

4 February 2015



The Chairperson
Admissions Committee
Legal Services Council
Level 11, 170 Phillip Street
SYDNEY NSW 2000

By email: submissions@legalservicescouncil.org.au

Dear Sir

PROPOSED ADMISSION RULES UNDER THE LEGAL PROFESSION UNIFORM LAW

The Law Council of Australia welcomes the establishment of the Admissions Committee under Part 8.4 of the Legal Profession Uniform Law (LPUL) and appreciates the opportunity to comment on the proposed Admission Rules developed, pursuant to section 426, by the Committee.

The Law Council notes that a key objective of the LPUL scheme is to provide certainty and promote consistency in the interpretation and application of the law regulating the legal profession and the provision of legal services. To this end the design of the LPUL arrangements purposely establish a scheme based on the primary legislation, Rules, and Guidelines and Directions.

The Law Council considers that the role of Rules, and of Guidelines and Directions, under the LPUL arrangements applies to all areas of regulatory focus, including admission to the legal profession. To this end it is highly desirable that common considerations intended to be applied by designated local regulatory authorities with responsibility for issuing compliance certificates under section 19 of the LPUL (including recommendations in those certificates as to conditional admission of foreign lawyers under section 20) be set out, as appropriate, in either Admission Rules made by the Legal Services Council under section 428 of the LPUL or in Guidelines or Directions issued by the Council under section 407 on advice from the Admissions Committee pursuant to section 402(2)(b) of the LPUL.

The Law Council respects the inherent jurisdiction of the Supreme Court (as confirmed in section 16(4) of the LPUL) to consider and, if it so decides, to refuse admission based on its own considerations and the information available to it at the time. To this end it is in the interests of the court, applicants, the community and the legal profession that the considerations relevant to the decision by a local regulatory authority to issue and provide a compliance certificate to a Supreme Court be applied consistently to all applicants regardless of their jurisdiction of residence.

Whilst supporting the Admission Committee's view that matters of process and procedure can be more conveniently dealt with administratively by local regulatory authorities (or "Boards") pursuant to section 420(1)(a) of the LPUL, the Law Council is generally of the view that common considerations relevant to the question of whether or not a compliance certificate be issued under subsection 19(3), (and to recommendations on conditional admission under section 20), would be better set out in Rules or in Guidelines or Directions.

Areas the Law Council considers are appropriate for LSC Rules or guidelines

Three areas that the Law Council considers are appropriate for further Rules or for Guidelines or Directions issued by the Legal Services Council are set out below.

Rules 4 and 5 – Specified academic qualifications and practical legal training prerequisites

Rule 4(2) provides that where more than 5 years have elapsed since attaining the prerequisite academic qualifications before an application is made for a compliance certificate, the Board may require the applicant to undertake further academic subjects or pass such further examinations as the Board may determine. Similarly proposed Rule 5(4) provides that where more than 5 years have elapsed since completing the specified practical legal training prerequisite before an application is made compliance certificate, the Board may require the applicant to undertake further practical legal training.

The Explanatory Paper accompanying the proposed Admission Rules (at paragraph 4(c)) refers to "Common Considerations" which are set out in *Schedule 3 to the Uniform Admission Rules 2014* published by the Law Admissions Consultative Committee. This Schedule is not replicated in the proposed Admission Rules under the LPUL. The Explanatory Paper provides the following explanation for this omission:

"As those Common Considerations are imprecise and may need to be refined in the light of accumulated experience of other Admitting Authorities in applying them, it will be preferable for the Boards to agree to adopt the Common Considerations administratively, rather than specifying them in the Rules: see LPUL subsection 440(1). It may be appropriate for each Board to publish the agreed Common Considerations on its website."

The Law Council submits that the Common Considerations set out in *Schedule 3 to the Uniform Admission Rules 2014* should be carried across to the Uniform Law scheme either as an additional Schedule to the proposed Admission Rules, or under Guidelines issued by the Legal Services Council.

