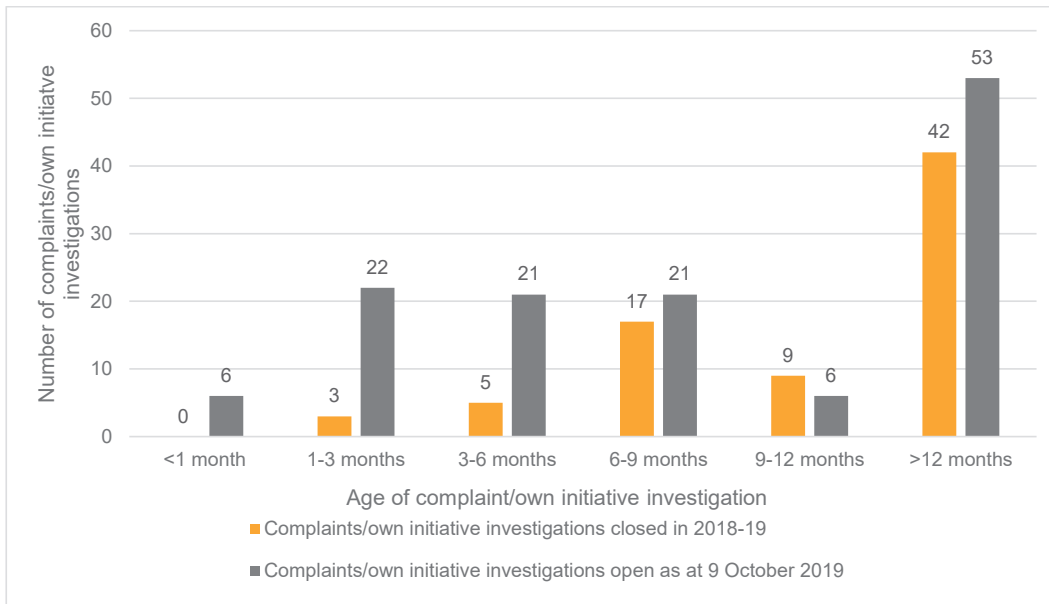
The oldest complaint closed in 2018-19 was nearly four years old.

Table 3: Number of complaints/own initiative investigations closed in 2018-19 and open, by age of matter

Age	Closed in 2018-19	Open Cases
< 1 month	0 (0%)	6 (4.7%)
1 -3 months	3 (3.9%)	22 (17.1%)
3 – 6 months	5 (6.6%)	21 (16.3%)
6 – 9 months	17 (22.4%)	21 (16.3%)
9 – 12 months	9 (11.8%)	6 (4.7%)
> 12 months	42 (55.3%)	53 (41.1%)
Total	76	129

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Figure 6: Number of complaints/own initiative investigations closed in 2018-19 and open, by age of matter



Source: Legal Profession Complaints Committee

In 2018-19, the LPCC's aim to finalise investigations within 12 months was achieved in less than half (44.7%) of complaints/own initiative investigations.

As further shown in Table 3, there was a high proportion of aged open complaints/own initiative investigations at the time of the request, with close to half (53, 41.1%) of open complaints/own initiative investigations open for over 12 months. For the 53 complaints/own initiative investigations that were more than 12 months old at 9 October 2019, the age of matters ranged from 366 to 2150 days, with a median age of 534 days.

The oldest open complaint/own initiative investigation was nearly six years old as at 9 October 2019.

3.2.11 Legislative obligation of the LPCC to be expeditious in the investigation of complaints

The LPCC is obliged to undertake expeditious and efficient resolution of complaints under the *Legal Profession Act 2008*.¹³⁹

3.2.12 Achieving change

It is important to observe that changes to timeliness involve both practice changes and cultural change. The culture of a complaints handling body is difficult to quantify and measure but underpins the timely and effective resolution of complaints. Edgar Schein refers to culture as:

... a pattern of shared tacit assumptions that was learned by a group as it solved its problems of external adaptation and internal integration, that has worked well enough to be considered

¹³⁹ *Legal Profession Act 2008*, s. 431.

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valid and, therefore, to be taught to new members as the correct way to perceive, think, and feel in relation to those problems.¹⁴⁰

In simple terms, culture is commonly expressed as ‘the way things are done around here’.

The research literature supports a link between an organisation’s culture and its performance.¹⁴¹ A complaints handling body is more likely to prioritise the timely resolution of complaints, effective communication with stakeholders and fair and reasonable decision making if such behaviours are supported by the underlying culture. The promotion of a positive and consumer-focused culture that values the timely resolution of complaints is therefore essential to the effectiveness of complaints handling. Michael McGarvie, the former Victorian Legal Services Commissioner, relevantly concluded:

... the regulator is far more than the legislation that creates it: the culture of the regulator is critical to the success or failure of regulation.¹⁴²

The research literature indicates that leadership has a unique function in creating and managing culture.¹⁴³ Leadership is responsible for a range of activities that support the achievement of positive complaint outcomes including promoting and demonstrating an organisation’s commitment to effective complaints management, providing adequate resources, promulgating complaint handling policies and practices and reviewing performance for the purpose of continuous improvement.¹⁴⁴

The experience of the Victorian Legal Services Commissioner (**VLSC**) over the past decade is illustrative of how leadership can shift the culture of a regulatory body to improve complaint handling outcomes. Following several complaints, in 2009 the Victorian Ombudsman reviewed the complaint handling processes and procedures of the VLSC and identified a series of systemic problems with the management of complaints, including:

- delays in investigating and finalising complaints;
- poor investigatory techniques, poor evidence gathering and failure to substantiate the explanations given by lawyers; and
- denial of procedural fairness to parties and inadequate explanations of decisions.¹⁴⁵

The leadership at VLSC implemented a range of reforms to shift their regulatory approach from being what it described as ‘cautious and legalistic’ to one that was more dynamic, personal and pragmatic.¹⁴⁶ This involved system and process changes and an overall shift in culture and broader philosophical outlook, including an increased focus on:

¹⁴⁰ Edgar H. Schein, *The corporate culture survival guide*, 2009, Jossey-Bass, San Francisco, p. 27.

¹⁴¹ See for example, Emmanuel Ogbonna & Lloyd C. Harris, Leadership style, organizational culture and performance: empirical evidence from UK companies, *International Journal of Human Resource Management*, 11(4), August 2000, pp. 766-788; Bronwen Bartley, Seishi Gomibuchi & Robin Mann, Best practices in achieving a customer-focused culture, *Benchmarking: An International Journal*, 14(4), 2007, pp. 482-496; Ken Parry & Sarah Proctor-Thompson, Leadership, culture and performance: The case of the New Zealand public sector, *Journal of Change Management*, 2003, Vol. 3(4), pp. 376–399.

¹⁴² Michael McGarvie, *A pragmatic approach to legal regulation*, Paper presented at the International Legal Ethics Conference V, Banff, Canada, 14 July 2012, p. 2.

