



LAW
INSTITUTE
VICTORIA

LIV submission to VLSB+C Review of Continuing Professional Development

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1. Introduction

The Law Institute of Victoria ('LIV') is Victoria's peak body for lawyers and represents around 19,000 people working and studying in the legal sector in Victoria, interstate and overseas. The LIV welcomes the opportunity to provide these responses, which are made in observation of its ongoing commitment to improve the administration and compliance of continuing professional education for lawyers in the State of Victoria.

The responses contained in this submission are based on feedback received from members, both generally, as well as through the Accredited Specialisation Program, our firms and our own experience as a leading provider of continuing professional development (CPD) programs and education for Victorian lawyers.

2. The role of legal Continuing Professional Development to support legal practice in Victoria

As a Legal Profession, we are a disciplined group of individuals, encapsulated, with a set of rules to live by. As members of the legal profession, practitioners adhere to ethical standards and hold themselves out as and are accepted by the public as possessing special knowledge and skills, with an acute awareness of their professional responsibilities and obligations to their clients, the community and to defend the rule of law.

Prescribed standards and practices around CPD are a common characteristic for a profession. Legal Practitioners are required to develop and maintain the professional competence and skills necessary to provide high quality services to their clients, employers, and other stakeholders, and thus strengthening public trust in the profession.

'CPD involves the systematic maintenance, improvement and broadening of knowledge and skills, and the development of personal qualities necessary for the execution of professional and technical duties throughout the individual's working life'¹.

As suggested, and validated by LIV research, there is a strong desire for solicitors within Victoria to continually upskill and maintain their knowledge irrespective of their compliance requirements. Members surveyed cited that 'being better in my current role' was the number one aim for their professional development². Yet the roles of lawyers, the challenges of Legal Practice, the motivations for learning and the ability to access CPD must also be understood to ensure a fit for purpose CPD scheme.

The world of work for lawyers is complex and messy. There are significant challenges facing the legal profession where global trends such as automation, digital disruption and alternative legal service providers are constantly challenging the future of the legal sector. We know legal practitioners are challenged by constant regulatory, legislative and industry changes; more equipped clients with changing expectations; the changing nature of how law is practiced and the use of technology, handling practice concerns such as client and resource management, and the ability to maintain positive mental health and general well-being³.

¹ Experiential Learning: A Best Practice Handbook for Educators and Trainers; Colin M. Beard, John Peter Wilson, p 62

² 61% of respondents - LIV Member Experience Survey 2019 Q. "What are your key aims for your professional development?"

³ LIV Member Satisfaction Survey 2019

There are currently five generations of lawyers in the workforce in Victoria, in different stages of their career all with different experiences and skills required to practice. They are distributed across the state in regional, suburban and metropolitan locations, and as adult learners, all have different needs, motivations and preferences for learning and skill development.

The careers of lawyers are not linear, where lawyers are now using their skills in non-traditional ways throughout their career. Practitioners will change industries, sectors and move into roles such as business development, technology and executive roles where they may balance technical legal roles with other roles in their organisation. Whilst the foundation of legal practice is grounded in the knowledge of the 'Priestly 11', there is an increasing acknowledgement through innovative legal practice that lawyer skills can be utilised outside of technical legal work, whilst still being an active contributor to preserving access to justice and advising on legal issues more broadly⁴.

Victoria is also home to a highly competitive and disparate legal education market place, with many options available for practitioners at different prices with varying levels of quality. The LIV is also a provider of CPD to the profession.

A modern adult learner irrespective of their profession is generally busy, savvy and motivated to learn; yet is also overwhelmed and distracted and will only generally allow about 1% of time to learning for work.⁵ When you consider the average working week for a lawyer, balancing professional and personal responsibilities, as is evidenced by the recent COVID-19 response, how can the CPD scheme enable legal practitioners to deliver outcomes for and on behalf of their community?

Purpose of CPD for the legal profession

In undertaking this review, there must be a thorough analysis and consideration of the fundamental purpose underlying the review. The VLSB+C must consider the following:

Do the current Uniform law CPD rules support the VLSB+C's desire to ensure meaningful, relevant and accessible CPD for the entire profession, thereby ensuring standards of excellence in the provision of legal services?

Yes. The LIV submits that the current CPD rules support the desire to ensure meaningful, relevant and accessible CPD for the for the entire profession, thereby ensuring standards of excellence in the provision of legal services. However, in consideration of the issues identified in the current scheme, improvements and/or alternatives could be implemented that will provide greater opportunity for lawyers to use CPD to enhance, develop and maintain their knowledge skills and competencies relevant to their service and/or practice as well as to comply.

3. How do the current Uniform Law CPD rules currently assist?

If we consider the characteristics of any profession based CPD regime it will:

⁴ Disruption, Innovation and Change – The future of the legal profession. Katie Miller, LIV, 2015 p26.

⁵ Profile of a Modern Learner [infographic], <https://www.elucidat.com/blog/modern-learner-profile-infographic/> [accessed 20 June 2020]

- Not be overly onerous but reflect the commitment required to maintain, improve and broaden professional knowledge and skills (both technical and transferable) in the profession [*Issue - Effective Learning, Compliance Strategy*]
- Be linked with (but not limited to) a Body of Knowledge [*Issue - Subject Areas*]
- Provide flexibility and a range of options as to how the professional and practitioner can achieve the desired outcomes [*Issue - Learning Activities*]
- Consider documentation and recording an integral part of the continuing development process [*Issue - Compliance & Enforcement – Record Keeping*]
- Be able to be documented and audited [*Issue - Compliance & Enforcement – Audit*]
- Be perceived as a useful/constructive process by professionals and practitioners, industry and the community [*Issue - Compliance Strategy*].

The LIV submits that the current Uniform Law CPD rules capture these characteristics and provide adequate direction over the timeframe, governance and compliance of CPD.

Through the definition of skill areas, types of learning activities and unit allocation, it reflects the commitment required to maintain, improve and broaden professional knowledge and skills as a lawyer.

Legal body of knowledge defined through 4 skill areas

The CPD rules already define four key areas and enables specialisation under the Uniform Law⁶:

- 6.1.1 ethics and professional responsibility
- 6.1.2 practice management and business skills
- 6.1.3 professional skills
- 6.1.4 substantive law

The LIV submits that the above fields are appropriately broad and applicable for the entire profession, allowing a legal practitioner the autonomy of undertaking continuing professional development as relevant to their area of practice.

