



Curran Consulting: Enhancing Justice and Human Rights

ABN:17509929143

RBN: B2384236M

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To The CDP Review Team and Mr Chris Humphreys,

Thank you for the opportunity of participating in this important consultation and review of CPD.

I hope of the suggestions made in this submission, and the resources provided for further reading, will assist you in your endeavours to ensure that CPD quips legal professionals to better be able to comply with their ethical duties. Also importantly, to build their capacity to exercise judgement and discernment in how they honour these duties.

Responses to the Terms of Reference (ToR)

This submission chiefly focuses on responses to questions 1 and 3 of the TOR.

Questions 1 to 4 are covered in my planned response to the specific consultation questions which will be attached alongside this submission in PDF format and are to be read in conjunction with it.

1. 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. This should include: Consideration of the quality, accessibility, relevance, and cost of CPD.

The current scheme is important, as sadly some members of the legal profession will not be inclined to update their skills or learn new skills to better equip them for the role in servicing clients and maintaining the rule of law, without such encouragement. Even with the scheme, some legal professionals will opt to take the easiest route and refused to admit that they have anything to learn. It is this cohort, that the scheme in some manner or form, may incorporate. I am thinking specifically of a sole practitioner firms where often because of the vagaries of a busy business, low levels of staffing this creates other imperatives and leads to isolation and sometimes a view that they do not need further training. This concerns me as sole practitioner firms often use trainees or practical legal training students to meet the needs of their practice for little or no payment and with the poor supervision that can result. Local law society networks differ but some do try to offer learning opportunities but reaching some practitioners at a local level is a challenge even for them.



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In terms of the quality, accessibility, relevance and cost of the CPD, my view, overall is that the quality can vary as can access accessibility relevance and cost. This depends heavily on who is offering the CPD. Personally one of the barriers to CPD, (given that I am called on to advise not only clients but organisations that provide legal assistance services to the poor and marginalised) is that a lot of the specialist substantive law content is provided by organisations for a cost that is certainly well beyond my means, given that I need to self-fund most of the training. I am aware that this is not only an impediment for me in accessing some of the CPD offerings, but is an impediment for new lawyers, paralegals and other people working in the legal assistance sector and for community legal centres who would like their staff to be up-to-date.

Victoria Legal Aid (VLA) does offer quality, relevant training that are sometimes offered to volunteers working in the CLC sector and my service, the Consumer Action Law Centre keeps me up-to-date with these offerings. Often VLA and the Law Institute of Victoria will invite specialists from large law firms to present on their panel. This is great, however, I wonder whether or not the actual law firms could actually be providing CPD to lawyers, beyond their own in-house training, at a low cost.

Some private providers provide CPD but at a significant cost and this excludes participation.

In the past five years, the CPD offerings have in fact improved in terms of their being more practically oriented and incorporating adult learning approaches. However, I have attended (now more in the minority that a decade ago) some CPD offerings that still revert to the old-fashioned didactic format of being lectured based. The obsession seems to be with getting through content across, in jargon, and with little regard as to whether or not this information is either being understood, relevant or is being delivered in a way that is practically useful.

Also those delivering training are not skilled in this endeavour just because they are lawyers and may have had little training in adult learning approaches and how to deliver training. It seems assumed because they have a law degree they can do training.

There are new ways of delivering legal education that I feel are currently being overlooked by some delivering CPD. These methods are emerging from the University sector particularly sectors that train in legal skills. I would like to see a greater intersectionality and exchange between some of the pedagogy emerging in the University sector as best practice, that could be utilised in the delivery of effective CPD. Also other disciplines can provide training that can be apposite in the practice of law and we can learn much from other disciplines.



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I would now like to spend some of this submission outlining some of the developments in legal education in higher education settings that have been developed internationally in the area of improvement of practical legal skills.

It is my view that more effort in the CPD to allow for the practice of new skills, rather than just the delivery of information, would enhance the capabilities of practitioners to actually integrate this information in ways of doing things in their actual practice. The old adage that we 'learn by doing' is important here.

- A. Giving Voice to Values (GVV) is a pedagogy or approach to education that has been developed by Mary Gentile in the United States. It has now been used across different disciplines to better prepare practitioners for real life situations where there are values or ethical duties are jeopardised or at risk of being jeopardised. It's modus operandi is that identifying that there is an ethical dilemma alone, has little utility, if one does not know how to act to prevent unethical behaviour or conduct from occurring. It provides a framework by which the practitioner can plan, think of possible perspectives, rationales for the poor behaviour, explore motivations and plan a different trajectory of conversational paths that might occur if one were to act to ensure ethical conduct.