¹⁴³ Edgar H. Schein, *The corporate culture survival guide*, 2009, Jossey-Bass, San Francisco, p. xi.

¹⁴⁴ International Organization for Standardization, *Quality management – Customer satisfaction – Guidelines for complaints handling in organizations*, ISO 10002:2018(E), pp. 5-6.

¹⁴⁵ Michael McGarvie, Legal Services Commissioner Victoria, *A Pragmatic Approach to Legal Regulation*, paper presented at the International Legal Ethics Conference V, Canada, 2012, p 2.

¹⁴⁶ Michael McGarvie, Legal Services Commissioner Victoria, *A Pragmatic Approach to Legal Regulation*, paper presented at the International Legal Ethics Conference V, Canada, 2012, p 1.

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- effective and ongoing communication, using varied and flexible methods as the parties to a complaint require (including less reliance on formal, written communication and the capacity to embrace email or telephone contact);
- the development of strong rapport and the proper management of relationships;
- flexibility and discretion for investigating staff to exercise their judgment and apply their 'practical wisdom' in individual complaints cases;
- predictable and timely resolutions to investigations and avoiding blindsiding a complainant or respondent;
- triaging complaints to proportionally direct resources and time to complex investigations and more serious issues; and
- proactively identifying and addressing systemic issues, including developing guidance to assist individuals to comply with appropriate standards.¹⁴⁷

These reforms resulted in improvements in complaint handling outcomes.¹⁴⁸

The VLSC's experience in promulgating a culture that values effective, timely complaint resolution is not unique. The Western Australian Ombudsman similarly identified the need for cultural change upon commencement in the role in 2007, noting:

a need to lead a fundamental change of culture – from one where aged cases, and lack of timeliness generally, was not simply tolerated, it was not sufficiently visible as a problem, to a culture that was aware of the problem, concerned about the problem and ultimately saw a lack of timeliness as a failure of our core principles and purpose.¹⁴⁹

Case study of Western Australian Ombudsman complaint handling improvement program

In 2007-08, the office of the Western Australian Ombudsman commenced a major complaint handling improvement program. An initial focus of the program was the elimination of aged complaints. Building on the program, the office developed and commenced a new organisational structure and processes in 2011-12 to promote and support early resolution of complaints.

Together, these initiatives have resulted in 2019-20 in 95% of all complaints finalised within 3 months. Following the implementation of a range of strategies to improve complaint handling and the establishment of a culture that placed a high value on the timely resolution of complaints (without compromising quality), the average age of complaints went from 173 days as at 30 June 2007 to 47 days as at 30 June 2020, complaints older than 6 months have decreased by 80% and all investigations are finalised within 12 months.¹⁵⁰ It is noteworthy that in 2007-08, prior to the commencement of the complaint handling improvement program, there were a significant number of investigation older than 2 years and the oldest investigation was six years.

This dramatically improved timeliness includes simple matters resolved through early resolution processes through to highly complex investigations undertaken with all the powers of a standing Royal Commission.

¹⁴⁷ Michael McGarvie, Legal Services Commissioner Victoria, *A Pragmatic Approach to Legal Regulation*, paper presented at the International Legal Ethics Conference V, Canada, 2012, pp 7-11.

¹⁴⁸ Michael McGarvie, Legal Services Commissioner Victoria, *A Pragmatic Approach to Legal Regulation*, paper presented at the International Legal Ethics Conference V, Canada, 2012, p. 12.

¹⁴⁹ Chris Field, Ombudsman Western Australia, *Achieving improved timeliness of complaint resolution*, presentation to the Public Sector Commission, 4 November 2011, p. 21.

¹⁵⁰ *Ombudsman Western Australia Annual Report 2019-20*, p. 29.

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3.2.13 Opportunity for the LPCC to comment on the preliminary report of the investigation

The LPCC were provided the opportunity to comment on the preliminary report of my investigation. The LPCC, for the reasons indicated at 3.2.7 above, suggested the staged implementation of improvements to the LPCC's timeliness of complaint handling. This suggestion is, in my view, consistent with good practice, likely to achieve permanent improvements more effectively and, in all the circumstances, entirely reasonable.

3.2.14 Opinion

In 2018-19, the LPCC's aim to finalise investigations within 12 months was achieved in less than half (44.7%) of complaints/own initiative investigations. For the 53 complaints/own initiative investigations that were more than 12 months old at 9 October 2019, the age of matters ranged from 366 to 2150 days, with a median age of 534 days. The oldest open complaint/own initiative investigation was nearly six years old as at 9 October 2019.

In my opinion, these timeframes for investigating complaints are excessive and wrong. In the context of both literature and good practice and section 431 of the *Legal Profession Act 2008*, and having carefully considered the LPCC letter, the timeliness currently achieved by the LPCC is not expeditious or efficient. It is my view that change can be achieved as set out at 3.2.12. In so expressing this view, I note particularly that the complaint handling processes prescribed by the Uniform Law confer the DLRA with considerable additional flexibility to resolve matters efficiently, proportionality and fairly via determinative powers and the demarcation of consumer matters and disciplinary matters.

3.2.15 Recommendations

Recommendation 2: That the LPCC immediately identify all investigations older than two years of age and ensure they are resolved as a matter of priority, with at least 50% of those investigations to be resolved by the end of the financial year 2020-21, another 25% by the end of the financial year 2021-22, and the remaining 25% by the end of the financial year 2022-23.

Recommendation 3: That the LPCC retain a separate disciplinary investigation process but improve that process with a view to 75% of matters subject to disciplinary investigation being resolved in less than two years by the end of the financial year 2021-22.

Recommendation 4: Upon the achievement of Recommendation 3, the LPCC seek to have 75% of disciplinary investigations resolved in less than 12 months, and 90% of disciplinary investigations resolved within two years by end of the financial year 2022-23 with no investigation open after two years by 2023-24 unless there are circumstances beyond the control of the LPCC.

Recommendation 5: The LPCC have 85% of disciplinary investigations resolved within 12 months by the end of the financial year 2023-24 and maintain that timeliness of resolution.