The LIV submits that the four CPD skill areas and minimum point allocation remain meaningful and relevant for all practitioners now and in the future, where these domains will continue to underpin the minimum competency and skills required to effectively practice law for all legal practitioners.

Opportunities for improvement

Members report however that while *ethics and professional responsibility* and *substantive law* are sufficiently precise, there is some confusion in distinguishing between *practice management and business skills* and *professional skills*.

The LIV submits that further guidance from the VLSB+C to provide clarity on the difference between these two skill areas and the distinction of each as their own entities. There may

⁶ Section 6, CPD Obligations, *Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015* <<https://www.legislation.nsw.gov.au/#/view/regulation/2015/242/full>>

also be an opportunity to consider the naming conventions used for these skill areas to ensure they are contemporary, and applicable to the entire profession, such as in-house, community or legal aid lawyers who might not see immediate relevance based on their naming conventions⁷.

The LIV submits that providing additional sub-domain guidance on skills and topics under these areas, can allow for the capture of the skills needed to adapt to a changing nature of legal work without the need to alter the current uniform law rules.

The LIV also submits that along with guidance, directives on mandating training in technology/digital literacy and safe workplace culture may be included in either of these two CPD fields. This will be discussed in further detail below.

A range of learning options is provided

Rule 8 & 9 of the CPD rules suggest a range of formats and units that CPD activities can form for compliance purposes, with the intent to provide flexibility and a range of options as to how a lawyer can achieve the desired outcomes. These formats span a range of formal, informal, self-directed, peer-peer, and social learning activities that can be effective in the provision of adult learning and are varied to allow a practitioner's learning preferences and/or experience to be considered in their choice of options.

An inherent challenge in any CPD regime is the ability to verify and measure CPD activity. The current approach is an input-based approach, where the activities completed, and subsequent unit allocation are the only measurement of learning.

The LIV notes that the Executive Summary to this review states:

*“The focus for lawyers should be on good learning and development outcomes, rather than on compliance as an aim in itself ... While some activities provide a genuine interest and satisfaction for lawyers, a significant proportion of mandated activity appears to be a box-ticking exercise”.*⁸

LIV members report that the notion of the box-ticking compulsion is a consequence of a lack of intellectual stimulation and motivation about CPD requirements. This appears to be partly due to a lack of transparency about the multitude of CPD activities in which practising lawyers may be involved. For example, writing articles for publication, preparing or presenting material for CPD activities, postgraduate studies, attending professional committees and watching audio-visual material, are all applicable for CPD points.⁹

LIV members also suggest that the box-ticking compulsion can also be a consequence of the pressure of conducting a business, their individual circumstances such as their location, their role or career stage, or additional obstacle to CPD participation¹⁰ where a proportion of lawyers will always minimise their engagement and activities in which they participate.

Yet, when practitioners are asked what encourages their registration to LIV CPD activities it is less about their CPD compliance requirements than the choice of speakers and topics¹¹. The

⁷ Issues Paper page 13

⁸ Issues Paper pages 1-2.

⁹ Issues Paper pages 3, 7.

¹⁰ Issues paper section 4.7 page 20

¹¹ LIV CPD attendance survey data 2019-2020, compliance is 1% of respondents.

majority of CPD units that LIV members claim in a year is between 10 – 20 units [with the median of 12], suggesting access to activities is appropriate¹². Unanimous feedback from members also reports that learning activities are sufficiently diverse and stimulating and suited to the wide-ranging nature of the profession.

Opportunities for improvement

Learning is ubiquitous and the motivation, need and choice for learning is driven in most part by the learner themselves.

Efficacy of learning is currently considered in the CPD scheme through the restrictions placed on the suggested activities. The activities recognised will generally have genuine learning outcomes or an output focussed approach that incorporates the reflective, planned and cyclical approach to learning that will ultimately lead to embedding and/or demonstrating the knowledge and skills required.

However, we acknowledge that the design of activities to provide those outcomes, particularly of those in rule 8.1.1 and 8.1.5 are left to the CPD providers to define and deliver. LIV members acknowledge that '[l]earning and development activities are more likely to be effective if they are regarded as a process rather than a series of mostly unrelated events' and that '[the] effectiveness [of the CPD scheme] is potentially increased by being closely linked to the lawyer's daily work and interests.'¹³

Private Study of audio/visual material

Access to learning is a key driver for the VLSB+C, and rule 8.1.1 documents a range of activities that will support compliance. The assumption however that self-directed study should be excluded [or capped]¹⁴ needs to be reconsidered.

Self-directed study and the explosion of the use of digital technology in education is now common and validated as an effective form of learning, that can support a just-in-time approach that is aligned with an adult's motivations for learning. Whilst private study and research related to particularly matters (learning whilst working) are not currently permitted¹⁵ there is increasing evidence that recognises its effectiveness in learning transfer and skill building – particularly as it relates to a just-in-time need. See example below – Learning whilst working – how effective skills can be learned.

For some digital learning, it is a passive activity, that despite learning transfer, is difficult to validate. For other digital learning, it can be interactive and engaging through digital learning design, which can be a distinguishing factor for verification of learning. LIV members have also reported the need for CPD activities to be more interactive and participatory — such as through question and answer elements, quizzes, or assessment talks to ensure the learning activity is genuine.

¹² LIV CPD Diary data – 2015 - 2020

¹³ Issues Paper page 6.

¹⁴ Issues paper page 7

¹⁵ Issues paper - page 7

Within the current rule 8.1.1, 'private study of audio/visual material' is defined as an acceptable activity without a restriction. Under rule 8.2, private study is further defined as an acceptable format if 'the private study of audio/visual material [is] specifically designed to updating a solicitor's knowledge and/or skills relevant to his/her practice needs' yet has a restriction of 5 units. This can be interpreted as contradictory.

In response to the COVID-19 pandemic, in recognition of the limitation to access compliant CPD, the VLSB+C announced the 5-unit cap on private study of relevant audio/visual material will not be enforced¹⁶. The LIV submits, that private study of audio/visual material is an effective activity for learning and can have a clearly defined objective and learning outcome associated with it. However, the LIV acknowledge that the efficacy of this style of learning is varied and is dependent on the design and interaction with this type of activity by a practitioner.