It goes beyond the rules, common law and legislation to actually build the capacity to make compelling arguments, rehearse dialogues to build the individual's capacity and resilience to speak to power. In the case of a legal professional this could include their principal, other colleagues, or clients with significant power putting them under pressure to act unethically. Sometimes people are not even aware that they are doing something that may be unethical, unaware of how they are being co-opted into problematic organisational cultures, are under significant time pressure or subject of power imbalances that make them tend to take rash action without thinking it through.

By skilling up legal practitioners to be able to slow things down and ask the right questions, at the right time and in the right way can lead to improved outcomes.

The Mary Gentile toolkit, and the worksheets that support the process that we have developed in the ANU GDLP (which I have now built upon) provide a framework that can support people in having difficult conversations, even when the stakes are high (such as risking job loss or losing face or risking further intimidation).

It enables people to develop a sophisticated, thoughtful way to respond to situations, that can often lead to improved decision-making and obviate the risks outlined previously.

Ethical and regulatory compliance is not just about knowing the rules. It requires issue identification, intelligence, awareness, research and thinking and the exercise of judgement and discernment and so a rules based approach to learning is deficient. This is a point made in a submission to the Victorian Royal Commission into the Management of Police Informants:



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See https://www.rcmpi.vic.gov.au/sites/default/files/2019-09/Submission-023-Evans-et-al%2C-Emeritus-Professor-Adrian_0.pdf

Below are some links that detail how GVV is being used to build the practical capacity for people to act ethically.

<https://ylai.state.gov/how-to-act-on-your-values-with-mary-gentile/>

<http://lawteacher.ac.uk/connecting-legal-education/connecting-legal-education-giving-voice-to-values/>

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3603573

B. Reflective Practice. Reflective practice is not indulgent ‘navel-gazing’. When done properly it provides a process of looking critically at the impacts of our work in how we plan our work, what we do when we work and reflecting on it after we have done the work. It enables us to see if we could have done things differently and in a more effective way. It requires us to be honest with ourselves and deconstruct in concrete ways what has happened how it happened and why it happened. If any aspects of problematic how we might do them differently or what steps, we might need to take to improve our performance and interactions including any additional training we might need.

Reflective practice is not easy skill. It requires honesty and an ability to make the time to think about what we do and how we may be perceived or impact on others. Given this, such a challenging skill it requires training and a safe space to be created that fosters a willingness to engage in reflective practice and an understanding of why it is important to do this to develop a culture of continuous learning development and improvement. The profession could only gain by realising reflective practice is a critical and important skill, not only in improving the quality of service, but also in minimising risk of error and mistake. The latter also being something that the regulator is also keen to avert.

I have been teaching reflective practice in my clinical legal education and Practice Legal Training courses for many years now. I have also been involved in some years, across a range of legal service providers. This includes in the development of new lawyers in integrating reflective practice both at an individual level, in a community of practice, in examining broader systemic implications, and across organisations in the way they do business and approach their leadership and staff development. Unfortunately, unlike other disciplines such as nursing, psychology, social work and so on, legal education at undergraduate level rarely introduces the concept of reflective practice in early years of training.



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Often the way that law is taught at a university is by statute and case-law and in an abstract didactic lecture format. If tutorials are offered they are often done through a problem analysis which takes a legal technical approach only. As law students are taught in this way they often replicate it in the manner in which they deliver training to community and CPD to legal professionals on leaving law school – as they probably know no other way. This traditional approach to the teaching of law loses opportunities of teaching content in ways that incorporate the more interactive nature of the law, the human aspect to legal problems. Also the law school focus on exams and assignments rather than other forms of assessment misses the other aspects that being a lawyer may require for example interpersonal skills, effective communication skills and critical analysis. These being critical skills for problem-solving when one encounters the actual client who may need their help and may not have the money to litigate or want to go through trauma of litigation but wants solutions to their problems.

Teaching law only by case law and statute alone, although this is important, loses the component of law that should be about proffering solutions and exploring alternative ways of resolving problems or preventing them in the future.

When law students graduate, unless they had had PLT training that is shaped and informed by the need for interpersonal interactions and emotional intelligence, rather than a 'tick a box' approach to the learning of competencies, then they will tend to still struggle they encounter clients and be less ready for practice. This is where effective CPD needs to step in and address the deficits that may have existed in their undergraduate or postgraduate law training.