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3.3 Resourcing of complaints handling

The NSW Law Reform Commission regarded 'Proper Funding and Resources' as a good practice principle, noting that a complaint handling system:

...requires an adequate level of resourcing, including decent (professional and support) staffing levels, salaries which attract officers with the appropriate levels of expertise, computer hardware and software, and so on. A proper system involves not only the thorough investigation of complaints, but the timely investigation and processing of complaints, as well as a range of support and ancillary services and sufficient checks and balances to inspire public confidence.¹⁵¹

Best practice guidance developed by Australian ombudsmen similarly states the importance of a complaint management system being adequately resourced, with the adequacy of resourcing reflected in outcomes such as timeliness and quality of service.¹⁵² The Commonwealth Ombudsman relevantly notes:

A complaint handling system must be properly staffed and resourced. The agency must have enough staff to enable it to comply with its own timeliness standards for complaint handling. Line area managers should also ensure that their staff give appropriate priority to helping complaint handling staff investigate and resolve complaints. The agency must be able to provide a high-quality service to clients.¹⁵³

Accordingly, adequacy of funding is generally reflected in outcomes, including the capacity to achieve prescribed objectives, thoroughly and expeditiously resolve complaints and provide public confidence in the regulation of the legal profession. Good practice requires management to assess the level of resourcing and provide what is necessary for the efficient and effective operation of complaint handling processes.¹⁵⁴ The amount of funding should also not place an undue burden on those who fund it, given that increased costs will likely be passed on to the consumer.¹⁵⁵

The research literature identifies appropriately trained and qualified staff as central to the success of legal practitioner complaint handling body. The NSW Law Reform Commission noted that a legal practitioner complaint handling body is to be resourced in such a way to attract staff with '...appropriate levels of expertise.'¹⁵⁶

Guidance from Australian ombudsmen similarly describes the importance of staff with appropriate expertise and skills to achieve timely and effective resolution of complaints. The Northern Territory Ombudsman notes:

People are the backbone of an effective complaints management system. This is the single most important resource in the complaints handling process. It is imperative that staff are

¹⁵¹ NSW Law Reform Commission, *Scrutiny of the legal profession: Complaints against lawyers*, Report 70 (1993), p. 56.

¹⁵² Commonwealth Ombudsman, *Better Practice Guide to Complaint Handling*, April 2009, p. 8; Ombudsman SA, *Complaint management framework*, March 2016, p. 8.

¹⁵³ Commonwealth Ombudsman, *Better Practice Guide to Complaint Handling*, April 2009, p. 8.

¹⁵⁴ International Organization for Standardization, *Quality management – Customer satisfaction – Guidelines for complaints handling in organizations*, ISO 10002:2018(E), p. 8.

¹⁵⁵ Sir David Clementi, *Review of the regulatory framework for legal services in England and Wales: Final Report*, December 2004, p. 74

¹⁵⁶ NSW Law Reform Commission, *Scrutiny of the legal profession: Complaints against lawyers*, Report 70 (1993), p. 56.

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appropriately selected and trained, and provided with adequate support networks, to ensure that complaints are dealt with effectively...¹⁵⁷

The Commonwealth Ombudsman notes that '[a]gencies must recruit people who have the right skills and attributes into complaint handling positions' and the South Australian Ombudsman similarly describes the need for staff to have the '...appropriate aptitude, knowledge and skills to be able to respond to complaints effectively'.¹⁵⁸

As the resolution of complaints about legal practitioners can involve the consideration of complex legal matters and the conduct of litigation, it is evident that some staff will need to be practising lawyers with sufficient legal expertise to minimise additional costs associated with use of external counsel. The recruitment of staff who do not have a legal background but have broader expertise in investigations or dispute resolution is also advisable. The former Victorian Legal Services Commissioner, Michael McGarvie, noted:

The individual staff member can have a powerful impact in helping to resolve relationship difficulties between lawyer and client, in assisting a lawyer under pressure to resolve ongoing concerns, and in providing procedural satisfaction to the parties. This makes it a priority to recruit people who combine specialist skills (such as investigation or dispute resolution) with maturity, sound judgment, wisdom, common sense and empathy.

...

In recruiting new members of staff over time, I have also moved to employ not only lawyers, but skilled professionals of varied backgrounds in dealing with complaints and conducting investigations. I have particularly sought to recruit for and develop those with skills in conciliation and alternative dispute resolution (ADR), who have proved highly effective in matters where a formal investigation is not warranted, but where an acceptable outcome for the consumer is essential.¹⁵⁹

The relevance of non-legal-specific dispute resolution skills and attributes such as empathy, creativity, resilience, analytical skills, good judgment and communication skills reflects increasing use of informal, alternative dispute resolution approaches to the resolution of complaints against legal practitioners (see section 3.2.4).¹⁶⁰ It also aligns with the broader complaint handling literature, with the Commonwealth Ombudsman and South Australian Ombudsman similarly noting the importance of these attributes.¹⁶¹

Good practice guidance indicates the need for resourcing to be regularly reviewed by management to ensure it is sufficient to achieve desired outcomes.¹⁶² The passage of the Uniform Law provides an opportunity for the LPCC to consider its resourcing requirements. The LPCC has noted that the Uniform Law may result in additional workload which may have resourcing implications:

¹⁵⁷ Ombudsman NT, *Effective complaints management – 7: Resources*, p. 1, Accessed 3 February 2020 at <<https://www.ombudsman.nt.gov.au/agencies/effective-complaints-management-fact-sheets>>

¹⁵⁸ Commonwealth Ombudsman, *Better Practice Guide to Complaint Handling*, April 2009, p. 17; Ombudsman SA, *Complaint management framework*, March 2016, p. 8.

¹⁵⁹ Michael McGarvie, *A pragmatic approach to legal regulation*, Paper presented at the International Legal Ethics Conference V, Banff, Canada, 14 July 2012, pp 9, 13.

¹⁶⁰ See for example, John Teerds, Regulation refresh – LSC seeks a better approach, *Proctor*, November 2014, p. 19; Steve Mark, The Office of the Legal Services Commissioner – consumer protection, *Precedent*, Issue 90, January/February 2009, p. 14.

¹⁶¹ Commonwealth Ombudsman, *Better Practice Guide to Complaint Handling*, April 2009, p. 17; Ombudsman SA, *Complaint management framework*, March 2016, p. 8.

¹⁶² International Organization for Standardization, *Quality management – Customer satisfaction – Guidelines for complaints handling in organizations*, ISO 10002:2018(E), p. 8.

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One of the unknowns with [Uniform Law] but a significant concern is the possibility of an additional workload which may be necessitated for the Committee's legal staff, if, based on the experiences reported by the existing [Uniform Law] states, there is the need to make preliminary and at times binding cost determinations. This is to be borne in mind in light of the significant demand on the Committee's resources where the level of contact with the Committee is unrelenting and increasing.¹⁶³

The potential for an increased workload arising from the commencement of the Uniform Law is of concern given that the LPCC has consistently reported significant workload pressures in their annual reports, including:

- '...staff continuing to work at full capacity. Two senior legal officers increased their working hours'.¹⁶⁴
- 'Due to the RRT workloads, whether risk alert letters should be sent out was only assessed once during the year...'.¹⁶⁵
- 'Due to this increasing workload, the Committee did not undertake any audits of incorporated legal practices this year'.¹⁶⁶
- 'The Committee's ability to undertake more extensive audit work is restricted by its resources. The need for more audits to be undertaken is not expected to diminish'.¹⁶⁷

