

BushWeb Regional Issues Committee
Business Law Committee
Civil Litigation Committee
Public Law & Government Committee
Human Rights Committee

NSW Young Lawyers Committees:

Submission to Legal Services Council

Legal Profession Uniform Law Consultation

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Legal Services Council
Level 11, 170 Phillip Street
Sydney NSW 2000
submissions@legalservicescouncil.org.au

Co-ordinator: Alexandra Sprouster

Editors: Sally Davies, Arjun Sachdev

Authors: Nicola Bailey, Allison Couchman, Rhonda Furner, Craig Holland and David Killen

Contributors: Catherine Barry, Maeve Curry, Danielle Daquino, Patrick Gardner, Nichole Hoskin, Athurshen Jeyakumaran, Katerina Jovanovska, Lisa Sinclair, Raeshell Tang, Tiffany Tran, Niall Watson Dunne

NSW Young Lawyers
170 Phillip Street
Sydney NSW 2000
www.younglawyers.com.au

NSW Young Lawyers

NSW Young Lawyers (**NSWYL**) is a division of the Law Society of New South Wales. NSWYL represents approximately 15,000 members. Membership of NSWYL is open to all lawyers under the age of 36 and/or in their first five years of practice and to law students.

Committees refers to the BushWeb Regional Issues Committee, the Business Law Committee, the Civil Litigation Committee, the Human Rights Committee and the Public Law and Government Committee of NSW Young Lawyers.

The **BushWeb Regional Issues Committee** is responsible for representing and facilitating peer support for members throughout NSW, particularly those in regional and rural areas. To overcome the tyranny of distance, BushWeb started as an idea to use the internet and technology to bridge physical distances and to connect young lawyers with others in their region and throughout NSW.

The **Business Law Committee** provides a forum for enthusiastic individuals who have joined together to improve their own knowledge of business law and raise increased understanding of this area in the profession. Members discuss relevant business law issues, comment on proposed amendments to business law and network with similarly motivated and engaged people.

The **Civil Litigation Committee** promotes understanding of civil litigation and dispute resolution in the profession, offering a support base and information resource for our members. The committee seeks to improve the administration of justice, with an emphasis on advocacy, evidence and procedure.

The **Human Rights Committee** is a group of lawyers and law students interested in Australian and international human rights issues. The objectives of the Committee are to raise awareness about human rights issues and to provide education to the legal profession and wider community about human rights.

The **Public Law and Government Committee** aims to foster a social and educational environment for those who wish to keep informed of jurisdictional and practical developments, as well as those who wish to gain awareness of their potential career paths in these areas. Our areas of focus include (but are not limited to) administrative law, constitutional law and government law.

Inquiries

Inquiries may be directed to Elias Yamine, President of NSWYL, at president@younglawyers.com.au.

Introduction

This submission is prepared by the Committees of NSW Young Lawyers in response to the Legal Profession Uniform Law Consultation.

Summary of issues raised in this submission

The Committees raise the following key issues in relation to the Consultation Draft of the Proposed Legal Profession Uniform General Rules 2014 (**Proposed General Rules**):

- The Proposed General Rules relating to service of a costs bill may require clarification to assist practitioners to understand the options for valid personal and electronic service.
- The prescribed forms in Schedule 1 relating to costs may require additional space and some formatting changes.
- The Committees support the rules relating to professional indemnity insurance and fidelity cover.

The Committees raise the following key issues in relation to the Consultation Draft of the Legal Profession Proposed Admission Rules (**Proposed Admission Rules**):

- The Committees view the proposed objectives as appropriate.
- The Committees are of the view that the Proposed Admission Rules provide greater certainty in relation to academic qualifications, including that courses of study must be accredited.
- The Committees support the inclusion of stale qualifications rules.
- The Committees support the PLT rules, in particular the changes to the electives rules.
- The Committees are of the view that the system of accreditation, monitoring and review for PLT providers is a positive change.
- The Committees submit that the requirement for a health assessment in relation to determining whether someone is a fit and proper person may be too broad in its current form.

1. Consultation Draft of the Legal Profession Uniform General Rules 2014

Chapter 4

4.3 Legal Costs

Part 4.3 of the Proposed Legal Profession Uniform General Rules 2014 (the **Proposed General Rules**) has been considered in conjunction with the proposed Forms 1 and 2 in Schedule 1 (**the Forms**) and with reference to the current *Legal Profession Uniform Law 2014* (NSW) (the **Uniform Law**).

