

VLSB+C Review of Continuing Professional Development in Victoria

RESPONSE TO THE ISSUES PAPER

Professor Julian Webb

MELBOURNE LAW SCHOOL

June 2020

INTRODUCTION

1. This is a necessary and timely review. Internationally CPD has long been the Cinderella of professional education and training; it is often under-designed, under-regulated and relatively lightly resourced.
2. CPD schemes are now the norm across established professions. A commitment to CPD serves as part of the 'social contract' between the profession and society, in which the profession seeks to assure the competence of its members in exchange for the privileges of professional autonomy and standing. It also acknowledges that a period of initial education and training is insufficient to ground a career that may extend over 40 years post-qualification.
3. Whilst the principle of CPD is now widely accepted, there is continuing debate as regards its form and regulation. Best practice has moved on, as the Issues Paper notes, with schemes in (eg) Canada, the UK and New Zealand taking a more pro-active and developmental approach. As a consequence, there is a real risk that the model in use in Victoria may be seen as, at best, outmoded and, at worst, no longer fit for purpose.
4. As a non-practitioner I cannot comment directly on personal CPD experience. This response therefore focuses on the systemic regulatory and design issues, drawing on my knowledge and experience from researching and advising on professional regulation and legal education and training design, including as project lead for the Legal Education and Training Review (LETR),¹ which initiated the post-2014 reforms to CPD in England and Wales, as a consultant to the Comprehensive Review of Legal Education and Training in Hong Kong (2016-18),² and currently as a member of the Singapore Academy of Law's LIFTED (Legal Industry Framework for Training and Education) Global Network.
5. These systemic matters are addressed here under two broad headings: scheme requirements, and the regulatory function.

SCHEME REQUIREMENTS

6. This section addresses four key design issues identified in the consultation questions, namely: (i) whether the existing focus on 'activities' (inputs) should be retained, or the scheme should require

¹ Julian Webb et al, *Setting Standards: The Future of Legal Services Education and Training Regulation in England and Wales* (Legal Education and Training Review, June 2013) 350 <<http://www.lettr.org.uk/the-report/>> ('LETR Report').

² Anthony Rogers, Tony (ATH) Smith and Julian Webb, *Comprehensive Review of Legal Education and Training in Hong Kong: Final Report of the Consultants* (Standing Committee on Legal Education and Training, April 2018) 172 <<http://www.sclet.gov.hk/eng/publications>> ('SCLET Final Report').

practitioner to set goals or outcomes for their own learning; (ii) whether, relatedly, a requirement for CPD hours is useful and, if retained, in what form, (iii) whether mandatory areas/topics should be prescribed, and (iv) whether such prescription should vary according to professional experience.

Inputs vs outcomes

7. The Issues Paper rightly notes a move in other jurisdictions away from prescribed 'inputs' to a more flexible 'outcomes' or 'benefits' approach that requires practitioners to plan, record, and reflect on their specific CPD engagement. This was defined by LETR as a 'continuing competence' approach, one which aims to ensure that CPD activity *demonstrably* focuses on matters that are of direct use and relevance to the practitioner at each stage of their professional lifecycle.
8. The move to a benefits approach should be promoted. Though relatively new, the strengths of the model are widely understood and articulated in the literature on professional education design.³ These (interrelated) benefits include:
 - Learning activity becomes less *ad hoc*
 - Activity becomes less obviously about ('tick box') regulatory compliance⁴
 - Formal learning may become more personalised as participants are encouraged to focus directly on the tangible outcomes for themselves/their organisations
 - Practice-based and informal learning can be better evidenced
 - Future learning needs and resources can be better built into business planning
 - The benefits of specific training may become more transparent to the practitioner, employer and regulator
9. The challenges of a benefits approach are real, and mostly concern mitigating the risk of overload and poor outcomes
 - Increased commitment of practitioner time and resources to planning, reflecting and recording learning⁵
 - A need for professional bodies/the regulator to support practitioners in developing the necessary skills - particularly of learning needs analysis, and reflection⁶

³ Andrew Friedman, *Continuing Professional Development* (Routledge, 2012); Jeff Gold et al, 'Continuing Professional Development in the Legal Profession: A Practice-Based Learning Perspective' (2007) 38(2) *Management Learning* 235 ('Continuing Professional Development in the Legal Profession'); S Wallace and SA May, 'Assessing and Enhancing Quality through Outcomes-Based Continuing Professional Development (CPD): A Review of Current Practice' (2016) 179(20) *Veterinary Record* 515 ('Assessing and Enhancing Quality through Outcomes-Based Continuing Professional Development (CPD)').

