

LAW ADMISSIONS CONSULTATIVE COMMITTEE¹

ASSURING PROFESSIONAL COMPETENCE

1. OVERVIEW

This paper proposes a comprehensive review of the way Australia presently tries to assure the competence of practising lawyers.

For some time, a number of significant stakeholders have expressed concern about the adequacy and appropriateness of existing arrangements to meet our current needs. Others are concerned about the rapidly-changing nature of legal practice – its increasing diversity, specialisation, and global reach. Are our existing education and training requirements adequate and appropriate to these new circumstances?

The proposal suggests that we should begin by trying to find out exactly what a legal practitioner needs to be able to do, now and in the future, in order to practise effectively. We should also try to discover precisely what, if any, inadequacies exist with prevailing arrangements and whether significant change appears to be necessary.

If it then seems appropriate to do so, this could help us to develop a Competence Statement for Australian Legal Practitioners that sets out what competence Australians should be able to expect from their legal practitioners, now and in the future.

If this were done, it would then be possible to devise a Continuing Professional Development regime to maintain that competence and to adjust to changes in the nature of, and demand for, legal services.

Once we understand what a legal practitioner needs to be able to do in order to practise effectively, it would then also be possible to derive the threshold level of competence required of entry-level lawyers; and to propose appropriate means to ensure that all those seeking admission have that threshold competence.

It would also be possible to set out the underlying legal knowledge required to support the proposed level of competence. This, in turn, would allow us, in due course, to determine whether, and if so what, changes may now be appropriate to the present 11 Academic Requirements for admission, the national PLT Competency Standards for Entry-level Lawyers and any appropriate adjustments to the prevailing arrangements for supervised workplace experience, before a practitioner obtains a full practising certificate.

Any such review will require substantial consultation with a wide range of key groups, including practising lawyers, professional associations and regulators, law school and PLT teachers and the Council of Chief Justices, with the object of forging consensus wherever possible. It will also need to extend over more than 1 year and require substantial funding support.

2. BACKGROUND

The need for a significant review of arrangements for preparing lawyers for legal practice has been identified by a number of sources.

¹ LACC's Charter is approved by the Council of Chief Justices which also appoints its Chairman. LACC is not, however, a committee of the Council, nor does it act on the Council's behalf.

The Council of Chief Justices has expressed concern and suggested that further work be done –

- (a) to consider introducing a requirement for a significant period of preadmission workplace training;
- (b) to identify learning outcomes and competency standards for the workplace training (or supervised practice) component of preparing people to become competent practising lawyers; and
- (c) to find appropriate mechanisms for an Admitting Authority to determine whether those learning outcomes and competency standards have been met by each applicant for admission.

LACC has also recently conducted a limited review of the Academic Requirements for Admission, asking whether certain areas of knowledge should no longer be prescribed and whether other areas should be added. The following themes emerged from submissions to that Review –

- (a) there are serious reservations among certain legal practitioners and practitioner organisations about the relevant preparation and competence of entry-level lawyers to embark on legal practice;
- (b) there is a preference among some for specifying the required competence of entry-level lawyers in terms of “outcomes”, or things that a new practitioner should be able to do;
- (c) because of the “growing disjuncture between the need to equip students for traditional private practice and a diverse range of destinations” one submission suggested that it might be sensible to consider introducing a separate entry examination for entry-level lawyers seeking admission to the legal profession; and
- (d) further research should be undertaken to generate relevant Australian data before deciding on any significant changes to the various stages of legal education and training.

Finally, at the end of 2014, the Government released the Productivity Commission's Report on *Access to Justice Arrangements*.

Recommendation 7.1 proposes a systemic review of "the current status" of the three stages of legal education, being the Academic, Practical Legal Training (**PLT**) and Continuing Professional Development (**CPD**) stages. Any such review should examine the appropriate role of, and balance between, each of those stages; the ongoing need for each of the Academic Requirements; and the regulatory oversight for each stage of legal education.