The LPCC reported that these workload pressures have impacted its capacity to undertake proactive and preventative work, namely audits of incorporated legal practices and the assessment of whether risk alert letters should be sent out to firms that have been the subject of multiple inquiries or complaints of substance against their practitioners. Audits of incorporated legal practices commenced in October 2013 and six of these audits were undertaken in 2014-15.¹⁶⁸ Since 2014-15, only one audit of an incorporated legal practice has taken place, in 2016-17.¹⁶⁹ Similarly, from 2015-16 to 2018-19, the LPCC reported only having the capacity to conduct one assessment of whether risk assessment letters should be sent out to firms that have been the subject of multiple inquiries or complaints of substance against their practitioners.¹⁷⁰

In making these observations regarding resourcing, it is important to acknowledge, and warmly so, that the members of the LPCC provide their time pro bono. Particularly given that LPCC members are among the most senior, respected and sought-after counsel in Western Australia, this represents a genuine level of generosity, professionalism and commitment to public service without expectation of reward. Second, this pro bono contribution is a very significant resource to be valued and maintained. Third, it is clear, in my view, that the LPCC is utterly independent in discharging its legislative obligations. This is a cornerstone, of course, of both the rule of law and effective complaints handling agencies.

¹⁶³ Legal Profession Complaints Committee, *Annual Report 2018*, December 2018, pp. 4-5.

¹⁶⁴ Legal Profession Complaints Committee, *Annual Report 2016*, August 2016, p. 7.

¹⁶⁵ Legal Profession Complaints Committee, *Annual Report 2018*, December 2018, p. 50.

¹⁶⁶ Legal Profession Complaints Committee, *Annual Report 2016*, August 2016, p. 2.

¹⁶⁷ Legal Profession Complaints Committee, *Annual Report 2015*, August 2015, p. 2.

¹⁶⁸ Legal Profession Complaints Committee, *Annual Report 2014*, August 2014, p. 4; Legal Profession Complaints Committee, *Annual Report 2015*, August 2015, p. 2.

¹⁶⁹ Legal Profession Complaints Committee, *Annual Report 2017*, December 2017, p. 8.

¹⁷⁰ Legal Profession Complaints Committee, *Annual Report 2018*, December 2018, p. 50; Legal Profession Complaints Committee, *Annual Report 2017*, December 2017, p. 49; Legal Profession Complaints Committee, *Annual Report 2016*, August 2016, p. 54.

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3.3.1 Achieving efficiencies

As noted at 3.2.12 above, in 2007-08, the office of the Western Australian Ombudsman commenced a major complaint handling improvement program. Following the implementation of a range of strategies to improve complaint handling and the establishment of a culture that placed a high value on the timely resolution of complaints (without compromising quality), the average age of complaints went from 173 days as at 30 June 2007 to 47 days as at 30 June 2020, complaints older than 6 months have decreased by 80% and all investigations are finalised within 12 months.¹⁷¹

The result of this improvement program was that the cost of handling complaints reduced by 37%. More specifically, the cost per finalised complaint to the office of the Ombudsman in 2007-08 was \$2,941, compared to \$1,858 in 2019-20.

3.3.2 Opinion

In my opinion, it is wrong for the LPCC not to be as efficient as practicable in dealing with complaints and the complaints handling improvements the subject of Recommendations 2 to 5 will result in efficiencies.

3.3.3 Recommendation

Recommendation 6: That the LPCC optimise their funding through the achieving of complaint handling efficiencies.

3.3.4 Expeditiousness, efficiency and fairness of the procedures and processes of the LPCC

It is also important for the LPCC to consider that ‘fairness’ to complainants and legal practitioners is not simply procedural fairness (as is required in accordance with section 430 of the *Legal Profession Act 2008*) but the unfairness that can result to complainants from complaints that are not resolved expeditiously (indeed, it is apposite to note the legal axiom, justice delayed is justice denied), to the consumers of legal services from complaints that are not resolved efficiently (as to do so is more costly, a cost that is ultimately borne by the consumers of legal services) and the negative effects on legal practitioners.

3.4 Transparency and Accountability

The notion that a complaints handling body should be transparent and open to scrutiny is a key principle that forms the basis of a robust complaint handling system. The New South Wales Law Reform Commission regards ‘openness and accountability’ as a best practice principle for complaints handling in the legal profession, noting:

Public confidence in the complaints handling system requires that the system be fair, open and accountable. Subject to the need for confidentiality in certain circumstances, as many elements of the system as possible should be open to the public and on the record, and reasons for decisions must be provided.¹⁷²

¹⁷¹ *Ombudsman Western Australia Annual Report 2019-20*, p.29.

¹⁷² Adam Dodek & Emily Alderson, Risk regulation for the legal profession, *Alberta Law Review*, 2018, 55(3), p. 637.

¹⁷² New South Wales Law Reform Commission, *Scrutiny of the Legal Profession: Complaints against lawyers*, Report 70, 1993, p. 51.

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Reviews of legal regulatory systems in the United Kingdom have similarly noted the need for accountability and transparency.¹⁷³ This is consistent with the broader regulatory good practice literature, with the United Kingdom's Better Regulation Taskforce and the OECD including accountability and transparency as elements of good practice regulation.¹⁷⁴ It is also consistent with the broader complaint handling good practice literature, with the British and Irish Ombudsman Association's guide to good complaint handling noting:

A scheme is expected to have a policy of openness and transparency in relation to what it does, how it does it and the results it achieves. This is fundamental to accountability. It enables a scheme to demonstrate fairness of approach, which in turn increases public confidence. It also ensures that a scheme is not perceived as exclusive, secretive or unwilling to be open to public scrutiny.¹⁷⁵

In the context of the complaint handling in the legal profession, the research literature indicates that this good practice principle is achieved in two main ways:

- Ensuring the operations of the regulatory body are open and transparent to the public to the greatest extent possible; and
- Providing complainants reasons for decisions and an opportunity for decisions to be reviewed.

The website of the Legal Ombudsman for England and Wales is a good practice example. The website includes a regularly updated downloadable record of decisions, a range of guidance and resources for both legal professionals and the public on how they undertake their role, key performance indicators and complaint statistics.¹⁷⁶ The Legal Ombudsman for England and Wales released a discussion paper in October 2019 as part of an effort to further improve their transparency and the usefulness of the information they publish.¹⁷⁷

Accountability and transparency is further supported by the complaints handler providing complainants reasons for decisions and informing them of avenues for internal review, external review and appeal.¹⁷⁸ Consistent with good practice, legislation in Australia provides for the external review of decisions by tribunals and the courts and some Australian legal regulators have internal review mechanisms.¹⁷⁹ Legislation in Australia also requires the regulator to provide reasons for decisions and to inform complainants and/or practitioners of their rights of appeal or review.¹⁸⁰

¹⁷³ Lord Hunt of Wirral, *The Hunt Review of the Regulation of Legal Services*, October 2009, p. 47; Esther Robertson, *Fit for the Future: Report of the Independent Review of Legal Services Regulation in Scotland*, p. 4; Sir David Clementi, *Review of the regulatory framework for legal services in England and Wales: A consultation paper*, March 2004, pp. 86; OECD, *The Governance of Regulators, OECD Best Practice Principles for Regulatory Policy*, 2014, pp. 79-88.