The LIV submits a definition of the learning style between passive and active types of digital learning could be considered, and thus different restrictions could apply to each. As an example, if the audio/visual material has an interactive element, it could be considered under rule 8.1.1. If no interaction exists, rule 8.2 would then apply.

Mentoring

One activity that is not currently reflected in the available CPD formats, is the provision or receiving of help, influence and guidance of others in the profession through mentoring. The legal profession when compared to other professions puts an emphasis on supervision and mentoring, including for graduates and newly admitted lawyers through the rules associated with admission.

Learning whilst working – how effective skills can be learned

The recent COVID-19 pandemic has seen the increased use of Zoom for effective stakeholder and client communications. There are several ways to learn how to use the platform, but in these circumstances the most effective and efficient way of building this skill has been through 'learning by doing' or peer-peer help. In addition, this skill has been further embedded if you then help other stakeholders use Zoom and assist in their ability to communicate effectively. It can't be argued that this skill has not been critical to ensure the provision of quality outcomes for clients, yet, under the current rules – this is not seen as a valid form of CPD.

As distinct from supervision, formal mentoring programs have a goal to develop a practitioner's skills and competency in defined areas. Programs are set up to encourage reflection, identification of learning needs, an approach to address those needs, action and evaluation of success, and active participation by the mentor and the mentee.

The LIV submits that formal mentoring should be considered a legitimate CPD format and could be considered under rule 8.1.1 'any other educational activity' as an interim measure for guidance. In addition, specific guidelines should be provided to both mentor and mentee to ensure appropriate standards, this is also discussed under supervision further.

¹⁶ VLSB+C News update: <https://lsbc.vic.gov.au/news-updates/news/update-changes-cpd-activities>

Acknowledgement of study towards Accredited Specialisation

Specialist Accreditation is a structured peer assessment program which enable practitioners to gain recognition as an expert in their chosen area of practice. Solicitors who fulfil the requirements of the Program are entitled to use, after their name, the words 'Accredited Specialist' in the nominated area of practice. The assessment program requires a practitioner to demonstrate their competence through their passing of three assessments, which equates to a minimum of five hours, where the average likelihood of success is only 50 - 60 %.¹⁷ Each speciality is given a list of topics that might be assessed¹⁸, and it is suggested that anywhere between 50 – 75+ hours of study is required to prepare for the assessments. Learning support is provided to practitioners in a variety of formats including study groups, mentors, access to past assessments and structured seminars.

Under rule 9.3, *Solicitors who successfully complete a specialist accreditation assessment process will be deemed to have completed 10 CPD units in the year of their completion.* The LIV submits that whilst the study for the assessment is largely self-directed, it is structured. When combined with the amount of time required to complete the assessment, a practitioner is completing more than 10 CPD units. Therefore, irrespective of success, any practitioner who sits the assessment process should be entitled to the claim 10 CPD units.

Increase transparency and awareness of activities available

Despite the previous suggestions, LIV members report that compliance can be accomplished through the open and flexible way in which points may be achieved. The lack of awareness, rather than an alleged limited offering, is the reason why many revert to the default 'chalk and talk' classroom style presentations¹⁹ and the annual 'March madness'.²⁰

The LIV submit that additional guidance and clarity on the current rules, formats, units and restrictions should be provided by the VLSB+C. An example is in the table below.

¹⁷ Average of all LIV accredited specialisation examination results 2015 - 2020

¹⁸ [LIV Accredited Specialisation – Commercial Law Guidelines 2020](#)

¹⁹ Issues Paper page 7.

²⁰ Issues Paper page 4.

RULE AND FORMAT [8]	CPD UNIT [9.1]	RESTRICTIONS [9.2]
8.1.1. a seminar, workshop, lecture, conference, discussion group, multimedia or web-based program, private study of audio/visual material or any other educational activity	1 HR	No restriction
8.1.2 - the research, preparation or editing by a solicitor of: <ul style="list-style-type: none"> - 8.1.2.1 an article published in a legal publication, - or 8.1.2.2 a legal article published in a non-legal publication, - or 8.1.2.3 published Law Reports or other legal services 	1000 WORDS	No more than 5 units
8.1.3 - the preparation and/or presentation by a solicitor of written or oral material to be used in a CPD activity or in other forms of education provided to solicitors and/or to other professionals and/or to other persons including those undertaking practical or supervised legal training,	1 HR	No more than 5 units
8.1.4 - membership of a committee, taskforce or practice section of a professional association, designated local regulatory authority or the Law Council of Australia or of other committees, provided that the solicitor regularly attends its meetings, if the work performed on the committee, taskforce or practice section is of substantial significance to the practice of law and is reasonably likely to assist the solicitor's professional development	2 HRS	No more than 3 units
8.1.5 - postgraduate studies relevant to a solicitor's practice needs.	1HR	No restriction. However, Successful Accredited Specialists will be able to claim 10 units. [9.3]
8.2 - Private study does not constitute CPD activity for the purpose of these Rules unless it involves the private study of audio/visual material specifically designed for the purpose of updating a solicitor's knowledge and/or skills relevant to his/her practice needs.		No more than 5 units

Table 1: Overview of Current CPD formats, units and restrictions²¹

Documentation, recording, audit and enforcement approaches are defined.

As well as skill areas, activities and unit allocation, the Uniform law also provides clear and specific rules regarding timeframes, recording requirements, exemptions, audit and enforcement approaches and rectifications.

The CPD year is defined from April – March. Whilst this timeframe lends itself to 'March madness', it provides clarity and certainty for lawyers to comply. The record keeping is simple and can be achieved in multiple ways through paper or digital means, with evidence guidance also provided that matches the activities. The LIV provides a template for CPD recording

²¹ Section 8 & 9, CPD Obligations, *Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015* <
<https://www.legislation.nsw.gov.au/#/view/regulation/2015/242/full>>

purposes available on to all practitioners on its website²². And for members a digital CPD diary exists that will be populated with any LIV activities they participate in and allows other external activities to be uploaded directly by the member.