The work suggested in this proposal is capable of meeting these objectives, as well looking at what competencies should be required of each practising lawyer; and how those competencies can be acquired, maintained and kept current through CPD programs. In due course it will need to consider whether the present prescription of the 11 Academic Requirements should be maintained in order to acquire the relevant competencies.

3. **RECENT ENGLISH DEVELOPMENTS**

In 2013, a Legal Education and Training Review (**LETR**) Report was published in England, which called for greater regulatory attention to be paid to the standards required of lawyers, both at the point of admission and thereafter. The respective responses of the Solicitors Regulation Authority (**SRA**) and Bar Standards Board (**BSB**) were as follows.

3.1 **SRA Response**

In October 2013, the SRA issued a *Training for Tomorrow* Policy Statement, which committed it to defining solicitors' standards more rigorously by developing a competence statement for solicitors. Following an extensive consultative process, in March 2015 the SRA adopted a Competence Statement² that is supported both by a Threshold Standard for those seeking admission and a Statement of Underpinning Legal Knowledge required to support both the Threshold Standard and the Competence Statement

In the SRA's view, the Competence Statement –

- (i) tells consumers what they can expect from their solicitor;
- (ii) tells solicitors what activities are required for effective performance as a solicitor;
- (iii) informs education and training providers about what courses they need to develop to train intending or practising solicitors;
- (iv) shows intending solicitors what they need to demonstrate in order to qualify; and
- (v) allows practising solicitors to see what they need to do to maintain their competence.³

It is conceived of as both a regulatory and a learning tool for solicitors. It is not intended to require a practising solicitor to maintain knowledge that has no bearing on that solicitor's practice area. Awareness of background law is only required so far as it is relevant to the solicitor's practice. On the other hand, solicitors must have awareness of all relevant law that affects their area of practice.

3.2 **BSB Response**

In July 2015, the BSB also released a Consultation Paper for public comment, in response both to the LETR report and in the light of the regulatory standards framework developed by the Legal Services Board pursuant to the *Legal Services Act 2007*.⁴ As with the SRA, the Consultation Paper is also accompanied by a Professional Statement proposing standards and characteristics required of barristers, and seeks public comment on that draft Professional Statement.⁵

While the Consultation Paper considers several deficiencies identified in the present Bar Professional Training Course and the present pupillage system, it does not foreshadow what, if any, assessment arrangements might be adopted to ensure that prospective barristers have, indeed, met the proposed Threshold Standards at the time when they seek a full practising certificate.

4. **DESIGNING A DEVELOPMENT PROGRAM**

In the light of the matters set out in items 2 and 3, it is proposed to devise and undertake a development program as described in items 4.1 and 4.2 below.

² SRA, *Training for Tomorrow: A Competence Statement for Solicitors* (2015).

³ SRA, *A Competence Statement for Solicitors, SRA Response to the consultation*, March 2015, 3 para 10.

⁴ BSB, *Future Bar Training, Consultation on the future Training for the Bar: Academic, Vocational and Professional Stages of Training*, July 2015.

⁵ BSB, *Future Bar Training Consultation: The Professional Statement* (2015).

A series of investigations of the type proposed could have numerous advantages. Among them are –

- (a) they could be fashioned expressly to respond to recommendation 7.1 of the Productivity Commission's report;
- (b) they may lay the groundwork for a more rational and better-targeted CPD regime;
- (c) they might also facilitate the development of other education and training paths for providing legal services that do not necessarily lead to admission to the legal profession;
- (d) they would necessarily engage practising lawyers and their respective professional associations, the Legal Services regulators in each jurisdiction, law school and PLT teachers, Admitting Authorities, the Legal Services Council, LACC and the Council of Chief Justices, with the object of forging consensus wherever possible. It might also attract funding and support from some of these bodies;
- (e) they might divert debate that is presently focussed on the content of the present Academic Requirements and the adequacy of assessment regimes in PLT courses into more forward-looking areas of ultimate importance to the practice of law, itself;
- (f) they would be capable of producing a regime that would meet the aspirations of the Council of Chief Justices to assure the competence of applicants for admission before they embark upon legal practice; and
- (g) they would provide an opportunity to consider whether, and if so how, the changing nature of legal practice, the evolving needs of consumers and the global reach of legal services, should be reflected in the education and training of legal practitioners.