¹⁷⁴ Better Regulation Taskforce, *Principles of Good Regulation*, 2003, pp. 4-5;

¹⁷⁵ The British and Irish Ombudsman Association, *Guide to principles of good complaint handling*, 2007, p. 17.

¹⁷⁶ Legal Ombudsman for England and Wales, *Decisions made about legal service providers*, Accessed 14 February 2020 at <<https://www.legalombudsman.org.uk/raising-standards/data-and-decisions/#case-summaries>>

¹⁷⁷ Legal Ombudsman for England and Wales, *Discussion Paper: Transparency and reporting impact*, October 2019.

¹⁷⁸ NSW Law Reform Commission, *Scrutiny of the legal profession: Complaints against lawyers*, Report 70 (1993), p. 51; Ombudsman SA, *Complaint management framework*, March 2016, p. i, 29; Commonwealth Ombudsman, *Better Practice Guide to Complaint Handling*, April 2009, p. 11.

¹⁷⁹ See for example, *Legal Profession Act 2008*, s. 435; *Legal Profession Uniform Law Application Act 2014* (NSW), Part 10; Legal Services Commission (QLD), *Annual Report 2018 – 2019*, 30 August 2019, p. 28; The Office of the Legal Services Commissioner (NSW), *Annual Report 2018-2019*, p. 8.

¹⁸⁰ *Legal Profession Act 2008*, s. 9, 184(3); *Legal Profession Uniform Law 2014* (NSW), s. 464.

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In considering transparency and accountability, it is important to note that nothing arising from this investigation has suggested that the LPCC is anything other than utterly independent in discharging its legislative obligations. This is a cornerstone, of course, of both the rule of law and effective complaints handling agencies.

3.4.1 Key performance indicators

3.4.1.1 The requirement for efficiency in complaint handling by the LPCC

The LPCC is obliged to undertake expeditious and efficient resolution of complaints under the *Legal Profession Act 2008*.¹⁸¹

3.4.1.2 The importance of demonstrating efficiency in the handling of complaints

Legislation regulating the legal profession is enacted by Parliament, directed at the legal profession and seeking to protect the public. These stakeholders, and the regulator itself, should have confidence that the regulatory system is operating effectively and efficiently. Accordingly, central to the transparency, accountability and overall effectiveness of a legal regulatory body is the development, measurement, reporting and review of key performance indicators.

3.4.1.3 The need for key performance indicators

Good practice requires key performance indicators to reflect outcomes (rather than inputs and processes) and be linked to the broader policy goals of the complaint handler.¹⁸² Lord Hunt recommended the use of outcome-based performance measures in his review of the legal regulatory system in England and Wales, noting:

The existence of effective performance measures is an important factor in delivering outcomes, and essential to enhancing transparency and accountability.

...

Measuring outcomes enables everyone to know what impact enforcement activities are having, and whether these have improved compliance, or remedied harm caused by non-compliance. Reporting on these measures, through existing channels to stakeholders and/or Parliament, helps keep both the regulated community and the general public appropriately apprised of what regulators are up to and whether they are effectively discharging their statutory duties, holding them to account.¹⁸³

In addition to keeping the complaint handler accountable for their performance, outcome targets encourage innovation, assist staff to focus on goals rather than processes or outputs, minimise perverse incentives and improves stakeholder understanding of the purpose of the complaint handler.¹⁸⁴ Performance indicators may also help identify best practice benchmarks and can inform ongoing operational management decisions including the allocation of resources.¹⁸⁵

¹⁸¹ *Legal Profession Act 2008*, s. 431.

¹⁸² Lord Hunt of Wirral, *The Hunt Review of the Regulation of Legal Services*, October 2009, pp. 52-53; OECD, *The Governance of Regulators, OECD Best Practice Principles for Regulatory Policy*, 2014, p. 107.

¹⁸³ Lord Hunt of Wirral, *The Hunt Review of the Regulation of Legal Services*, October 2009, pp. 52-53.

¹⁸⁴ Lord Hunt of Wirral, *The Hunt Review of the Regulation of Legal Services*, October 2009, pp. 53.

¹⁸⁵ Western Australian Auditor General, *Beyond Compliance: Reporting and managing KPIs in the public sector*, Report 3 – April 2012, p. 5.

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Legal complaint handlers in Australia do not consistently report on key performance indicators though some report on the timeliness of complaint handling.¹⁸⁶ The measurement and reporting of timeliness targets, which may be operationalised as the proportion of complaints resolved within a timeframe (e.g. 100% of complaints resolved within one year), is consistent with broader complaint handling good practice.¹⁸⁷ Timeliness is also a proxy for a range of important outcomes for a complaint handling body, as the Office for Legal Complaints (England and Wales) notes:

The time taken to deal with complaints impacts both on our costs and the customer experience. Dealing with cases efficiently means eliminating re-work and double-handling, taking the shortest route possible to resolution, and empowering people early in the process to take decisions. This efficiency should manifest itself in the time taken to resolve complaints – although variations in complexity and external factors such as the actions of customers will also impact on this measure.¹⁸⁸

Research indicates that timeliness is the single most important driver of customer satisfaction.¹⁸⁹ However, the Office for Legal Complaints (England and Wales) observe that there is not a direct correlation between timeliness and customer satisfaction as complaint handling must also be high quality and fair.¹⁹⁰ Accordingly, and consistent with complaint handling good practice, the Office for Legal Complaints (England and Wales) also measures customer satisfaction and a range of other indicators of performance.¹⁹¹ The measurement of a range of outcomes suitable for the size and circumstances of a regulatory body therefore ensures that any unintended consequences arising from more timely, efficient complaint resolution can be monitored and mitigated.

3.4.1.4 *The LPCC do not have key performance indicators*

Good practice suggests that the LPCC should keep the complaint handling system open and accountable to the public and the legal profession to the greatest extent possible. Consistent with good practice, the LPCC reports a range of useful descriptive information about the profile of complaints and those subject to complaints in their annual reports.¹⁹² The LPCC also report relevant performance information including the number of complaints closed, the number of outstanding matters and the determinations of tribunals and courts.¹⁹³

The LPCC do not, however, have, nor report on, key performance indicators. As noted in section 3.4.1.2, key performance indicators keep Parliament, the legal profession and the public informed about the performance of the LPCC and assist to keep the LPCC

¹⁸⁶ For example, the Queensland Legal Services Commission has timeliness targets including that 75% of complaints should be resolved within 6 months and 100% within 18 months. See Legal Services Commission (QLD), *Annual Report 2018 – 2019*, 30 August 2019, p. 37.