CPD Verification Process

The VLSB+C policy²³ provides guidance to assist lawyers to comply with their continuing professional development (CPD) obligations under the Uniform law CPD Rules, including verification, rectifications and exemptions, to assist the VLSB+C consistently exercise their functions, duties and powers under the CPD Rules.

All lawyers who declare they have complied with the CPD Rules when applying to renew their practicing certificate may be audited under 3.2.1 of the VLSB CPD Policy²⁴.

The VLSB may request verification from lawyers who are:

- subject to criminal or disciplinary proceedings or orders
- have a history of non-compliance with the CPD Rules or Uniform Law (under 3.2.4)²⁵

The current process involves the VLSB selecting a random sample of solicitors for verification. This random audit occurs at the end of each practising certificate year (under 3.2.8)²⁶

Opportunities for improvement

The LIV would be supportive of a more risk-based audit to ensure compliance, based on data collected by the VLSB+C. This data may be in the form of an analysis of service offering, noting that PII claims indicate the lawyers practicing in multiple practice areas are more likely to be subject to a claim. Other risk factors could include delays in responding to correspondence requests from client's and the regulator, or the frequency of complaints data. As demonstrated above, there may be a way of targeting cohorts of practitioners based on their role and position.

Rather than seek to amend the Uniform law CPD rules which govern the rules on rectification and exemptions, these guidance notes could be tailored to provide the additional training requirements to fit in within the existing CPD fields.

Does the current Uniform law CPD rules support the VLSB+C's desire to ensure meaningful, relevant and accessible CPD for the entire profession, thereby ensuring standards of excellence in the provision of legal services?

As suggested above, the LIV submits that the current rules can support the VLSB+C's desire to ensure meaningful, relevant and accessible CPD for the entire profession. As it relates to CPD scheme characteristics, the current CPD scheme is not overly onerous, and reflects the commitment required to maintain, improve and broaden professional knowledge and skills in the legal profession.

There are opportunities for improvements through targeted guidance notes which could mitigate some of the issues identified, however The LIV acknowledges that the breadth and

²² https://www.liv.asn.au/getattachment/Professional-Practice/Compliance/CPD-Compliance/CPD-requirements---FAQs/20171003_Form_PD_CPDRule-Compliance-interactive_V05.pdf.aspx

²³ VLSB+C CPD Policy https://lsbc.vic.gov.au/sites/default/files/2020-02/Policy-Continuing_Professional_Development-2016.pdf

²⁴ ibid

²⁵ ibid

²⁶ ibid

scope of the CPD rules may not always ensure standards of excellence in legal services in some instances. The rules alone cannot be the only vehicle to drive standards of excellence in the legal profession.

4. The role of the Victorian Legal profession in creating standards of excellence for legal practice

CPD as Risk Management

Compliance with Uniform Law underpins a practitioner's ability to practice in Victoria where a demonstration of ongoing CPD leads to annual practicing certificate renewal. However, CPD compliance is also an effective risk management strategy that also directly links to a practitioner's insurance and liability coverage.

The LIV risk management education program

The LIV has an obligation with the regulatory continuum agreed with the VLSB+C to ensure legal practitioners are adequately provided with training and education to *deliver the best outcomes for and on behalf of their clients and the community*.

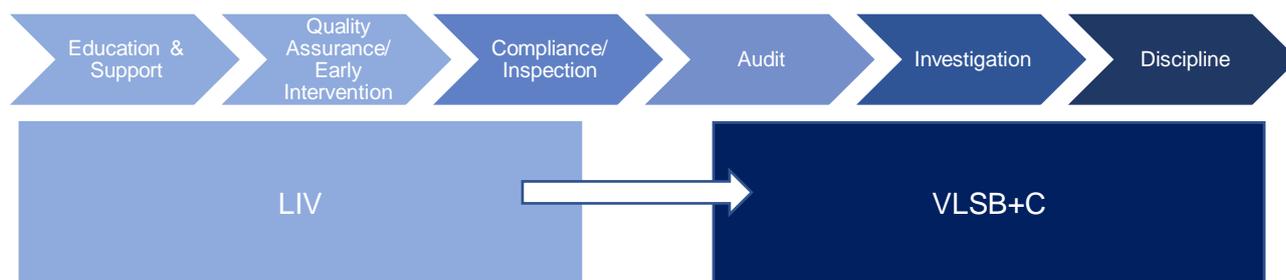


Figure 1: The LIV/VLSB+C Regulation Continuum

The LIV monitors its educational risk management strategy for members through regular liaison with Practice Section Committees and by following information and analysis of complaints data obtained from the VLSB+C and claims data from the LPLC. The strategy delivers a targeted PD program, including seminars and conferences to support lawyers' CPD obligations in all compulsory fields, with increased practice and risk management content following identification that these fields are a significant source of complaint to the VLSB+C.

The legal obligations to the Professional Standards Scheme

Professional standards legislation was introduced as a measure to improve professional standards among the legal profession and mitigate against further risk to the consumer by limiting the liability of members of occupational associations. The legislation is state based under the Professional Standards Act 2003 (Vic).

The VLSB+C have reinforced that practice management systems are fundamental to good practice. The LIV's Professional Standards Scheme, and its integration with LIV education programs, targeting practice and risk management to reduce the profession's exposure to complaints and claims, complements existing regulatory oversight programs, by sharing good practice and providing a proactive approach to early intervention where professionals are struggling to meet minimum standards.

LPLC risk management education program

For the legal profession to maintain its regulatory obligations and mitigate risks in running a legal practice, lawyers are required to be adequately insured.

As part of its role as the profession's insurer, the Legal Practitioner's Liability Committee (LPLC) provides a program of risk management education to legal practitioners. The LPLC also manages a risk management hotline for practitioners, emails a regular risk blog to practitioners about topical issues in legal practice, and contributes risk management content and practical tips to the Law Institute Journal each month to assist lawyers to mitigate their exposure to claims.

Precedent for using mandated CPD (or equivalents) to address key risks or aligned with desired performance standards has already occurred by the VLSB+C.

New Principal Practising Certificate Holder and the Practice Management Course

The criteria for to become a new Principal Practising Certificate Holder details the completion of an approved practice management course (PMC) amongst one of the guidelines²⁷. Supporting this requirement, the VLSB +C in conjunction with the LIV, LPLC and other law societies detailed specific guidelines for the course including content, structure, delivery, presenters and assessment ²⁸.