Rule 26 – Dispensing power

Rule 26 provides that, subject to section 18 of the LPUL, the Board may, either generally or in a particular case and subject to such conditions as it thinks fit, dispense with or vary any requirement of these Rules if the Board is satisfied that to do so will not materially detract from any of the prerequisites for the issue of a compliance certificate as set out in section 17 of the LPUL, or any other requirement of the Law or the Admission Rules relating to the issue of a compliance certificate.

The Law Council considers that Rule 26 confers on each Board a very wide discretion as to how it will, pursuant to section 18 of the LPUL, consider and apply this dispensing power in relation to the academic and practical legal training prerequisites provided for by section 17(1) of the LPUL.

The Law Council's preference is that matters considered relevant to the question of whether exemptions will be granted under section 18 of the LPUL on the basis of sufficient legal skills or relevant experience so as to render the person suitable for admission must be set out in either the Admission Rules or in Guidelines.

The Law Council also notes that Rule 26 appears to provide the basis upon which effect is given to the power under section 421(2)(f) of the LPUL to make provision in Admission Rules for applications for, and the giving of, directions by a designated local regulatory authority as to the sufficiency of qualifications or training obtained overseas and to providing guidance as to the need (if any) to obtain further qualifications or training. To this end the Law Council notes the considerable authority and reliance currently placed on the *Uniform Principles for Assessing Qualifications of Overseas Applicants for Admission to the Australian Legal Profession* published by the Law Admissions Consultative Committee in April 2014.

The Law Council stresses the importance of certainty and consistency in the assessment of qualifications and experience obtained overseas (and to providing guidance on additional qualifications and training that may be required) for both intending applicants for admission and for Australian law firms that are participating in the international legal services market and recruiting overseas qualified lawyers.

The Law Council submits that it is important that common considerations to be applied in assessing qualifications of overseas applicants be set out in Admission Rules or Guidelines and the Law Council would welcome an opportunity to be consulted on the content of those Rules or Guidelines.

Conditional admission of foreign lawyers

Section 20 of the LPUL provides for the conditional admission of foreign lawyers and sets out a range of conditions that a designated local regulatory authority may recommend in a compliance certificate. The Law Council notes the intent of section 20¹ is to "facilitate the entry of foreign lawyers to practise in Australia for a limited period of time or subject to appropriate supervision, training or other limitation."

The introduction of section 20 into the LPUL is a significant and important reform that can do much to simplify the internationalisation of the profession and facilitate the participation of Australian legal practices in the international legal services market. Accordingly, the Law Council considers it highly desirable that the Admission Committee consult with the Law Council with a view to developing Admission Rules or Guidelines to give effect to the expanded basis for admission available under section 20.

¹ As set out in the Explanatory Memorandum to the *Legal Profession Uniform Law Application Bill 2013* (Vic), at p48

Comments on other proposed Admission Rules

Rule 9 - Determining whether someone is a fit and proper person

Proposed Rule 9 sets out matters to which a Board must have regard in considering whether a person is a fit and proper person to be admitted to the Australian legal profession. In addition, Rule 6 of the Draft General Rules sets out the matters to be considered in determining if a person is a fit and proper person for the grant or renewal of a practising certificate.

The Law Council suggests that the wording of these matters should be made more consistent across the two sets of Rules. For example, proposed Rule 9(1)(f) of the Admission Rules refer to “good fame and character” whereas Rule (6)(a) of the Draft General Rules refers to “good reputation and character”.

The Law Council suggests that consideration be given to the Legal Profession National Rules, published by the Council of Australian Governments in December 2010, which provided for greater consistency in these matters.

Rule 12 - Admission of New Zealand Practitioners

The Law Council notes that proposed Rule 12 applies only to Victoria, and therefore should be deleted. The Law Council notes that in New South Wales these matters are currently dealt with under Supreme Court Rules and suggests that options be considered in Victoria for dealing with these matters in a similar way.

Rule 17 - Police reports

The Law Council queries whether the word “application” in the opening sentence should be “applicant”.

