

Mr Chris Humphreys
Continuing Professional Development Review
Victorian Legal Services Board + Commission

By email to: CPDreview@lsbc.vic.gov.au

Dear Mr Humphreys

Victorian Legal Services Board + Commission (VLSB+C) *Issues Paper - Continuing Professional Development.*

The Professional Standards Councils of the eight state and territory jurisdictions, including the Professional Standards Council of Victoria, appreciates the opportunity to comment on the Victorian Legal Services Board + Commission (VLSB+C) *Issues Paper - Continuing Professional Development.*

The Councils note the VLSB+C responsibilities for:

- ensuring lawyers are competent and maintain high ethical standards in the provision of legal services; and,
- enhancing the protection of clients of law practices and the protection of the public generally

The CPD review Terms of Reference include investigation and reporting on "... the effectiveness of the current CPD scheme as a learning and development tool, and the extent to which the scheme benefits Victorian lawyers and consumers of legal services..."

The Councils' submission reflects the central role of regulation to protect consumers, then considers the Councils' research and publication of articles on continuing professional development, then directly considers questions raised in the *Issues Paper*. The Councils' submission is informed by and founded on the Councils' research articles, and its experience as a meta-regulator of associations who regulate the professional conduct, behaviour and competence of their members, with the objective of consumer protection.

Councils consumer protection focus

The Professional Standards Council of Victoria is established under the *Professional Standards Act 2003* (Vic) which has as its objects (inter alia): '...to facilitate the improvement of occupational standards of professionals; and, to protect the consumers of the services provided by professionals.' The Professional Standards Councils of each state and territory meet as a single body and their stated mission is 'to regulate occupational associations to facilitate and promote consumer protection through improvement in professional standards under professional standards schemes.' The Councils have approved professional standards schemes for the members of the Law Institute of Victoria, the Victorian Bar Association, and law societies and bar associations of New South Wales, South Australia, and Western Australia. These schemes operate by way of mutual recognition in all states and territories.

The Councils' focus on professional conduct regulation, including continuing professional development (referred to in the *Professional Standards Act 2003* (Vic), as continuing

occupational education) is to facilitate the continual improvement of professional standards with an objective of protecting the consumers of the services provided by professionals. The Councils encourage the VLSB+C to continue to draw the direct connection between the purpose, content and delivery of continuing professional development and protecting consumers, including that consumer's needs and voice, and the types and levels of protection required by consumers, are evolving rapidly. Recent and germane examples are increased cyber risks to practitioners and their clients, and increased practice risks in the changing modes of legal services delivery during the COVID-19 workplace adjustments, as well as the risks of competence and conduct failure associated with sexual harassment and bullying in the profession as canvassed at the 2019 Conference of Regulatory Officers held in Melbourne.

Councils' research library on modern professionalism

In December 2018, the Councils launched a research library on modern professionalism. The research library provides articles on practical mechanisms to advance professional standards and to help occupational associations improve standards of conduct of their members and provide higher levels of consumer protection and can be found at:

<https://www.psc.gov.au/research-library>

The research library was the result of a 3-year collaborative research project led by the University of NSW Centre for Law, Markets and Regulation (UNSW CLMR), with funding from the Australian Research Council (ARC) Linkage Project scheme, to promote and advance research on professional obligation and regulation in the 21st century. The Councils were a lead partner, working with research collaborators including the UNSW CLMR, University of Technology Sydney (UTS), Griffith University, and the University of Melbourne, as well as with industry partners from law firms Allens and Corrs Chambers Westgarth.

The Councils' research library on modern professionalism has 40 articles with links to further resources in seven focus areas, being: professions, ethics and conduct, regulation and governance, risk, qualifications, certification, and ongoing education including the following five articles (see attachment A) which we align closely with questions raised in the *CPD Issues Paper*:

1. [Continuing Professional Development Models](#), which considers the CPD content model and CPD scheme models, including the input model/outcome-focused model, practitioner-determined model, and the standards and competency-based model.
2. [Continuing Professional Development Requirements](#), which reviews the Australian CPD requirements across five example professions: lawyers, doctors, accountants, engineers and financial planners, to consider different approaches to CPD and in terms of administration, minimum hours, levels of professional autonomy, and consequences for non-compliance.