Trust money authorisation and the Trust Accounting Course

Analysis of ten years of complaints data demonstrated the need for the VLSB+C to mitigate the risks to consumers of fraudulent and poor trust accounting practices, leading to the VLSB+C policy on Risk-based regulation of lawyers' trust accounts²⁹. To apply for a practising certificate authorising the receipt of trust money, a lawyer must satisfy the VLSB+C that they possess the necessary skills and expertise to operate a law practice trust account competently, diligently and honestly. Contained within the VLSB+C policy are the defined skills and expertise expected, and to achieve, The LIV's trust account course is approved by the VLSB+C as meeting its skills and expertise requirements to obtain a practising certificate with trust money authorisation.

Should there be a mandated allocation or requirement for training to allow for the changing nature of the profession and changing risk areas?

It is not unusual for regulators to introduce mandated training and education standards for a profession in response to risk factors. A CPD transformative model is sometimes introduced to support holistic, critical change within a profession. This can occur when a professions regulatory framework has not kept up to date with evolving consumer expectations or compliance with other existing workplace requirements, which result in an external review or even a Royal Commission. An example of such a model is the regulation and oversight of

²⁷ <https://lsbc.vic.gov.au/lawyers/practising-law/running-law-practice/new-principal-lawyers>

²⁸ https://lsbc.vic.gov.au/sites/default/files/2020-02/Guidelines-Practice_Management_Course_for_Victoria-2018.pdf

²⁹ VLSB+C Policy - Risk-based regulation of lawyers' trust accounts https://lsbc.vic.gov.au/sites/default/files/2020-02/Policy-Risk_Based_Regulation_Trust_Accounts-2017.pdf

Financial Advisors. The Financial Advisor Standards and Ethics Authority (FASEA) was established in response to recommendations from the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. Within their revised education standards, they mandated minimum ethical and education requirements of existing advisers to reach a revised benchmark of skill for practice a financial adviser. The existing baseline knowledge and skills of lawyers don't lend itself to this radical approach, however, there is an argument that upskilling in key areas through mandating training, refresher courses or a defined learning and skill development plan can be effective, where traditional skills of a profession have changed.

Digital Literacy and technology

The LIV recognises that there are rapid changes and advancements in the modern workplace, and the legal profession is not immune to this.

The LIV considers knowledge of the developments in the field of technology and other legal service tools, including what they can offer firms and their clients are not currently specified in the CPD rules. The LIV submits that more emphasis on the importance of digital literacy and technological competence is required.

Technology competency has become a necessary tool in maintaining a practitioner's professional obligations to effectively meet client and consumer expectations. Increasingly, industries are utilising technological services to streamline processes. In circumstances where most firms have a time-based billing model, the LIV recognises that lawyers owe a duty to their clients to do things efficiently, particularly where technology can assist in streamlining certain processes.

The LIV submits that this training falls appropriately within the fields of *practice management and business skills* or *professional skills*, where definition of an appropriate sub-domain skill under one of these areas would be appropriate guidance.

An option to further ensure this type of training is undertaken could be to include a guidance note or directive by the VLSB to mandate digital literacy which would assist in incentivising lawyers, particularly time-poor senior lawyers, to develop their technological competencies. Mandating requirements under the CPD scheme to improve technological competencies would, improve the delivery of services for clients, assist in dealing with the backlog in the courts through an increase in technology-facilitated appearances, and provide lawyers and firms with the competencies to service their clients effectively.

Option 1: Mandate specific training within the current 10-unit allocation under the areas of Practice Management and Business Skills or Professional skills

Option 2: Adopt an approach where due to the new nature of the skill, and risk to the community, mandate that all practitioners must upskill in this area within a specific timeframe, to ensure an effective revised baseline of competency for the profession.

Safe workplace culture: Wellbeing, bullying and sexual harassment

Like the discussions above, there is now widespread recognition that the legal profession is overrepresented when it comes to mental illness and studies have shown that lawyers are more likely than the general population to experience depression and anxiety.

Similarly, recent reports confirm that there have historically been, and continues to be a high incidence of sexual harassment within the legal profession which is unacceptable. In Victoria, it is also conduct that can constitute professional misconduct.

The LIV strongly supports mandatory training related to safe workplace culture, diversity and equality, and acknowledges that the current offering of CPD related to anti-discrimination and equal opportunity may 'preach to the already converted'.

The LIV submits that compulsory and ongoing training on these issues is vital for all legal practitioners. A transformative CPD program may be a consideration to ensure all practitioners demonstrate the requisite knowledge in workplace culture.

The LIV also submits that training on these issues can be addressed in the current CPD rules under the fields of *ethics and professional responsibility* and *practice management and business skills*.

Similarly, as stated above under digital literacy, the LIV suggests that training in these areas could be mandated by way of a directive from the VLSB+C.

The LIV suggests multiple approaches. All seek to address the need to change the culture, and aspire to practical learning outcomes, rather than be reduced to a 'tick-box' exercise.

Recommendation 1: Graduate lawyers and their supervisors under their two-year supervision be required to undertake training in safe workplace culture as part of their ethics and professional responsibility or practice management and business skills points. For supervisors, this would be required every time they were a supervisor.

Recommendation 2: Seek an attestation by a Principal during the practicing certificate renewal process that the principal confirms that the employees of their firm or organisation have undertaken professional development training in safe workplace culture and continued to review their workplace policies.

Recommendation 3: Due to the risk to all practitioners irrespective of their role, mandate that all practitioners must upskill in this area within a specific timeframe, to ensure an effective revised baseline of awareness and competency for the profession.

Safe workplace culture: Supervisory obligations

LIV Members report that the current requirements for supervision, places the onus of supervision on the supervised lawyer, rather the supervisor. For example, once you've completed your two-year supervised legal practice period, you must apply to remove your supervised legal practice condition from your practising certificate before you can practise without supervision. The application must include a statutory declaration and attach a supporting letter from your relevant supervisor³⁰.

Beyond this declaration, there is no other requirement during the two years to validate any learnings or reflections gained as a supervised legal practitioner. This is distinct from existing work experience standards for PLT and minimum approved firm requirements for SLT for graduate lawyers.