¹⁸⁷ Commonwealth Ombudsman, *Better Practice Guide to Complaint Handling*, April 2009, p. 28; Ombudsman SA, *Complaint management framework*, March 2016, p. 25.

¹⁸⁸ The Office for Legal Complaints (England and Wales), *OLC Revised Key Performance Indicators*, November 2015, p. 7.

¹⁸⁹ Ombudsman SA, *Complaint management framework*, March 2016, p. 5.

¹⁹⁰ The Office for Legal Complaints (England and Wales), *OLC Revised Key Performance Indicators*, November 2015, p. 8.

¹⁹¹ The Office for Legal Complaints (England and Wales), *Annual report and accounts: For the year ending 31 March 2019*, July 2019, pp. 17-24.

¹⁹² See for example, Legal Profession Complaints Committee, *2019 Annual Report*, December 2019, pp. 66-76.

¹⁹³ See for example, Legal Profession Complaints Committee, *2019 Annual Report*, December 2019, pp. 14, 20-62, 76.

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accountable. Key performance indicators are also a useful tool to inform operational planning, including the allocation of resources.¹⁹⁴

3.4.2 Opportunity for the LPCC to comment on the preliminary report of the investigation

The LPCC were provided the opportunity to comment on the preliminary report of my investigation. The LPCC suggested:

With 2021-22 expected to be the first year of operation of Uniform Law, I would also respectfully suggest that the target date in Recommendation 9 and Recommendation 10 be extended or amended. The data should still be collected and the performance measured, but, given the changeover expected between legislative regimes, publishing the results may be confusing and onerous.

In my view, this respectful suggestion is entirely reasonable and appropriate.

3.4.3 Opinion

In my opinion it is wrong for the LPCC not to have key performance indicators. In the context of both literature and good practice and assisting the LPCC's compliance with section 431 of the *Legal Profession Act 2008* (insofar as the LPCC's obligations to undertake expeditious and efficient complaint handling can be analysed and understood optimally against objectively measured and benchmarked indicators of what constitutes expeditious and efficient complaint handling), and having carefully considered the LPCC letter, the LPCC would benefit from identifying, publishing, measuring against and improving over time, a series of key performance indicators. Overall, the lack of key performance indicators is detrimental to the LPCC's transparency, accountability and effectiveness.

Furthermore, the lack of timeliness key performance indicators is particularly relevant given that:

- Research indicates that timeliness is the single most important driver of consumer satisfaction with services;¹⁹⁵
- The measurement of timeliness is consistent with complaint handling good practice;¹⁹⁶
- What is measured, controlled and paid attention to contributes to the underlying culture of an organisation;¹⁹⁷ and
- There is room for improvement in the LPCC's timeliness of complaint resolution with over half of complaints closed in 2018-19 being over 12 months old and the oldest open complaint being six years old (see section 3.2.10).

The Uniform Law provides an opportunity for the LPCC to benchmark their performance with other Uniform Law jurisdictions. In undertaking this Investigation, the Office notes the difficulty in assessing the performance of the LPCC relative to other jurisdictions given different operationalisations of complaints. Developing a consistent approach to the

¹⁹⁴ Western Australian Auditor General, *Beyond Compliance: Reporting and managing KPIs in the public sector*, Report 3 – April 2012, p. 5.

¹⁹⁵ Ombudsman SA, *Complaint management framework*, March 2016, p. 5.

¹⁹⁶ Commonwealth Ombudsman, *Better Practice Guide to Complaint Handling*, April 2009, p. 28; Ombudsman SA, *Complaint management framework*, March 2016, p. 25.

¹⁹⁷ Edgar H. Schein, *The corporate culture survival guide*, 2009, Jossey-Bass, San Francisco, p. 131.

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measurement of performance in consultation with other Uniform Law jurisdictions permits the LPCC to benchmark their performance and provides an impetus for the sharing of good practice.

3.4.4 Recommendations

Recommendation 7: That the LPCC identify a series of key performance indicators regarding timeliness of complaint handling.

Recommendation 8: That the LPCC identify a series of key performance indicators regarding the cost of complaint handling.

Recommendation 9: That the LPCC publish these key performance indicators in their annual report in 2022-23.

Recommendation 10: That the LPCC publish their performance against these key performance indicators in their annual report for the financial year 2023-24 and then each annual report thereafter.

Recommendation 11: That the LPCC adjust these key performance indicators in line with the timeliness to be achieved through the implementation of recommendations 2-5.

Recommendation 12: That the LPCC seek to improve their key performance indicators over time.

3.5 Electronic complaints management system

An electronic complaints management system is vital to the efficient and effective operations of a modern complaint handling body. The NSW Law Reform Commission's 'Good Practice Principles for handling complaints about lawyers' notes the need for 'technical' resources such as computer hardware and software.¹⁹⁸ Given significant advances in technology since the 1993 release of the NSW Law Reform Commission's report, including, for example, the advent of online complaint submissions and considerably more sophisticated reporting functionality, the importance of appropriate computer hardware and software has undoubtedly increased even further.

The Commonwealth Ombudsman's 'Better Practice Guide for Complaint Handling' notes that a complaint handling body must have an electronic complaints management system for entering, tracking, monitoring and analysing complaint data unless complaints are few in number.¹⁹⁹ The Commonwealth Ombudsman further outlines the necessary features of an electronic complaints management system, which includes:

- simple data entry
- the ability to search across various fields, such as
 - the complainant's name—to track the progress of an individual complaint
 - the staff member's name—to conduct quality assurance reviews
 - the type of problem—to identify emerging trends and ensure consistency in how the agency responds to complaints

¹⁹⁸ NSW Law Reform Commission, *Scrutiny of the legal profession: Complaints against lawyers*, Report 70 (1993), p. 56.

¹⁹⁹ Commonwealth Ombudsman, *Better Practice Guide to Complaint Handling*, April 2009, p. 17; Ombudsman SA, *Complaint management framework*, March 2016, p. 8.

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- the location of the problem—to highlight regional or institutional trends in complaints and how they are handled
- the time taken to resolve the complaint—to monitor timeliness and efficiency
- regular reporting, to prompt the agency to monitor trends and quickly identify and respond to new challenges
- simple access by all staff involved in complaint handling
- compliance with the agency’s recordkeeping practices
- compliance with any legislation that regulates how the agency is to make, record and notify decisions or resolve complaints, as well as with information privacy principles.²⁰⁰

The benefits of a fit-for-purpose electronic complaints management system include more timely and efficient data entry, improved data accuracy, improved mechanisms for quality assurance and enhanced monitoring and reporting functionality. As the Northern Territory Ombudsman notes:

A good electronic complaints management system will allow you to record, answer and monitor customer complaints to ensure you respond to customers in a timely way. This will also enable your agency to easily keep customers informed of the status of their complaints and gather useful information that can be channelled towards improving services.