In December 2018, after the article was published, the Financial Standards and Ethics Authority (FASEA) established an additional statutory, competency-based CPD standard, *Corporations (Relevant Providers Continuing Professional Development Standard) Determination 2018* (Cth), and policy (see attachment B) requiring 40 hours of CPD per year in the following areas of competence to be demonstrated for ongoing professional practice: (i) technical competence: acting as a technically proficient professional; (ii) client care and practice: acting as a client centric practitioner, (iii)

regulatory compliance and consumer protection: acting as a legally compliant practitioner; and, (iv) professionalism and ethics: acting as an ethical professional.

3. Continuing Professional Development Programs, which considers the types of learning to be undertaken and the balance of prescription and practitioner determined CPD in the five example professions.
4. Practitioner-determined Continuing Professional Development considers the benefits of practitioner-determined CPD and the pedagogical elements of practitioner self-reflection and the practitioner professional development plan.
5. Ethics education, written by professors Hugh Breakey and Charles Sampford, which examines its purpose, when and who should provide it, curriculum design, modes of delivery and a brief critique of ethics education.

Responses to questions raised in the *Issues Paper*, primarily 4.8 Regulators Role.

34. Should the mandatory 10 CPD point requirement be abolished, maintained, increased or reduced? Please elaborate on your response.
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The 10 points/year may be a 'safety net' or minimum regulatory requirement but may not demonstrate the profession's commitment to professional learning and development. It is also one of the lowest numbers of mandated hours compared with other professions, as examined in the Councils' CPD Requirements article, for example medicine or allied health, where there is typically a 30-point (hour) requirement.

A well-known issue of the input-based hours model such as this is that seminars, conferences, "talking heads", are often the most popular activity. However, mere attendance at these talks has limited impact on maintaining competence over a given scope of practice. New knowledge does not automatically translate into new practice, or behaviours, because most of what is learned goes into short-term memory and is lost within a few weeks if not applied.

Effective CPD should include activities outside a professional's 'comfort zone'. It should relate to identified needs and consumer harms, informed by data collected by the regulator and professional associations. Professionals, of their own volition, tend to pursue activities in content areas of interest and increasing expertise, rather than content areas where experience is less or where they have less confidence and interest. Accordingly, it's important to ensure that all domains of practice are covered. There is also a risk that professionals do not know what they do not know outside their areas of interest, resulting in persistent underdeveloped competence in some areas.

Notwithstanding these issues, a mandatory CPD program is essential. Consumers have a reasonable expectation that lawyers should maintain their skills through regular, relevant and effective CPD. The mandatory program may be improved from the current input biased CPD points system towards a competency based, learning plan and reflective practice model that is more in line with contemporary thinking and best practice revealed in the Councils' research papers.

35. Should all lawyers be required to prepare CPD plans on an annual basis that identify learning and development needs and activities? Please elaborate on your response.

The Councils supports this proposal. Learning and development activities are more likely to be effective if they are part of a process (not necessarily annual) rather than a series of unrelated events. The cycle starts with a needs assessment (review of practice), followed by a learning plan, followed by the relevant learning activities, followed by reflection and further practice review. CPD is generally more effective if it relates to actual practice, which varies across individuals. This is where the concept of 'reflection on practice' has emerged in recent times. Some practitioners may consider this process patronising in that it suggests they do not get around to thinking about what they are doing and what they have done in terms of the services they provide, but it is actually a formalised process of targeted and structured contemplation and review.

Awareness of gaps in knowledge can emerge from the practice of the professional engaging in CPD. For many professionals, this is an intuitive process, but for some professionals the methods for working out educational needs must be made more explicit, and these methods can often lead to more appropriate CPD being undertaken. One such method is where professionals match their own knowledge/skill/experience against those of peers. Another method is where the professional keeps a reflective journal of challenging client encounters, then seeks to increase skills, knowledge and experience in areas of concern, then applies the new skills, knowledge or experience during subsequent encounters. A more formal version of this method is a self-audit that guides CPD choices, based on what is encountered in practice. Another activity that can identify needs is multi-source feedback. The Councils suggest that if the use of self-developed, reflective-practice plans are adopted, there will be a need for the regulator to work with educational authorities to ensure that curricula include the development of reflective practice skills so that practitioners are equipped to meet their lifelong professional obligations.

Even where the main or preferred vehicle for CPD is a self-developed, reflective-practice plan, it is important for the regulator to identify 'core' competencies that are updated on a regular basis (not necessarily annual) particularly to address evolving consumer harms and consumers expectations, such as ethics and professional responsibility; practice management and business skills; professional skills; and substantive law (as now). There may be other areas that have evolved into core competencies in CPD but are not overtly identified in the current statute, examples include practitioner health and well-being and prevention of sexual harassment. These areas of competence and conduct knowledge/skill should not rely on professionals to self-identify need but should be included in mandatory CPD obligations, targeted at the areas of greatest harms to the consumer, informed by data.