Happily, some in the higher education sphere have been extremely mindful (and I include myself in this) of the limitations of traditional legal education. We have been trying to develop legal training so that it is more attuned to the vagaries of real-life legal practice in the 21st century.

This includes incorporating into our models of teaching cultural competency, torture informed practice, strengths-based approaches to legal practice, client centred practice.

At the core of all this a greater sense of self-awareness and of the implications of the way we do things through embedding reflective practice in our courses. I am more than happy to talk in more detail about how these approaches have been integrated by me in both my teaching, my offerings of professional development through a range of organisations including legal assistance services both in Australia and overseas. Most recently in a series of seminars for academics, nurse and legal practitioners in the UK. Most of the issues contained in this



submission are also canvassed in more detail in my forthcoming book for Routledge UK entitled, *Better Law for a Better World: New approaches to law practice and education*, which is due for release in early 2021.

Below are some links that detail how reflective is being used to build the practical capacity for reflection:

<https://digitalcommons.osgoode.yorku.ca/jlsp/vol23/iss1/5/>

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3162879

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2997597

C. CPD Offerings in substantive law CPD Offerings that go beyond assuming litigation way is the only way to proceed. Underpinning a lot of CPD offerings is an assumption that the legal avenues the most likely to be taken is through the courts. The empirical research tells us that very few people have the resources, the money all the wherewithal to go to court (Australia-wide Law Survey 2014, Australian Law Reform Commission 2000, Balmer et al 2020).

New ways of practising law that offer clients alternative avenues are under-represented in the CPD offerings. The increasing use of restorative practices, multidisciplinary practices, problem-solving courts, Koori courts are areas underexplored with a tendency to focus on only mediation and negotiation. This ignores other developments that are occurring to respond better to clients and community need such as restorative practice including conflict conferencing. With more practical offerings to develop the lawyers' capacity, capability and repertoire of responses to clients' problems this can only enhance client options.

3. Potential opportunities where the VLSB+C can achieve greater efficiency and improve outcomes, and the potential risks and challenges of these opportunities, including looking at other jurisdictions.

See answers to question one above clear the role of the GVV and reflective practice in minimising potential risks and preventing problems from occurring.

Points from Issues Paper:

Some jurisdictions have abandoned the requirement for minimum credits and replaced it with requirements for lawyers to reflect on their learning needs, to act to maintain their competency, and to complete an annual statement of compliance with those learning and competency obligations.

Other professionals such as the nursing profession incorporate to great effect reflection learning needs and competency. They also require reflection on patient care and minimising patient error. I am aware specifically that this is a requirement of nurses in the United Kingdom and that student nurses at the University of Portsmouth receive training in this from their first year of training and during their practical placements. They are required to



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demonstrate skills in reflection on the subject matter before they can qualify. I think that the legal profession and its development of learning practices might examine what disciplines such as nursing do and ways in which we might be able to integrate this in legal practice as a way of minimising risk and ensuring client care.

As noted in my response to the consultancy questions, I think it's still important to have some form of statement of compliance with learning and competency obligations. This is reflected in the numbers of complaints about lawyers and the ways in which they manage client's and communicate with them. I think that some learning that happens in informal settings could be better understood but I also think that there are some in the legal profession who do not see learning as a lifelong aim, but feel it is something they have already attained.

Adult learning theory and practice recognises that adults learn differently

I wholeheartedly agree with the adoption of adult learning theory and practice and ensuring that different modes of delivery are in place. This acknowledges not only that adults learn differently but that the legal profession needs to increasingly embrace inclusion and diversity. If you can achieve more inclusion and diversity in the profession to reflect the populations that it serves, then it also needs to incorporate cultural competency and different ways of delivering its service to accommodate the need for inclusion and diversity both in the legal workforce itself as well as the community it should reflect more broadly, if it is to be responsive to its clients.

Need to gain 10 CPD points by the end of each CPD year on 31 March, and the relative affordability of providing classroom-style activities, leads to a focus on compliance at the expense of learning and development outcomes.

I agree with this statement. One benefit of the Covid 19 experience is that it has led many providers of education to adapt to the online environment. Good quality learning can occur in an online environment as long as it is done mindfully carefully and informed by good pedagogy and learning engagement.