³⁰ <https://lsbc.vic.gov.au/lawyers/practising-law/practising-certificates/how-remove-your-supervision-condition>

The LIV submits there is an opportunity to make this a more structured approach to ensure existing skills are built on and minimum standards are adhered to. This could take a similar form in the to the PLT work experience rules which are more rigorous, requiring both supervisor and law student to adhere to a specific set of requirements. The LIV submits that these issues are about changing workplace culture and are both the responsibility of the individual legal practitioner, as well as the employer in maintaining a safe workplace. These suggestions should be mandated through directives from the VLSB+C and would not require legislative change of the Uniform law CPD rules.

Example in Practice: Kate - New lawyer [Supervised legal training]

Kate is a graduate lawyer in her first year of practice at a suburban law firm. The firm has a family law and wills and estates practice. As part of her two-year supervision, she must rotate within the firm's two practice areas before being allocated to a specific practice area. During the CPD year, Kate undertakes the following:

- 3-hour workshop in Family law (3 CPD points: substantive law)

She also attends the LIV Succession Law Conference where she undertakes:

- 1-hour Ethics session (1 CPD point: Ethics and professional responsibility)
- 2 hours technology workshop session (2 CPD points: professional skills)
- 2 hours session on Wills and Estates (2 CPD points: substantive law)
- 1-hour trust accounting session (1 CPD point: practice management and business skills)
- Kate is also a member of the LIV's Young Lawyers Law Reform Committee and attends 5 one-hour meetings in the CPD year. As a Committee member, she helps draft a policy submission on parenting orders in the Family Court. Kate can claim up to 3 CPD points for participating in the Committee and contributing to its submission under Rule 8.1.1 of the CPD rules.

According to the above, Kate has complied with the annual CPD requirements, undertaking more than 10 CPD units in all the four CPD fields.

Question: *As Kate is in her two-year supervision, should there also be a mandated requirement for Kate to undertake an extra session on safe workplace culture, and would this assist Kate in being a better lawyer?*

Example in Practice - Marcus - Principal Lawyer, CBD firm

Marcus is a veteran criminal defence lawyer and has been practising for 39 years. He is the principal of a medium sized CBD law firm practising predominantly in criminal law and some family law matters. He employs six lawyers and three administration staff.

Marcus is very busy as while he runs the firm's business, he continues to take on his own case load and appears daily at the Magistrates' and County Courts. He loves advocacy work and lives for getting the best outcomes for his clients, who are often socially and economically disadvantaged. Marcus's firm undertakes a large amount of legal aid work, which is sometimes challenging for the business. As an older practitioner, he relies on his administrative staff to manage the day to day running of the business including "managing the books", and his junior lawyers to handle all the "tech stuff", such as electronic filing of cases.

During the CPD year, Marcus undertakes the following:

- Attends the Criminal law conference, as he feels this "ticks all the boxes in one day" in all four CPD fields providing him with 6 CPD points.
- Attends a local law association dinner, with a speaker presenting on 'commercial tenancy agreements'. Marcus claims this as 1 substantive law point.
- Attends 4 LIV Criminal law section committee meetings but does not contribute to submissions or discussions as he is most often on his phone during the meetings. Marcus claims the maximum of 3 points for his participation on the Committee under Rule 8.1.4 of the CPD Rules.
- Marcus is well known in the criminal law circles as a passionate advocate with encyclopaedic knowledge of criminal law practice and procedure. He is invited to join a panel of presenters for a webinar on 'criminal law advocacy in drug matters'. He claims this 2-hour presentation under Rule 8.1.3 of the CPD rules.

According to the above, Marcus has complied with his CPD requirements under the Uniform law.

Question: *Is there a gap in Marcus' learning activities which may be addressed by mandating further training?*

Yes. Marcus might be assisted by further guidance and support in the CPD field of practice management and business skills. A form of mandatory training in technology, digital literacy, and general business management skills could be mandated through the CPD verification process.

Additionally, as a principal lawyer, Marcus could be required to attest that his firm's staff have undertaken compulsory training in safe workplace culture.

CPD as a driver of performance across a lawyer's career

As identified in the Issues Paper, effective learning for adults is grounded in the ability to recognise that adult learners:

- are self-directed and able make their own choices about what and how they learn;
- have accumulated experience that influence their learning interests and perceptions of what is relevant;
- are problem-focused and prefer to learn by doing, and
- are largely driven by internal rather than external motivators.

In other words, performance is driven by the balance of existing knowledge, and skills with an understanding of motivation, and supported by an environment that will support it.

The LIV acknowledges the challenge of catering to a wide range of practitioners. As previously mentioned, because of the challenges of practice, and the diversity of experience and roles of a practitioner the LIV acknowledges the challenge of catering to a wide range of practitioners and to develop and deliver relevant CPD programs.

The CPD scheme is an input-based approach, and the undertaking for the choice of topics and skills in the various CPD fields should remain with the individual legal practitioner, to determine the skills they need to be a competent lawyer. This allows for true and genuine continuing professional development dependant on each practitioner's area of practice and level of experience vs expertise, noting however that years of experience does not indicate capability in all skill areas (as is evidenced with the use of technology in the profession).

However, under Uniform Law, it provides pre-requisites and thus guidelines for academic qualifications and practical legal training pre-requisites for admission. The LIV submits that there is an opportunity to develop output-based guidance around expected minimal competency of practitioners at different stages of their career, or job role and experience to assist practitioners to evaluate their specific skill need.

This could be in the form of a competency framework detailing the minimal skills and performance outcomes required of specific domain and sub-domains under the existing four skills.

Levels of experience and role

The following figure illustrates how a priority of different skills can change depending on the level of experience or job role of a practitioner.



Figure 2: An example of current Uniform Law skill levels vs. role within the profession

The assumption for all lawyers that focus on professional skills and ethics will always be needed for competency. However, as your role evolves and 'being on the tools' can diminish

as you progress through your career, emphasis on practice management and business skills may take precedence over the intimate knowledge expected of substantive law changes and updates.

This can be true for sole practitioners, partners in smaller firms or in-house lawyers, who (usually) are senior lawyers more involved in running an efficient and compliant business that will benefit that lawyer's clients and staff. CPD in 'business skills', general corporate compliance (e.g. WH&S, privacy, harassment and bullying, anti-bribery and corruption) and a focus on good HR practices should be a major consideration and part of the CPD landscape.