Technology allows complaints information, such as the type and subject of complaints, to be recorded and analysed and findings given to management to allow strategic decisions to be made.²⁰¹

The strategic decisions that can be informed through the analysis of data entered into an electronic complaints management system may include:

- Individual practitioners, firms or areas of legal practice that may require further capacity building or proactive investigation as a result of their complaint or complainant profile, consistent with a risk-informed regulatory approach;
- Areas of the community that are over-represented in terms of complaint numbers and may require further assistance and support; and
- Opportunities for continuous improvement in the complaint handling body’s practices or allocation of resources.

The LPCC do not have an electronic complaints management system. The LPCC uses a ‘rudimentary hybrid electronic file management process’ which facilitates the triaging of complaint enquiries and provides for the limited collation of practitioner information and enquirer history.²⁰² The LPCC notes that this electronic process was introduced with the approval of the Board and allowed for:

...more expeditious responses when identifying matters which could be considered “consumer issues”, as distinct from matters which could involve conduct requiring investigation by the Committee.²⁰³

The LPCC has expressed an ‘urgent’ need for an electronic complaints management system in annual reports since 2005-06 and has regularly noted detrimental impacts on

²⁰⁰ Commonwealth Ombudsman, *Better Practice Guide to Complaint Handling*, April 2009, p. 17; Ombudsman SA, *Complaint management framework*, March 2016, p. 8.

²⁰¹ Ombudsman NT, *Effective complaints management – 7: Resources*, p. 2, Accessed 3 February 2020 at <<https://www.ombudsman.nt.gov.au/agencies/effective-complaints-management-fact-sheets>>

²⁰² Legal Profession Complaints Committee, *Annual Report 2018*, December 2018, p. 3, 5.

²⁰³ Legal Profession Complaints Committee, *Annual Report 2018*, December 2018, p. 3.

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administrative efficiency, complaint monitoring and reporting arising from the lack of an electronic complaints management system, including:

- ‘The most significant problem impacting upon the Committee’s functions remains the lack of an electronic data based complaints management system’;²⁰⁴
- ‘The lack of adequate electronic support hampers administrative efficiency’;²⁰⁵
- ‘As indicated in the Committee’s last 5 Annual Reports, the implementation of a complaints management system would greatly enhance the Committee’s operations’;²⁰⁶ and
- ‘The Committee’s operations would undoubtedly be greatly improved if it had a dedicated complaint management system’.²⁰⁷

The Office sought an explanation from the LPCC as to why it had not implemented an electronic complaints management system given the benefits identified by the LPCC for both complainants and those the subject of complaints and own initiated investigations. The LPCC noted:

The operations of the Committee are funded entirely by the Legal Practice Board (**Board**). Under s 557(5) of the *Legal Profession Act 2008* (WA), the Board “must ensure that (Committee) is provided with such services and facilities as are reasonably necessary to enable the (Committee) to perform its functions”. Accordingly, before an electronic complaints management system (**ECMS**) can be introduced, the Management Committee of the Board must approve the expenditure. It is for the Committee to persuade the Management Committee that an ECMS is necessary, and for the Management Committee to decide whether it is affordable.

The Committee has no doubt that an ECMS is necessary, and has been agitating for its introduction for many years.

...

The Committee first asked the Board to approve the implementation of an ECMS in June 2013. The Board agreed in principle and planning for the implementation proceeded until May 2015, but then stalled.

The Committee raised the matter with the Board again in late 2016, when the Board again agreed to investigate it, and identified potential suppliers from which it obtained proposals to provide and install an ECMS.

...

However, in January 2017 the Convenor of the Management Committee of the Board directed that there be no more work done in relation to the introduction of the ECMS until further notice. The reason given by the Convenor was that the Management Committee wanted to assess further the needs of the Board as a whole, before considering the implementation of an ECMS. Since that time, the Board has not revisited the issue.²⁰⁸

The LPCC’s use of its limited resources to maximise the efficiency of its electronic complaint management processes and to develop ‘work-arounds’ in the absence of an electronic complaints management system is commendable.

²⁰⁴ Legal Profession Complaints Committee, *Annual Report 1 July 2008 – 30 June 2009*, December 2009, p. 4.

²⁰⁵ Legal Profession Complaints Committee, *Annual Report 1 July 2008 – 30 June 2009*, December 2009, p. 4.

²⁰⁶ Legal Profession Complaints Committee, *Annual Report 2016*, August 2016, p. 2.

²⁰⁷ Legal Profession Complaints Committee, *Annual Report 2018*, December 2018, p. 3.

²⁰⁸ Correspondence from the Legal Profession Complaints Committee dated 25 October 2019, pp 2-3.

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As noted by the LPCC, section 557(5) of the *Legal Profession Act 2008* provides that the LPB 'must ensure that [Committee] is provided with such services and facilities as are reasonably necessary to enable the [Committee] to perform its functions'. The Legal Profession Uniform Law Application Bill 2020 (WA) has a consistent requirement.

Relevantly, the South Australian Legal Profession Conduct Commissioner implemented a new electronic complaints management system after relying on rudimentary systems for many years and reported improved efficiency:

The Board and my office had for many years operated on very simplistic technology systems, primarily within the Office environment supplemented by a rudimentary database and document management system. During 2016/17, we implemented a modern case management system designed specifically for a complaints organisation. That system has been operating for the whole of the reporting period. As I had expected, that new system is helping us to handle the high volume of complaints we receive more efficiently than before, and should enable us to continue to do so without having either to increase significantly our staffing levels or to see an increase in the duration of the complaint / investigation process.²⁰⁹

3.5.1 Opinion

In my opinion, it is wrong that the LPCC does not have an electronic complaints management system. This is compounded by the fact that the LPCC itself has identified an 'urgent' need for such a system for nearly 15 years. To achieve modern and good practice for complaint handling bodies, including bodies that handle complaints about legal practitioners, and to assist compliance with section 431 of the *Legal Profession Act 2008* and proposed legislation to adopt the Uniform Law in Western Australia in an optimal way, the LPCC requires an electronic complaints management system that includes, at a minimum, the functionality outlined by the Commonwealth Ombudsman in section 3.5.

Put simply, it is not possible to undertake the most timely, efficient complaint handling without an electronic complaints management system. For example, every Ombudsman in Australia and New Zealand has such a system and each for well over a decade. It is anticipated, as per the experience of the South Australian Legal Profession Conduct Commissioner, that this will lead to improvements in the efficiency and expeditiousness of its complaint handling and will facilitate more strategic decision making.