In addition, professional isolation/disengagement is an emerging area of investigation as a risk factor for professional competence and conduct failures that can be addressed through CPD^{1 2}. Professional isolation/disengagement may be associated with some of the characteristics of lawyers subject to complaints and misconduct findings identified in the

¹ <https://www.hcpc-uk.org/globalassets/resources/reports/preventing-small-problems-from-becoming-big-problems-in-health-and-care.pdf?v=636785062220000000>

² <https://www.bda.uk.com/uploads/assets/3830abb3-e267-4f5c-a93e7c3aca843ffe/cpdjointstatement.pdf>

2018 research funded by the VLSB+C³. Requiring ongoing, regular connection with peers is a safeguard and can be directed in the form of CPD to be undertaken, for example, by requiring CPD hours/points/activities to be spread across a balance of formal learning, informal learning and professional engagement activities.

36. Would you welcome more information from the VLSB+C and/or professional bodies about CPD programs in some or all of the four current subject areas? If yes, in which of the four areas would information be most useful?

The FASEA determination and policy on CPD released in December 2018 incorporates four mandatory areas of demonstrated professional competence. It is arguable these four competence areas, and the associated explanation establish the most recent consideration and elaboration of professional competence approved by at the commonwealth level. They are: (i) technical competence: acting as a technically proficient professional; (ii) client care and practice: acting as a client centric practitioner, (iii) regulatory compliance and consumer protection: acting as a legally compliant practitioner; and, (iv) professionalism and ethics: acting as an ethical professional. Using this standard as a starting point, the areas of professional competence which require additional information would be client care and practice: acting as a client centric practitioner; and, consumer protection.

37. Would a competency framework, and associated guidance, help to create a more useful CPD program?

The Councils agree with this proposal. It would be a major undertaking to identify competencies across all scopes of practice, and it is arguably best undertaken in conjunction with the professional associations. The Councils' research shows the principles of CPD and ongoing education, and the competencies for ongoing professional practice to protect consumers and in the public interest are largely the same across all professions, save for the details of doctrinal or technical content. While doctrinal content, or substantive law is important, when considering the occupations regulated by the Councils, it is observed that the root cause of consumer complaints are ethical conduct, unprofessional conduct or behaviour, or poor practice management, and are rarely grounded in doctrinal incompetence arguably due to professional restraint (that is, knowing what they do not know).

38. Do you think that a voluntary accreditation scheme for CPD providers would provide you with useful information about CPD providers and activities?

The Councils supports the concept of accredited providers and has contributed to government in the establishment of CPD accreditation criteria in the built environment. Accredited CPD should assure both regulators and professionals and their firms, that the programs they attend provided with the sound principles, skills and knowledge of adult learning. Accreditation also facilitates a demonstration of links between CPD approaches

³ Tara Sklar, Jennifer Schulz Moore, Yamna Taouk, Marie M Bismark, Vulnerability to Legal Misconduct: Qualitative Study of Regulatory Decisions Involving Problem Lawyers and Their Clients, SSRN Electronic Journal, 10.2139/ssrn.3299744, (2018).

and the maintenance of skills and ethical standards. The research on quality improvement suggests CPD is more effective when the individual professional has a greater responsibility for maintaining competence with mandatory consumer protection requirements and established competencies; as most professionals are motivated to keep continuously competent. Linking the practitioner's motivation with (known) high quality educational activities will improve the efficacy of the CPD scheme.

The Professional Standards Council of Victoria, in conjunction with the Professional Standards Councils of the other states and territories, look forward to the next evolution in the CPD system for legal service providers, noting the national scheme and national model for legal service providers in the uniform law. Please feel free to contact me by telephone on 0439 355 807 or by email at <<redacted>> or our Director Professional Standards Regulation, John R Rappell, by telephone on <<redacted>> or by email at <<redacted>>, if the Authority or the Councils can provide any further assistance in the VLSB+C review of Continuing Professional Development.

Yours sincerely

Roxane Marcelle-Shaw
Chief Executive Officer
Professional Standards Councils

20 July 2020

Encl:

- A: Professional Standards Councils CPD research papers 1-5 combined, December 2018
- B: FASEA *Continuing Professional Development Policy*, January 2019