Levels of expertise

In contrast, the mastery of all required competencies of a lawyer is not expected across all domains and sub-domains. It is acceptable to only have a foundation level skill in some areas, whilst an expert or advanced level of understanding will be required in others. This is true of an accredited specialist for example, where attainment of the specialisation is grounded in the verification of expert level competency in their area of practice [see following for more details of Accredited Specialisation].

The LIV submits that the current CPD fields underpins the minimal skills required of all legal practitioners. The points system aims to balance this with competing interests and areas of expertise. The LIV has commenced the development of such a framework, and would be willing to continue its development and rollout through ongoing industry consultation and funding support from the VLSB+C.

Example in Practice - Sam - Managing Lawyer, Government organisation

Sam manages over 55 staff at a large government legal organisation. Her team members range from senior and junior lawyers, paralegals and administrative staff, aged between 20 and 50 years old. While Sam started practising as a family lawyer 15 years ago, she now spends most of her days in strategy and budget meetings, workforce planning and staff management.

As Sam continues her legal journey, she finds that she enjoys the management part of her role particularly mentoring junior lawyers. She has virtually stopped taking on cases files but continues to provide case strategy advice to her junior lawyers.

Being employed with a large government organisation, Sam benefits from being able to undertake CPD programs provided to staff in-house. The employer also runs its own leadership and management program for those who wish to pursue management within the organisation.

During the CPD year, Sam attends the following: A full day leadership program provided her employer which includes sessions on sexual harassment, bullying, human resources and cyber security (8 CPD points in fields covering ethics and professional responsibility, practice management and business skills, and professional skills)

Sam feels that while she is no longer practising in family law, she needs to be across legislative and practice changes in this area to be able to support her junior lawyers who continue to take on case work and advocacy in the family courts, so she attends 2 workshops provided by her employer on family law issues. Sam logs this as 2 points in the substantive law CPD field.

Question: *Has Sam adequately ensured she has undertaken meaningful, relevant and accessible CPD programs, thereby ensuring a standard of excellence in the provision of legal services by her team?*

Yes. Sam has thoughtfully considered the requirements of her own professional development and the autonomy and broad scope of the CPD fields has allowed her the flexibility to ensure she receives the right learning outcomes for her role.

Example in Practice - Charlie - Inhouse Lawyer/General Counsel

Charlie works for a large multi-national company as their General Counsel. The company is based in Melbourne but works with a range of national and international suppliers. Charlie's role involves assisting the Board with its governance and business operations, common workplace issues arising from staff and contracts between suppliers.

Where matters are technical and require skills in a specific area of law, Charlie briefs commercial law firm with the relevant expertise. Also, Charlie briefed a barrister in a recent matter involving an international trade agreement to undertake the commercial arbitration negotiations.

Charlie sometimes find it difficult to find local CPD offerings in the areas he feels would benefit him in his role, so Charlie's employer approves for him to travel interstate or internationally to attend conferences or programs.

During the CPD year, Charlie undertakes the following CPD programs:

Attends a 2-day workshop on international relations and trade law held in Hong Kong.

As 8.1.1 of the CPD Rules do not have a current cap limit, Charlie claims 7 of his 10 CPD points requirement in the area of substantive law.

When Charlie returns to Melbourne, he decides that he could use further training on cyber security and technology, so he attends a 3-hour workshop co-hosted by the LIV and LPLC on cyber awareness and technology training. He claims 2 points under practice management and business skills, and professional skills under Rule 6.1 of the CPD Rules.

Charlie also downloads a LIV Ethics video, which he claims as his ethics and professional responsibility point.

Question: *Has Charlie adequately ensured he has undertaken meaningful, relevant and accessible CPD programs, thereby ensuring a standard of excellence in the provision of legal services to his employer?*

Yes. Charlie's situation is unique; however, he has reflected on his own needs for professional development to ensure he undertakes the appropriate and relevant programs to complement his role. Had Charlie chosen to undertake a CPD program simply to 'tick a box' he would have been able to choose any form of CPD training available with numerous providers in practice management and business skills, or professional skills. Charlie was able to cater for his own learning needs by choosing the relevant training.

Unlike Charlie, there may be other practitioners who are unable to use self-reflection as a tool to enhance their learning. Mandating a technology component as part of either practice management and business skills, or professional skills may be a way of resolving this issue.

Additionally, if Charlie holds a principal practising certificate, he would be required to attest that he had undertaken training in safe workplace culture which would also have assisted him in his role within the company.

A culture of continuous professional development and lifelong learning

As the professional body representing the profession, the LIV is committed to promoting and fostering a culture of lifelong learning. We generally see evidence of this in the LIV membership, where there is a strong desire by lawyers to continually upskill and maintain their knowledge irrespective of their compliance requirements.

For larger firms, there is usually a function within the firm that supports learning. This done through the development of their own capability and competency needs balanced with their specific firm circumstances. It is also embedded early in a lawyer's career for those firms that participate in Supervised Legal Training of graduates.

As an example, the LIV is commissioned to come into firms and present various topics notably ethics training, that is then tailored to the specific needs of the lawyers. The LIV acknowledges that the opportunities for much of the profession to have this function are limited, and it is the aim of the LIV to be able to provide through its professional development (PD) offering, access to as much personalised learning for the profession as possible.

The quality assurance of CPD programs and activities by the Marketplace

As the VLSB+C is aware, the LIV is a well-known provider of continuing professional education for Victorian legal practitioners. The LIV's Professional Development (PD) department creates and delivers CPD activities for lawyers that are focused on the four compulsory fields identified under the CPD rules and in line with its risk management approach. The LIV draws on insights from members, practitioners and other stakeholders in the profession to provide legal practitioners with personalised, relevant flexible and valued professional development. The LIV delivers content in different formats including conferences, seminars and workshops throughout the year, with the addition of on-demand recordings that are also available for practitioners to access.