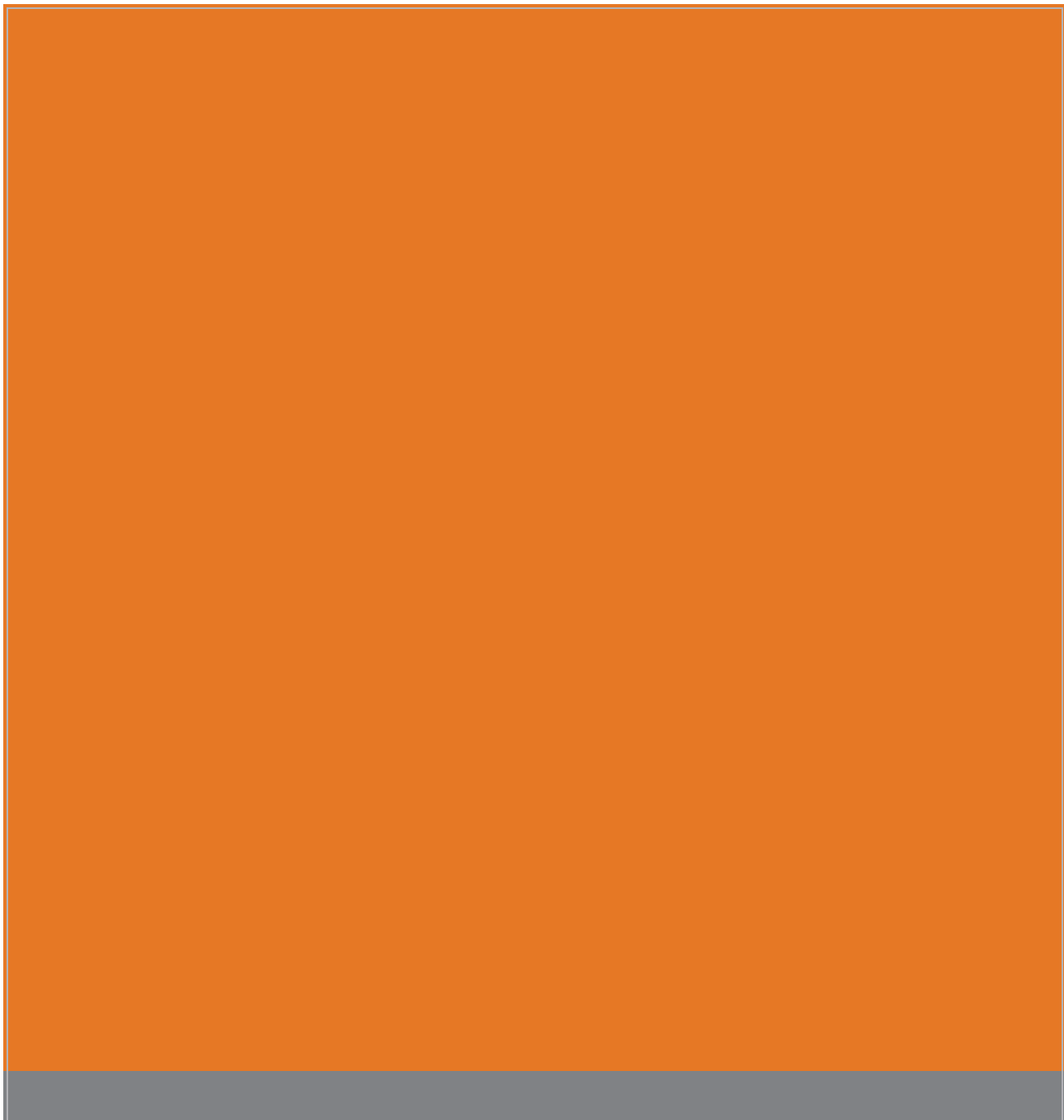
3.5.2 Recommendation

Recommendation 13: That the LPCC implement an electronic complaints management system by no later than the end of the financial year 2021-22 and should aim to do so by December 2021.

²⁰⁹ Legal Profession Conduct Commissioner (SA), *2018 Annual Report*, 31 October 2018, p. 3.

Major Investigations and Reports

Title	Date
<u><i>Preventing suicide by children and young people 2020</i></u>	September 2020
<u><i>A report on giving effect to the recommendations arising from Investigation into ways to prevent or reduce deaths of children by drowning</i></u>	November 2018
<u><i>A report on the monitoring of the infringement notices provisions of The Criminal Code</i></u>	December 2017
<u><i>Investigation into ways to prevent or reduce deaths of children by drowning</i></u>	November 2017
<u><i>A report on giving effect to the recommendations arising from the Investigation into issues associated with violence restraining orders and their relationship with family and domestic violence fatalities</i></u>	November 2016
<u><i>Investigation into issues associated with violence restraining orders and their relationship with family and domestic violence fatalities</i></u>	November 2015
<u><i>Investigation into ways that State Government departments and authorities can prevent or reduce suicide by young people</i></u>	April 2014
<u><i>Investigation into ways that State Government departments can prevent or reduce sleep-related infants deaths</i></u>	November 2012
<u><i>Planning for children in care: An Ombudsman's own motion investigation into the administration of the care planning provisions of the Children and Community Services Act 2004</i></u>	November 2011
<u><i>The Management of Personal Information - good practice and opportunities for improvement</i></u>	March 2011
<u><i>2009-10 Survey of Complaint Handling Practices in the Western Australian State and Local Government Sectors</i></u>	June 2010



Ombudsman Western Australia

Level 2, 469 Wellington Street Perth WA 6000
PO Box Z5386 St Georges Terrace Perth WA 6831
Tel 08 9220 7555 • Freecall (free from landlines) 1800 117 000 • Fax 08 9220 7500
Email mail@ombudsman.wa.gov.au • Website www.ombudsman.wa.gov.au

Major Investigations and Reports

Title	Date
<u><i>A report on the steps taken to give effect to the recommendations arising from Preventing suicide by children and young people 2020</i></u>	September 2021
<u><i>An investigation into the Office of the Public Advocate's role in notifying the families of Mrs Joyce Savage, Mr Robert Ayling and Mr Kenneth Hartley of the deaths of Mrs Savage, Mr Ayling and Mr Hartley</i></u>	July 2021
<u><i>Preventing suicide by children and young people 2020</i></u>	September 2020
<u><i>A report on giving effect to the recommendations arising from Investigation into ways to prevent or reduce deaths of children by drowning</i></u>	November 2018
<u><i>Investigation into ways to prevent or reduce deaths of children by drowning</i></u>	November 2017
<u><i>A report on giving effect to the recommendations arising from the Investigation into issues associated with violence restraining orders and their relationship with family and domestic violence fatalities</i></u>	November 2016
<u><i>Investigation into issues associated with violence restraining orders and their relationship with family and domestic violence fatalities</i></u>	November 2015
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<u><i>Investigation into ways that State Government departments can prevent or reduce sleep-related infant deaths</i></u>	November 2012
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Level 2, 469 Wellington Street Perth WA 6000

PO Box Z5386 St Georges Terrace Perth WA 6831

Tel 08 9220 7555 • Freecall (free from landlines) 1800 117 000 • Fax 08 9220 7500

Email mail@ombudsman.wa.gov.au • Website www.ombudsman.wa.gov.au