⁴ Cp LETR Report, paras 2.147-2.166 and 6.72-6.95.

⁵ This is not necessarily a new or additional cost, particularly for larger firms that may already require some such process as part of internal staff development and appraisal purposes, but there is a risk it may disproportionately impact smaller firms/sole practitioners if made too onerous.

⁶ This is critical, and not as straightforward as it sounds (it has recently been identified as an issue for the Bar Standards Board's new scheme). The work of the Singapore Academy of Law's LIFTED initiative is worth investigating for its use of technology to support practitioners in developing a more benefits-orientated approach: <https://www.sal.org.sg/Resources-Tools/Legal-Education-LIFTED/Learning-Professional-Development>

- A need for the regulator, possibly in conjunction with professional bodies/employers, to commit adequate resources to designing procedures and reporting tools, and to audit.⁷

CPD 'hours'

10. CPD hours are widely used to 'unitise' and regulate activity. They are a simple measure, and easily understood, but also somewhat arbitrary. It is clear from any international comparison that there is little common agreement on what an appropriate number of hours looks like.
11. Though legal professions historically have tended to set lower targets than other professions,⁸ this is starting to change. Nonetheless there remains a broad band of expectations internationally. The Issues Paper thus notes the example of Singapore, which, though setting variable requirements (by experience), is at the lower end of the range. Before abolishing their hours requirements, the English Bar and solicitors' professions required 12 and 16 hours respectively, while Ireland (20 hours for solicitors) and New York, which requires 24 hours, are at the upper end of the scale. In a survey of European legal professions conducted by the CCBE in 2011, the average minimum was 14 hours/13-14 points annually.⁹ In this context, a moderate increase in hours in Victoria would raise the baseline closer to international norms, and more appropriately acknowledge the effort of those who already exceed what is required.
12. Is there greater benefit in dropping an hours requirement? So far, few legal professions have tried. Whilst this has been done in the context of moves to a benefits model (eg in Alberta and England and Wales) the two things need not be connected. A benefits model may still set minimum hours, as is the practice in Scotland and New Zealand.
13. Most lawyers do not need to be told to do CPD. Studies (albeit dated) indicate that many practitioners routinely exceed their prescribed threshold.¹⁰ The risk is that, for those practitioners who do see CPD as a burden rather than a benefit, or those who are struggling to fit training in - and to whom regulation is therefore most directly addressed - the minimum sets the only target, and has utility on that basis. Anecdotally, in jurisdictions where the hours requirement has been dropped, this has led to some 'gaming' and compliance problems, though these may reflect the combined impact of removing hours requirements whilst also adopting a light touch approach to audit. If an hours requirement were to be dropped from the Uniform Law, then logic suggests that

⁷ The use of secure online records is an obvious solution that can substantially automate much of the process. This approach is adopted and obligatory in many medical and health care settings. The Law Society of Scotland offers optional resources for the online recording of CPD activity/reflection to its members.

⁸ For example, general medical practitioners (without accredited specialisation) in Australia must complete 50 hours pa; chartered accountants require the equivalent of 40 hours per year, and registered architects must complete at least 20 hours.