In relation to “delivery to a person” of a bill under subsection 69(1)(c) of the Proposed General Rules, it is unclear whether such delivery must be by personal delivery and whether such personal delivery may be effected in the manner set out in rule 10.21 of the *Uniform Civil Procedure Rules 2005* (NSW) (UCPR), as set out below:

- (1) Personal service of a document on a person is effected by leaving a copy of the document with the person or, if the person does not accept the copy, by putting the copy down in the person’s presence and telling the person the nature of the document.
- (2) If, by violence or threat of violence, a person attempting service is prevented from approaching another person for the purpose of delivering a document to the other person, the person attempting service may deliver the document to the other person by leaving it as near as practicable to that other person.
- (3) Service in accordance with subrule (2) is taken to constitute personal service.

The Committees submit that further clarification of the details and options for delivery to a person will enable an accurate and precise understanding of this element of the Proposed General Rules.

In relation to sending a bill electronically to an address provided by the client “for that purpose” under subsection 69(1)(e) of the Proposed General Rules, the Committees submit that the words “for that purpose” be removed as their inclusion unfairly inhibits the solicitor from compliance with the Proposed General Rules if the solicitor cannot show that the email address was provided specifically for the purpose of receiving bills. Whilst it is assumed a common sense approach would be taken in the interpretation of the Proposed General Rules and the Uniform Law, in the event an issue relating to delivery of a bill arose, technical compliance with this subsection may not be achieved in many instances if the subsection remains in its present form.

In relation to section 69 of the Proposed General Rules generally, it is noted that delivery of a bill may not occur by way of facsimile. Whilst the Committees accept that the use of facsimile has diminished in the wake of the heightened use of email, it is submitted that delivery by facsimile be included as a valid means of delivering a bill.

Forms 1 and 2 of Schedule 1 of the General Rules

The Forms have been considered with reference to Part 4.3 of the Proposed General Rules and to Part 4.3 of the Uniform Law.

To aid solicitors and barristers (**legal practitioners**) with the completion of the Forms, the Committees submit that the words “add a page to set out these

reasons if necessary” be added after the words “I calculated this estimate by: (comments section)”. The Committees submit that the reckoning of the costs estimate is an important consideration in determining what is “fair and reasonable” in accordance with section 172 of the Uniform Law, and that limiting the space for explanation to the size provided in the Forms may discourage legal practitioners from fully explaining their reasons and calculations. This could have adverse implications for the solicitor in the event of a costs assessment, where a determination is made as to whether the costs were “fair and reasonable”. The addition of identical wording could be inserted after “Description of work done” for the same reasons.

It is submitted that the “yes/no” circle options at the bottom of the Forms should be supplemented by a notation that the client will be deemed to have agreed to the terms of the costs disclosure by providing, or continuing to provide, instructions to the legal practitioner after the receipt of the relevant Form. This is in line with common practice of legal practitioners and provides protection to legal practitioners who incur costs by acting on verbal (or written) instructions from clients prior to actual receipt of a signed disclosure form.

A further alternative submission is that a formatting alteration may be made, removing the “yes/no” circle boxes and instead showing the following exemplar wording:

*“By signing this form, you acknowledge that you:
Understand the information in this form; and
Consent to the proposed course of action and proposed costs”*

This will remove any uncertainty surrounding the understanding and/or consent of the client in circumstances where a signed Form is returned to the legal practitioner without either of the existing “yes/no” boxes being circled.

4.4 Professional Indemnity Insurance

The Committees submit that the creation of a uniform legal services market, which includes a standardised professional indemnity regulatory scheme, such as the one included in the Proposed General Rules, is desirable in order to reduce the compliance costs of firms.

The Committees support the Proposed General Rules in Part 4.4 and are of the view that they will simplify the process of arranging professional indemnity insurance for multi-jurisdictional firms.

The Committees strongly support the mandatory requirement for solicitors to hold professional indemnity insurance. The mandatory scheme provides both clients and solicitors with essential protection against losses arising from professional negligence.