While there is an obvious need to acquire Australian data about whether inadequacies exist, whether change is required and what form such change should take, the purpose of the relevant research must be clearly defined, precisely targeted and designed and executed by people with appropriate expertise.

The precise, form, nature and sequence of investigations will thus depend on expert advice. It may be possible and more efficient for certain investigations to be conducted concurrently, rather than sequentially. Similarly, it might be possible to seek public consultation on designated themes or possibilities, rather than inviting open-ended contributions.

While noting the need for expert project design, the development program might include the following elements.

4.1 **Stage 1**

- (a) Gather views about what exactly a legal practitioner needs to be able to do, in order to practise effectively.
- (b) Gather evidence about whether prevailing arrangements for preparing lawyers for legal practice, and for maintaining and developing their competence after admission, are appropriate and effective in the light of the results of (a)..

Whether the issues are explored sequentially or concurrently, they would each probably require –

- (i) focus group discussions in each jurisdiction, including city, suburban and regional practitioners, members of the bar, courts, tribunals and educators;
- (ii) an on-line survey, to broaden the reach of the consultation.

Those responding to the first issue might be asked to respond to certain themes. They might, for example, be asked to consider what precisely a practising lawyer needs to be able to do, in broad terms, in each of the following areas –

- (i) ethics, professionalism and judgement
 - (ii) technical aspects of legal practice;
 - (iii) working with others;
 - (iv) managing people and work.
- (c) Analyse responses to item (b). Determine whether there is a need to change prevailing arrangements and, if so, what options might be viable in the light of what a practising lawyer needs to be able to do to practise effectively.
 - (d) Analyse information gathered under item (a). Consider whether it might be helpful in devising future CPD, Academic and PLT programs to prepare a Competence Statement for Australian Legal Practitioners.

4.2 **Stage 2**

If preparing a Competence Statement appears to be appropriate -

- (a) prepare a preliminary draft of a possible Competence Statement and submit it for public comment;

(Whether this phase could be conducted successfully by seeking on-line submissions, or whether further group discussions may be required will need to be determined in the light of expert advice.)
- (b) prepare a final version of a Competence Statement in the light of submissions received.

4.3 **Stage 3**

If an adequate case for reform is revealed, further work will be required. Depending on the results, such further work might include –

- (a) developing a Statement of Legal Knowledge setting out the range of substantive legal knowledge and skills that will be necessary to support the competence required of a legal practitioner;
- (b) defining the Threshold Standards, in terms of both the competence required of a legal practitioner and the Statement of Legal Knowledge, which a person will need to demonstrate when seeking admission;
- (c) determining whether consequential changes in the prevailing Academic Requirements and *PLT Competencies for Entry-level Lawyers* may be required;
- (d) determining how, and at what stage, an applicant's achievement of the relevant Threshold Standards should be assessed;

- (e) determining whether a period of supervised workplace experience is required before or after admission, and whether the content of that experience needs to be more closely regulated;
- (f) determining the shape and nature of CPD programs derived from the competence required of a legal practitioner, the Statement of Legal Knowledge and the Threshold Standards, that would be required to maintain and develop the professional competence of Australian practitioners; and how those programs should be regulated.

The precise form, nature and sequence of each of these further investigations will need to be determined in the light of both expert advice and the experience gained in implementing Stages 1 and 2.

5. **IMPLEMENTATION**

5.1 **Administration**

A development program of this scale will need to have an identifiable institutional framework. LACC does not, itself, have the resources or administrative structure that could perform this function. One possibility would be the newly formed Legal Services Council (**LSC**). It has the statutory objective of promoting consistency in the exercise of functions of the local regulatory authorities in each participating jurisdiction, and is also subject to the overall objective of the *Legal Profession Uniform Law* of "providing and promoting interjurisdictional consistency in the law applying to the Australian legal profession". The LSC has a permanent administrative office located in Sydney. Further, through its Admissions Committee, it has strong links to both LACC and the Admitting Authorities in all Australian jurisdictions

It is thus suggested that the Legal Services Council might be approached to provide the administrative host for the proposed development program.