⁹ Council of the Bars and Law Societies of the European Union (CCBE) 'Continuing Training in the CCBE Full Member Countries: Summary' (CCBE, 2011)

<http://www.ccbe.eu/fileadmin/user_upload/document/National_training_regime/1_-_Summary_of_national_continuing_training_regimes.pdf>

¹⁰ Eg, J. Hales, N. Stratford & A. Sherr, 'Continuing Professional Development in the Solicitors' Profession' (Research Study No. 32) (Law Society of England and Wales, 1998); Christopher Roper, 'Senior Solicitors and Their Participation in Continuing Legal Education' (Centre for Legal Education, 1993).

more stringent audit arrangements must be put in place to provide a sufficient check on compliance.¹¹

14. If an 'hours' requirement is retained, a further way of encouraging flexibility could be to reconsider whether CPD units are counted on an annual or longer cycle. A three year cycle (eg as adopted by the accountancy profession) may help incentivise and normalise CPD that requires more intensive or reflective learning experiences, rather than the sometimes fragmented approach to professional development that can flow from reliance on seminars and online lectures. Likewise, some carry over of 'excess' learning activity may also be permitted, eg, as per r.11 of the Uniform CPD (Solicitors) Rules 2015.

Mandatory subject areas/topics

15. The current prescription of areas, particularly given the minimal hours assigned under the Victorian scheme likely serves a symbolic rather than significant practical function. The areas chosen are largely unobjectionable, and highly flexible, but also therefore of limited assistance to practitioners (particularly in a move to a benefits scheme) since they are so wide as to be virtually content-free. If, as is argued in section 4, a primary objective of a CPD scheme is the *assurance* of competence, then content does need to be taken seriously, even if an outcomes/benefits approach is adopted. The most obvious and, to my knowledge, most commonly specified areas concern professional ethics and conduct, and practice management, but again there is no single model, and where the number of prescribed hours are low, such prescription can itself appear tokenistic. A more fine-grained topic requirement in respect of a CPD cycle may have more direct value, though it may be difficult to get agreement on topics. There is moreover a risk that any such list grows by neglect and over time becomes a rag-bag of things once deemed important. That said, there are some seemingly quite new but in fact substantial and perennial issues where greater attention could be paid and hands-on CPD participation encouraged: diversity training;¹² cross-cultural communication; working with indigenous clients/communities; technological competence;¹³ wellbeing, all come to mind.

The question of experience

16. The Issues Paper notes that the present hours/areas approach operates uniformly across the profession. Two specific matters are rightly flagged here: whether this same approach appropriately meets the needs of newly qualified lawyers, and whether senior lawyers might be entitled to some discounting on the basis of experience.

¹¹ This was recommended in England and Wales by the LETR Report, but the audit requirements were not, in practice, fully implemented.

¹² Also highlighted in the LETR data.

¹³ This was, for example, introduced as a specific competence under r.1.1 [8] of the American Bar Association's *Model Rules of Professional Conduct* in 2012.

17. The first matter cannot be separated from the larger issue of supervision of graduate lawyers, about which the Issues Paper says relatively little. The duty to supervise is specified in very general terms under s.49 of the Uniform Law. However, as Giddings and McNamara observe,¹⁴

The term 'supervised legal practice' is not given any useful definition in the legislation. Nor has it been the subject of any useful judicial consideration. While supervised legal practice guidelines have been published by some law societies and regulators, they provide virtually no practical guidance in relation to the meaning of supervision, appropriate supervision practices, or the training and developmental aspects of supervision.

The NSW Office of the Legal Services Commissioner has also candidly acknowledged that there is little effective oversight of supervision, and genuine difficulty in identifying a 'failure to supervise' absent a specific complaint.¹⁵ These challenges are likely compounded by technological advances and other environmental complexities: virtual practice and normalisation of home working, and more lawyers working outside their personal jurisdiction.

18. Empirically, the actual quality and extent of supervision is also something of an unknown, though common sense at least suggests there is likely to be some significant variation. This is supported by limited data from other jurisdictions. Thus, in England poor quality supervision was highlighted in a number of responses to the LETR Report, though not in a way that could quantify the scale of the problem; the Law Society's Junior Lawyers Division also expressed ongoing concerns "about the quality of qualifying work experience and the lack of regulation of the same".¹⁶ In Hong Kong, similarly, the 2001 Redmond Roper Report noted its "severe" concerns that workplace training was sometimes of poor quality or non-existent.¹⁷ This led the Hong Kong Law Society to introduce a scheme of trainee-specific CPD for solicitors. Regulations there now require trainees to complete at least 15 points (hours) in each of the two years of supervised practice, and to undertake two core and one elective module of trainee solicitor 'Risk Management Education' (RME).¹⁸ Training principals and trainees must also certify that qualifying work experience has been undertaken in three practice areas (identified from a prescribed list), addressed prescribed skills areas, and that

¹⁴ Jeff Giddings and Michael McNamara, 'Preparing Future Generations of Lawyers for Legal Practice: What's Supervision Got to Do With It?' (2014) 27(3) *UNSW Law Journal* 1226, 1237.