The decision to access CPD sits with the practitioner, or in some cases their firm, based on their needs at the time. This decision is influenced by a range of factors including format, time, topic, presenter and price, and each provider will promote their activities accordingly. Despite providers offering CPD throughout the year, the end of the CPD year naturally contributes to an increased demand, and thus responsiveness by providers in their calendar of activities available. The varied nature of CPD requirements and needs of the practitioner, enables competition in the marketplace amongst the type, content and price of CPD available. It is an expectation that any education provider adopts quality standards, however, it is up to the practitioner to decide on what they see as value in the providers in the market in their design, development and delivery of CPD.

In more recent times, and in response to the current Covid-19 crisis, the LIV has delivered all its scheduled PD programs online. The traditional preference of the member is in attending face-to-face activity, however this is currently not a viable option. The LIV has run over 40 activities for members and the profession from April – June and engaged with close to 10,000 practitioners. This is across a range of content areas, formats and price points. This further reinforces the notion, if CPD activity is available that is deemed valuable to a learner, they will make the decision to attend.

Effective learning enabled through access

As previously discussed, the acknowledgement of the current circumstance relating to the COVID-19 pandemic and the adaptation of guidance in response to CPD is demonstrable of an opportunity to adapt a regulatory framework. In addition to the likely need to continue to acknowledge access to private study/audio visual activity, anecdotal feedback suggests that digital access will become a preference for practitioners in the future. The overwhelming benefits of access beyond a location, access to a larger range of expertise and the ability to extend access beyond the live activity to a recording, also supports the VLSB+C's desire to ensure meaningful, relevant and accessible CPD for the entire profession.

5. Compliance & Performance – The LIV Accredited Specialisation Scheme

An example of how existing rules and the definition of standards can drive performance excellence is the LIV Accredited Specialisation Scheme.

The Accredited Specialisation Scheme has operated for more than 25 years and accredits more than 1000 specialists across 16 areas of law. The distinction as a LIV Accredited Specialist allows recognition of having an enhanced skill level and experience in a practice area. An ongoing demonstration of superior knowledge, experience and proficiency in a particular area of law ensures that recognition as an accredited specialist is meaningful and reliable.

This scheme seeks to complement existing uniform law and CPD Rules, however it has additional rules that seeks to preserve the integrity of a specialist in their chosen area of expertise. In addition to existing practicing certificate requirements, the scheme has:

- Eligibility criteria that define minimum entry and continuing specialisation standards that must be met including level of experience and level of involvement or expertise in a practice area is defined
- A peer-based assessment program that that defines and measure the contemporary skills and knowledge expected of a specialist in that area of practice. This is reviewed biannually in line with the assessment program delivery
- A defined and increased commitment to complete CPD in the area of specialisation [8 of the 12 units must be in the area of speciality]
- A requirement to maintain substantial involvement in an area of speciality
- A requirement to self-report against the scheme rules annually
- A requirement to renew specialisation every three years.³¹

Overwhelmingly, Accredited Specialists are an engaged group of practitioners who undertake CPD as a driver for improvement and keeping up with changes rather than meeting minimum requirements. Accredited Specialists generally participate in excess of the 12 units required for compliance (15+ units), with some double the minimum requirements (20+ units) annually.³²

³¹ https://www.liv.asn.au/getattachment/Learning-and-Networking/Accredited-Specialisation/Become-an-Accredited-Specialist/Specialisation-Resources-Forms/20200122_Master_SpecialisationSchemeRules_Jan20-PDF.pdf.aspx

³² LIV Future of Accredited Specialisation Survey Findings 2019

Despite the additional compliance requirements, it is evident that Accredited Specialists are more likely than other practitioners to complete CPD above and beyond the minimum requirements in each skill area, and it is not a tick the box exercise. Accredited Specialists are similarly challenged by the obstacle that face other practitioners, however it is clear they value the knowledge and learning and understand the importance of a continuous and lifelong learning approach in the provision of service excellence to their clients and the community.

6. Conclusion

Standards and practices around Continuing Professional Development (CPD) are not only seen as a legitimate activity of professional bodies but an essential requirement. While CPD is a characteristic of a profession, there are professionals who both go above and beyond, as well as those that resist CPD.

However, the LIV submits that the current CPD rules supports the VLSB+C's desire to ensure meaningful, relevant and accessible CPD for the entire profession, thereby ensuring standards of excellence in the provision of legal services.

It is a fair assumption that the Uniform Law promotes a tick box exercise for compliance, which in the most part is linked to a practitioner's current circumstances, and the challenges they face juggling personal and professional responsibilities; rather than a desire to not want to invest in their own continuous development.

As demonstrated in the case studies above, autonomy will allow for a cohort of practitioners who are unable to comply with their CPD obligations. Yet, on the inverse it also supports practitioners such as Accredited Specialists who have a desire to be the best lawyer they can be through an approach to lifelong learning.

For those practitioners that are unable to meet the minimum CPD requirements and thus are considered high risk practitioners, the LIV submits that a complete overhaul of CPD rules for this cohort is not the most appropriate way of ensuring standards of excellence.

This cohort of legal practitioners may be assisted with further guidance and support through the profession more broadly, the LIV's Practitioner Performance & Professionalism (PPP) Framework, and if needed, mandating skill development in line with any risk areas identified by the VLSB+C.

For most legal practitioners, additional guidance from the VLSB+C on the nature of activities, consideration of changes to the definition of activities and restrictions (such as private study of audio/visual material) and the addition of mentoring, should assist in the perceived lack of motivation by practitioners in the choice of CPD activities, and contribute to a positive experience in their compliance requirements.

To address broader profession changes and risk areas, mandating a specific skill is an acceptable regulatory approach if it will drive awareness and an upskilling of lawyers in areas that are now critical to contemporary legal practice for the profession, such as technological competency and safe workplace culture.

Yet, to support service excellence and performance requires a coordinated approach by all stakeholders in the profession beyond the VLSB+C. The further definition of skills and their sub skills through a legal professional competency framework will assist in driving performance for the profession, as well as provide guidance for providers of specific quality outcomes that would therefore be expected of a practitioner at a point in time in their career. This framework

would enable a more informed practitioner that can evaluate their skill need and, thus select quality CPD activity that supports building that skill. This intern will drive the supply and demand within the CPD marketplace where quality CPD will be valued and thrive against competitors.

As the professional body representing the solicitor branch of the profession, the LIV welcomes the opportunity to work the VLSB+C in any of these initiatives to drive service excellence in the provision of legal services now and in the future.



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