5.2 **Policy direction**

The development program will require careful policy direction by a small Steering Committee of people proposed and appointed by LACC –

- (a) with relevant background knowledge and experience;
- (b) with sufficient time to devote to what is likely to be a challenging and lengthy task; and
- (c) who are, and are perceived to be, independent.

LACC should, in consultation with others, identify people of appropriate reputation and stature to form the Steering Committee for the program.

5.3 **Implementation**

LACC, in consultation with the Steering Committee and others, should be responsible for identifying and nominating people with appropriate expertise and experience to design and implement each phase of the development proposal; to carry out the necessary consultations; and to draft relevant reports on that phase.

Assuring Professional Competence

Sandford Clark & Richard Besley

LACC comprises

- Nominees of each State and Territory Chief Justice
- Representatives of
 - Law Council
 - CALD
 - APLEC

Council of Chief Justices approves its Charter and appoints its Chair.

Law Admissions Consultative Committee

LACC's Objective

- Forge consensus among Admitting Authorities on a wide range of matters relating to admission.
- Post Uniform Law, continues to work to achieve consensus between participating and non-participating jurisdictions.

Nagging Concerns

- Appropriateness of preparation for practice.
- Proliferation of new law schools.
- Standards and comparability of assessment.
- Numbers being admitted who cannot then find employment.

Law Admissions Consultative Committee

Limited review of Academic Requirements

Should the following still be required –

- Civil Procedure
- Evidence
- Company Law?

Should others be required?

What about Statutory Interpretation?

How might comparability be assured?

Law Admissions Consultative Committee

Results

Majority of submissions recommended –

- none of the three should be omitted;
- Statutory Interpretation might be appropriate.

Strong view that more research required before changing anything.

Besley Paper

1957 Murray Report assumed that significant workplace training would always be necessary preparation for legal practice.

England – 2 year pre-admission training contract,
with regulated content.

Australia – 2 year post-admission supervised practice, with
no regulated content.

Council of Chief Justices

Proposes further work on –

- Possibility of significant period of pre-admission workplace training.
- Identifying outcomes and competency standards for such training (or supervised practice).
- Finding appropriate mechanisms for determining whether those outcomes or standards have been achieved.

Law Admissions Consultative Committee

Legal Education & Training Review

Commissioned by –

SRA

BSB

CILEX

Report –

Setting Standards, 2013

Law Admissions Consultative Committee

Significant Elements

- What correlation now exists between academic knowledge and fitness to practise law?
- Problem of inconsistency in standards and comparability of qualifications.
- Need to clearly define required outcomes for education and training.
- Competence must be demonstrably identified, attained, signalled and assured.
- Need to identify different pathways to delivering legal services.

Responses to LETR Report

- SRA
 - A Competence Statement for solicitors was adopted in March 2015. It came into effect for CPD purposes on 1 April 2015.
 - It is also supported by –
 - a Threshold Standard, derived from the Competence Statement
 - a Statement of Underpinning Legal Knowledge.
- BSB
 - Consultation Paper with a draft Professional Statement for barristers, July 2015.

Assuring Professional Competence

Stage 1

- (a) Gather views about what a practitioner now needs to be able to do in order to practise effectively.
- (b) Gather evidence whether prevailing practices for preparing lawyers for practice and monitoring their competence are appropriate and effective, in the light of (a).
- (c) If appropriate, prepare a draft Competence Statement for Australian Legal Practitioners for public comment.

Assuring Professional Competence

Stage 2

- Derive CPD programs to maintain and further develop competence.
- Competence Statement.
- Derive Threshold Standards of competence from the Competence Statement.
- Set out the Underlying Legal Knowledge necessary to support the Competence Statement.
- Adjust Academic Requirements and PLT Competencies, if and when appropriate.

Law Admissions Consultative Committee