¹⁵ Caitlin Hamilton and Jim Milne, 'Supervising Graduate Lawyers in Legal Practice', Presentation by the NSW OLSC (2015) 11 <www.coro.com.au/documents/Presentation-Supervising_graduate_lawyers_in_legal_practice-2015.pdf>

¹⁶ See Law Society of England and Wales, 'SRA Consultation – a new route to qualification: New regulations. Response of the Junior Lawyers Division' (July 2017) 1 <<http://communities.lawsociety.org.uk/juniorlawyers/policy/sra-a-new-route-to-qualification-new-regulations/5062446.article>>

¹⁷ Paul Redmond and Christopher Roper, *Legal Education and Training in Hong Kong: Preliminary Review* (The Steering Committee on the Review of Legal Education and Training in Hong Kong 2001) at 222.

¹⁸ Legal Practitioner (Risk Management Education) Rules 2003 (Hong Kong) on file with the author.

CPD and RME obligations have been completed before admission. This would seem to offer a more robust model than the current Victorian system,¹⁹ though arguments might also be made, as they were in LETR, for a training requirement for those who undertake supervisory functions.

19. As the Issues Paper intimates, there seems to be little rationale to the suggestion that experienced lawyers should undertake a reduced CPD load, though the issue of relevant and suitable CPD does seem to require addressing. There is no objective evidence to my knowledge that senior practitioners represent a lower risk to consumers.

THE REGULATORY FUNCTION

The first problem for any regulator becoming involved in CPD is being clear about what it is trying to regulate and why ... Just as there is no single, right way of doing CPD, so there is no single right way of regulating it.

20. The above quote – from the UK General Medical Council (GMC)²⁰ – offers both a sensible warning and (to an extent) a pathway for regulation. It suggests we need to start with an inquiry into what the proper regulatory function is, and where CPD sits within that. This seems obvious, but I suggest it does offer some useful pointers to some of the key issues addressed by the Board’s paper.

The core CPD functions: assuring competence and public protection

21. Section 3 of the Uniform Law as currently in force, stresses the role of regulation in ‘ensuring lawyers are competent’ (s.3(b)) and ‘enhancing the protection of clients of law practices and the protection of the public generally’ (s.3(c)). These obviously align strongly with the functions ascribed to CPD, but the way they are achieved under the current scheme is not without problems. This can be observed in two key issues:

- Regulatory reliance on a thin conception of competence
- The absence of any ongoing assessment of competence

¹⁹ The Law Society of Scotland went even further in its training reforms in 2010, requiring trainee solicitors to complete a minimum of 60 hours of trainee continuing professional development (TCPD) over two years of supervised practice. This training is mapped against prescribed learning outcomes.

²⁰ General Medical Council CPD Review Working Group, ‘Review of the GMC’s Role in Doctors’ Continuing Professional Development: Final Report’ (GMC, 2011)
<http://www.gmcuk.org/Final_Report_on_review_of_CPD_14_Oct_2011_web_version.pdf_44813249.pdf>

Competence specification

22. If the regulator is to assure competence, we need to know what it is. At present CPD is the most under-determined stage of training (relative to law degrees and PLT provision) in this respect. At the same time, the need for usable and proportionate regulation should also militate against over-specification of competences. This is not an easy balance, and some systems (eg the present SRA outcomes model) have arguably gone too far in over-specifying standards, and/or not far enough in setting the range of competences. In the Hong Kong review we sought to address this problem by suggesting a high level framework of generic outcomes, which could be expanded upon through added guidance and exemplars:

- To demonstrate competence in a relevant area or areas of practice (technical knowledge)
- To perform a range of legal tasks (professional skills – client interviewing/conferencing, legal research, drafting and advocacy)
- To manage a range of tasks within a job (task and project management skills)
- To respond to uncertainties and breakdowns in routine/normal activities (task/project contingency management)
- To work effectively with and for others (team and professional relationship skills)
- To identify and deal with embedded issues of ethics, professionalism and professional regulation ‘in context’ (ethical and regulatory risk management)
- To reflect on and understand the limits of one’s own competence and to address one’s own personal and professional development needs (self-management)²¹

23. This approach could avoid the limited usability associated with very lengthy and detailed competence lists, and points to a rather broader conception of competence than has conventionally been expressed by most legal professional standards, one placing interpersonal and problem-solving skills, and the ability to deal with uncertainty more at the centre of the ‘curriculum’.²² Such an approach might also encourage regulators, training providers and participants to think differently about how training is structured.

Accreditation

24. Outside of accredited specialist schemes, there is no requirement for CPD to be formally assessed, and much CPD activity is not assessed, or not in any ‘high stakes’ fashion. To that extent any actual link between CPD and enhanced competence and public protection is difficult to prove.²³ The issue of assessment, and more fundamentally, of periodic re-accreditation of professional competence is the ‘elephant in the room’ in many of these discussions. Re-accreditation is becoming more common in medical settings, but not yet in law, though it is (and has been since at least LETR) on the

²¹ SCLET Final Report, section 7.4.2.

²² This list was not formulated for CPD specifically; while some aspects of practice management can be subsumed in these categories, the list probably does not sufficiently address leadership and financial management competences.

²³ This is reflective of a larger problem regarding the lack of good research and evidence as to the efficacy and prophylactic effect of CPD. Consequently, it is also more difficult to assess, in any evidence-based way, whether likely CPD reforms are ‘efficient, effective, targeted and proportionate’ (Uniform Law, s.3(e)).

agenda of the English Legal Services Board, as the Issues Paper observes. In my view, the public interest arguments for some form of re-accreditation are strong, but the evidential and practical difficulties are significant. As we observed in LETR:²⁴

At this stage, the research team does not consider that a strong case has been made out for a move to a universal re-accreditation scheme, for the following reasons:

- Any further development towards re-accreditation needs to be considered in the context of other recommendations in this report, particularly the need to reform CPD. It is notable that CPD is a key component of most modern professional revalidation schemes, and therefore a logical pre- (or at least co-)requisite to any move to re-accreditation. Key components, such as systems of personal development planning need to be put in place; there are also risk issues around the use of tools like critical incident reports, which would not be privileged, and might therefore be vulnerable to exposure in litigation for professional negligence.
- A number of proportionality issues need to be considered. First, there appears to have been little formal analysis in the public domain of the (additional) cost burden re-accreditation may impose on professionals operating in a market-based environment. Secondly in a sector like law, where there is a significant proportion of sole practitioners, there are practical challenges in creating an appraisal-based model. Unless self-appraisal is permitted, some form of external system would need to be developed. Thirdly, unlike medicine which operates in a quasi-market, a proportionate risk-based approach needs to take account of the extent to which market mechanisms, in at least some parts of the sector, may limit or obviate the need for additional measures. This may point to the need, as the [Legal Services Consumer Panel] acknowledges, to develop a more nuanced activity-based approach to accreditation rather than a universal scheme.
- Consequently, in the absence of a move to a universal scheme, additional work also needs to be undertaken to assess areas of risk where re-accreditation might be appropriate and proportionate. That would seem to be better progressed in conjunction with any work on activity-based authorisation.

Here likewise it is probably a good ambition, but given the stage of development of existing CPD schemes, a step too far at present.

25. As a half-way measure there may be useful ways of encouraging (a regulatory 'carrot' as opposed to 'stick' approach) the use of voluntary accreditation, eg, by reducing CPD audit requirements, or discounting practising certificate fees for appropriately accredited practitioners. Accredited learning (either via professional specialist accreditation, or learning that is formerly assessed or accredited by a higher education institution) might also be encouraged by a 'tiered' approach to the carry-over of units/hours of study (discussed in para. 14 above), eg, whereby unaccredited hours might carry over for one year of the CPD cycle, but accredited hours might be carried over for a two or three year period.

²⁴ LETR Report, para 5.119.