The Committees specifically note and agree with sub-rules 73(6) and (8), which prescribe a minimum level of coverage for each and every claim or loss and require that indemnity insurance must provide indemnity for a minimum of seven years for run-off liabilities in the event that the insured solicitor dies or the firm ceases to exist or the solicitor or firm ceases to provide legal services.

The Committees further agree with the disclosure requirements set out in rule 74. Where a legal service is not covered by professional indemnity insurance, it is essential that the client be notified prior to the provision of those legal services.

The Committees note that the Proposed General Rules would allow for corporate and government lawyers to be exempted from the requirement to take out professional indemnity insurance. The overarching purpose of mandatory professional indemnity coverage is to provide clients and solicitors with essential protection against losses arising from professional negligence. To the extent that corporate and government lawyers do not provide legal services to persons other than their employer and have no potential liability to their employer or others for professional negligence, the Committees support their exemption from the requirement to hold professional indemnity cover.

The Committees also support the exemption on the basis that any corporate or government lawyers who may seek to provide legal services other than those for their employer in the course of their employment – for example by engaging in volunteer/pro bono legal work – must be required to hold professional indemnity insurance. To that end, the Committees submit that rule 76(2) is an essential feature of the exemption regime.

4.5 – Fidelity Cover

The Fidelity Fund remains an important feature of the legal profession. The Committees support the Proposed General Rules in respect of Fidelity Cover.

The Committees reiterate that the creation of a uniform legal services market and regulatory scheme, as included in the Proposed General Rules, is desirable in order to reduce the compliance costs of firms.

It is the Committees' view that the Proposed General Rules appropriately balance consumer protection and the commercial reality of legal practice by providing strong benefits to government and corporate lawyers who do not handle trust money. The Committees submit that there is little public benefit in requiring legal practitioners who do not handle trust monies to pay into the fidelity fund.

The Committees submit that any practitioners who are exempted from paying into the Fidelity Fund must necessarily be precluded from being able to receive or handle trust money.

2. Consultation Draft of the Legal Profession Proposed Admission Rules

Introduction

Consistency between jurisdictions is an important tool to assisting legal practitioners to work more easily within other Australian jurisdictions without the added (and sometimes time-consuming) need to learn different obligations and regulatory requirements for each jurisdiction. Another potential benefit is for clients, who may have greater choice of legal services should consistency between jurisdictions be strengthened, as required by objective 3(d). The Committees are of the view that the objectives contained in section 3 of the Legal Profession Uniform Law (NSW) (the **Uniform Law**) are met by the Consultation Draft of the Legal Profession Proposed Admission Rules (the **Proposed Admission Rules**).

Part 2 – Qualifications and training required for admission

Background

Section 16(1)(a) of the Uniform Law requires that, in order to admit an individual to legal practice the designated local regulatory authority must provide the Supreme Court with a **compliance certificate** in respect of the individual.

Section 17(1) of the Uniform Law provides that the prerequisites for a compliance certificate are:

1. Attainment of the academic qualifications specified under the Admission Rules for the purposes of this section (the **specified academic qualifications prerequisite**); and
2. Satisfactory completion of the practical legal training requirements specified in the Admission Rules for the purposes of this section (the **specified practical legal training prerequisite**); and
3. That the individual is a fit and proper person to be admitted to the Australian legal profession.

Generally, the Proposed Admission Rules reflect the current Legal Profession Admission Rules 2005 (NSW) (the **Current Rules**). However, some differences are worthy of discussion.

The Explanatory Paper states that the Proposed Admission Rules are intended to be facilitative rather than prescriptive. In the Committees' view this appears to be the case. Generally, the Proposed Admission Rules leave more to be determined administratively by the Board than the Current Rules. While the Board should have some flexibility to determine certain matters administratively, there must be a balance between the facilitative and prescriptive. Leaning too far to the facilitative side may lead to uncertainty in relation to the qualifications and training requirements for admission.

Specified Academic Qualifications Prerequisite

Section 4 of the Proposed Admission Rules deals with the specified academic qualifications referred to in section 17(1)(a) of the Uniform Law.

In the Committees' view the Proposed Admission Rules tighten up the requirements with respect to academic qualifications. The Proposed Admission Rules require completion of a course of study in law **accredited** by the Board,

whereas the Current Rules only require that the course of study be recognised in at least one Australian jurisdiction as providing sufficient academic training for admission by the Supreme Court of that jurisdiction (section 95(1)(a)). The Committees submit that the requirement that the course of study in law be accredited is a positive change that promotes certainty in respect of the academic requirement for admission.