Since Covid 19 emerged in March (because of my almost nine years of delivering online training and education) I have been approached to train legal academics across United Kingdom in online learning, curriculum development and student engagement strategies. I have also been asked to deliver training to legal services in the UK and Australia on 'client engagement strategies for online service delivery'. With modern technology and all the necessary privacy and security protections, what I am starting to see is that innovative education is increasing and it uses multiple media and practically oriented exercises. This can obviate some of the problems identified in the statement above around providing classroom



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space that is affordable and making it easier for practitioners to participate including those in regions. This is because it reducing costs for participants in the learning who hopefully as legal practitioners, have access to the information technology facilities that sometimes their clients might lack.

Breakout rooms can also occur which can also assist in building networks of people to build a community of practice both in areas of specialisation, across the different legal sectors and across the rural regional and urban divide.

Singapore has a sliding scale of requirements, with more senior lawyers able to undertake fewer activities than more junior lawyers. However, a recent Victorian study found that older lawyers were more likely to be the subject of a conduct complaint.

This seems a sensible response. It also recognises the adult learning approaches that are required and different levels of experience and attainment. One thing I often say to my qualifying law students is, 'just because someone is older and more experienced does not make them good or wise. You need to evaluate other legal practitioners based on their quality legal service, ethical conduct and how they interact with others and how they abide by the objective standards that the profession is required to uphold.'

Regulators are increasingly aware of the role that organisational culture plays in determining levels of compliance

Absolutely true. See this simple and informative link to a cartoon from the University of Texas: <https://ethicsunwrapped.utexas.edu/video/intro-to-behavioral-ethics>

This is something that is often not taken into account in CPD training that I have observed.

There is a tendency to individualise problems and make them the responsibility of the individual practitioner rather than, acknowledging the context of pressures that are brought to bear on them by the culture within which they work.

A simplistic understanding of ethical compliance does not acknowledge that people may want to do the right thing but feel overwhelmed or unsupported if they take the steps to do so.

Again, GVV is a great tool to build resilience over time and with practice to counter often compelling forces that will have us act unethically.

The increasing commercialisation and globalisation of the profession combining with competition that is being created by the online provision of legal services will only increase pressures on people to take shortcuts. Organisations can feel justified in stepping around local regulatory and ethical standards. Culture in organisations needs to be addressed and



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understood. There is much critical research in the business and management sector that could assist the legal profession in managing some of these challenges.

The VLSB+C is required to take stronger enforcement action such as placing conditions on practising certificates or referring the matter for disciplinary investigation.

This is a yes and no answer depends on the circumstances. Sometimes a 'stick approach' can have minimal impact on someone's ability to change behaviour and can actually lead to avoidance and defensiveness or even cover-up.

Circumstances can vary so much.

A sophisticated and nuanced approach is always going to be important alongside consistency and the protection of the public and its ability to see that poor conduct or poor behaviour is not tolerated by the profession.

This is challenging balancing act that the regulator needs to undertake and there are no simple ways or answers.

The VLSB+C is interested in more nuanced enforcement focused on quality of learning outcomes for the lawyer and more integration with its other regulatory functions such as complaints and trust account management, while also remaining efficient and cost effective.

I agree with this statement. I hope that in this submission I have made numerous suggestions that will assist the regulator in finding ways to enable a more nuanced enforcement that values the quality of learning and integrates its functions as appropriate.

Please do not hesitate to contact me in relation to this submission or for any further follow-up. I am currently in lockdown and UK until 17 September when I hopefully will be able to fly home to Australia. My number in the UK is + 447925605658 and my email details are below.

I wish you well with this very important review.

Yours sincerely

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Also: Senior Fellow Nottingham Trent University (2017-22), Visiting Scholar, Nottingham Trent University (7 June – 15 July 2020), Visiting Academic, University of Portsmouth (2 March - December 2020), In house adviser, Consumer Action Law Centre (pro bono since 2011) Member Australian Society of Evaluators, Member Australian Association of Restorative Justice, Solicitor Holding a Current Practising Certificate in the Supreme Court of Victoria, Member Law Institute of Victoria.



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I acknowledge the traditional owners of the country throughout Australia and their continuing connection to land, sea and community. I pay our respect to them and their cultures, and to the elders both past and present.

Web links:

<https://researchers.anu.edu.au/researchers/curran-es>

<https://law.anu.edu.au/people/elizabeth-curran>

https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=2030109

<https://scholar.google.com/citations?user=U8danSwAAAAJ&hl=en>

https://www.researchgate.net/profile/Liz_Curran

<https://www.linkedin.com/in/dr-liz-curran-2583591a8/>

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