Rule 17 allows the Board to choose to require an applicant for a compliance certificate to attach a police report, either “generally or in a particular case”. The Law Council considers that a police report should normally only be called for where the applicant has made a relevant disclosure under Rule 16. The Law Council suggests that Rule 17 be limited to particular cases, rather than requiring all applicants to obtain and furnish a police report.

Rule 18 - Student conduct reports

Rule 18 requires all applicants to provide the Board with a report disclosing whether or not they have been the subject of any disciplinary action taken by an educational institution or provider. The Law Council notes that this requirement does not currently exist in NSW and suggests that this appears to create “red tape” for law graduates and educational institutions which may not be justified (particularly if the applicant has been issued with a degree from the institution). The Law Council submits that applicants usually should not have to provide such reports, and that the Board should require student conduct reports to be attached to an application where a disclosure has been made about the applicant’s academic misconduct.

Rule 19 - Certificate of good standing

Rule 19 requires applicants from interstate or foreign jurisdictions to provide the Board with a statement of good standing. The Law Council considers this requirement unnecessary in relation to a person who has been admitted in another Australian jurisdiction, as the person would be subject to relevant disclosure requirements if his or her name has been removed from the roll or he or she has been subject to disciplinary action.

Rules 22 and 23 – Health Assessments and Reports

Rule 22 would require an applicant to obtain and provide a health report to a Board for the purpose of the Board determining under Rule 9(k) whether or not the applicant is currently unable satisfactorily to carry out the inherent requirements of practice as an Australian legal practitioner. Rule 23 would, if the Board is not satisfied with the Report provided by the applicant, require the applicant to undergo a health assessment by a health assessor appointed by the Board.

The Law Council notes the need to balance the principles of privacy and non-discrimination in relation to a person's mental health condition, with appropriate consumer protection, when determining questions of admission.

In the Law Council's view, it would be more relevant to consider whether a person's mental health condition impacts on his or her ability to carry out the inherent requirements of being a legal practitioner at the time of granting or renewing a practising certificate. At that point, the local regulatory authority could consider any relevant information about a person's condition, and the way it is being managed, in making this determination. However, there may be rare circumstances in which it may be appropriate to consider this question at the point of admission to the legal profession.

As such, the Law Council submits that it is important that the health assessment power in Rule 22 is limited to circumstances where health information is relevant and necessary to determine whether a person is currently unable to carry out the inherent requirements of practice. The Law Council considers that a health report will generally only be relevant and necessary in the context of behaviour or conduct by the applicant that calls into question whether they are a fit and proper person.

Rule 22 should be amended to clarify that a report may be required only where there is material *“that indicates”* on reasonable grounds that an applicant may currently be unable to carry out the inherent requirements of practice, and to provide guidance as to the “reasonable grounds” test.

In addition, the Law Council submits that proposed Rule 16(4) should be amended to clarify that if an applicant chooses to disclose health information in relation to any aspect of their application, this can be done in a separate statutory declaration.

Where a mental health disclosure is made, the Law Council submits that procedural safeguards should be put in place to protect the applicant's right to procedural fairness, privacy and non-discrimination. The starting position is that there should be no obligation

to make a mental health disclosure unless it is relevant to whether the person is unable to carry out the inherent requirements of practice.

Guidelines are needed for health assessors that set the parameters of these reports. A health professional who undertakes such an assessment should be provided with a guideline of what elements constitute the inherent requirements of practice, and that health professional should assess whether the person can meet any or all of those requirements. However, the question of whether the person can carry out the inherent requirements of practice should be for the Board to determine, rather than the health assessor.

The Law Council notes that this is a complex area, and recommends that the Law Council and Admissions Committee engage in further consultations with a view to developing guidelines for adoption by the Legal Services Council.

The Law Council is happy to discuss the matters raised in this submission. If you wish to discuss the matters raised in this submission further, please contact Martyn Hagan at (02) 6246 3788.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Duncan McConnel', written in a cursive style.

Duncan McConnel
President