The Proposed Admission Rules also promote certainty by more clearly defining what is required from a course of study in law by requiring that the course of study provide for a student to “acquire and demonstrate appropriate understanding and competence” in each of the academic areas of knowledge. The Current Rules only require that a course provide “sufficient academic training” in the areas of knowledge referred to in section 95(1)(b) of the Current Rules. The Committees support this change.

The Committees note that Schedule 1 of the Proposed Admission Rules closely reflects the list of knowledge areas laid out in section 95(1)(b) and Schedule 5 of the Current Rules. However, it is noted that the Proposed Admission Rules now allow the areas of academic knowledge to be otherwise determined by the Admissions Committee (on joint recommendation of the Boards).

The Proposed Admission Rules now make provision for “stale qualifications”, that is, qualifications obtained more than 5 years before applying for a compliance certificate. In the Committees’ view, this is an important improvement and will benefit the profession by ensuring that the academic qualifications of those applying for admission are current. The Proposed Admission Rules also provide a remedy by undertaking further academic subjects and passing such examinations as the Board may require. This is similar to the way in which foreign qualified lawyers may currently seek admission in NSW.

Specified Practical Legal Training Prerequisite

Section 5 of the Proposed Admission Rules deals with the specified practical legal training prerequisite referred to in section 17(1)(b) of the Uniform Law.

This section is similar in its approach to the previous section and once again requires that an individual seeking admission must “acquire and demonstrate an appropriate understanding and competence” in the skills, values and practice areas set out in Schedule 2 to the Proposed Admission Rules. The skills, values and practice areas set out in Schedule 2 closely reflect the PLT competency standards set out in Schedule 6 of the Current Rules. In the Committees’ view the items in Schedule 2 are appropriate.

The Committees note that there has been a small change in relation to the elective subjects to be undertaken in a course of practical legal training. The Current Rules provide that the electives are divided into two groups with one subject from each group to be selected by a candidate. The Proposed Admission Rules eliminate this artificial division and allow any two electives to be selected. Arguably, this provides a little more flexibility for a candidate in a practical legal training course to follow their interests.

Another positive change is that the Proposed Admission Rules provide that the specified practical legal training prerequisite may be met by successfully completing either a Professional Legal Training (**PLT**) course (with an accredited PLT provider), or by supervised legal training of not less than 12 months under a “training plan” approved by the Board. Although included in the Proposed Admission Rules to maintain the current system in Victoria, the Committees support its inclusion for an additional reason. There may be opportunities for more long-term practical legal training to be developed in NSW (similar to the

repealed system of articles), offering choice to those students of law who may wish to conduct long-term legal practical training beyond the specified requirements of the current PLT system.

It should be noted that the Proposed Admission Rules also make provision for stale qualifications in respect of practical legal training (section 5(4)). For the reasons noted above, the Committees submit that this is an important improvement for ensuring currency of legal skills.

Accreditation, Monitoring and Review of Law Courses and Practical Legal Training Providers

Sections 6 and 7 of the Proposed Admission Rules include important changes in respect of the accreditation, review and monitoring of law courses and practical legal training providers.

Under the Current Rules a law school or practical legal training provider that intends to provide a law course or course of practical legal training must each year either make an application for accreditation or provide the Board with details of any material alterations made to the curriculum. In contrast, the Proposed Admission Rules provide for a system of accreditation, monitoring and review which, on its face, appears to offer greater flexibility to the Board to undertake more extensive and more focused reviews than presently available under the Current Rules, whilst maintaining the Board's obligation to monitor all accredited law courses and accredited practical legal training providers. This is supported by the obligation of providers of law courses and practical legal training under section 7(4) of the Proposed Admission Rules, to provide such information as required for the purpose of a review. The Committees submit that the proposed system of accreditation, monitoring and review provides the Board with the tools to improve the quality of legal education.

With respect to periodic reviews, section 7(2) of the Proposed Admission Rules allows the Board to appoint reviewers and determine the terms of reference for any review. In the Committees' view, the benefits of this system of review is that the Board may appoint the most appropriate person to conduct the review and set the terms of that review, depending on the circumstances. It should be noted that a reviewer appointed under section 7(2) may take into account any relevant matters that the reviewer considers material together with the appraisal criteria endorsed in other Australian jurisdictions (section 7(3)). The Committees submit that the system of thorough, focused review provided for by the Proposed Admission Rules is superior to the present system of annual reporting under the Current Rules.

The Committees' note and support the provision for mandatory publication of accredited law courses and practical legal training providers.

Supervised Legal Training

Section 8 of the Proposed Admission Rules provides that the Board may determine whether supervised legal training may be undertaken to meet the requirement of sub-section 5(2)(b). In the event that the Board so determines, then the provisions of Schedule 3 to the Proposed Admission Rules apply in respect of that training.

In the Committees' view, the provisions of Schedule 3 cast important obligations on the trainee, the trainee's supervisor(s) and the trainee's employer. These provisions take a structured approach to supervised legal training by way of the requirement to execute a training plan which must be approved by the Board. It should be noted that should the Board determine that supervised legal training may be undertaken, item 6 of Schedule 3 requires that a person undertaking

supervised legal training must meet all the same criteria as a person undertaking a course of practical legal training with an accredited provider.

Determining Whether Someone is a Fit and Proper Person

Section 9 of the Proposed Admission Rules state the matters for which the Board must have regard to when considering whether a person is a fit and proper person to be admitted to the legal profession.

It should be noted that the Current Rules do not specify the matters to be considered in determining whether a person is a fit and proper person. In mandating particular matters to be considered, the Proposed Admission Rules are making a distinction between those matters relevant to whether someone is a fit and proper person to be admitted to legal practice for the first time, and whether a person is a fit and proper person to hold a practicing certificate. It should be noted that pursuant to sub-section 17(2)(a), the Board may have regard to any matter relevant to the person's eligibility or suitability for admission, regardless of how the matter comes to its attention. The Proposed Admission Rules do not appear to change how a person is determined to be a fit and proper person to be admitted to practice.

One interesting change introduced by the Proposed Admission Rules and related to sub-section 9(1)(k) (whether the person is currently unable to satisfactorily carry out the inherent requirements of practice as an Australian legal practitioner) are the health assessments provided for in section 22. There is no comparable provision in the Current Rules or other NSW legislation. The Committees submit that while the power given to the Board in section 22 is discretionary and may not be exercised, it is very broad in its application. It appears that the provision is aimed toward assessment of mental illness and whether a person having a mental illness is a fit and proper person. If that is the case, then the Committees submit that section 22 should be more focused in its application.

Directions about Qualifications

Section 10 of the Proposed Admission Rules sets out a simplified process in relation to applicants for a compliance certificate where they have completed their academic requirements and or practical legal training in a foreign jurisdiction.

The Committees submit that this section meets the goals of being a more facilitative provision than section 97 of the Current Rules. Importantly, the Board must consider the extent to which the academic qualification in law and practical legal training undertaken by the applicant are substantially equivalent to the academic qualifications and practical legal training provisions of the Proposed Admission Rules as well as any principles endorsed by other Australian jurisdictions for assessment of academic qualifications gained in foreign jurisdictions.

Part 5 – Qualifications and training required for admission – transitional and savings provisions

The transitional and savings provisions of section 31 of the Proposed Admission Rules operate to ensure that anything done by the Board under the Current Rules will continue to have effect under the Proposed Admission Rules. Further, this provision ensures that the Diploma in Law, all law degrees and practical legal training providers accredited under the Current Rules will continue to be accredited subject to the provisions relating to monitoring and review of law courses and practical legal training providers.

Conclusion

The Committees thank the Legal Services Council and the Admissions Committee for the opportunity to comment on the Legal Profession Uniform Law Consultation and would be very pleased to provide further information or submissions as required.

Sincerely,



Elias Yamine | President
NSW Young Lawyers | The Law Society of New South Wales

E: president@younglawyers.com.au | **W:** www.younglawyers.com.au



Alexandra Sprouster | Councillor |
Vice-Chair | Public Law & Government Committee
NSW Young Lawyers | The Law Society of New South Wales

E: alex.sprouster@younglawyers.com.au | **W:** www.younglawyers.com.au