

22 March 2021

Ms Fiona McLeay
Board CEO + Commissioner
Victorian Legal Services Board and Commissioner
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Dear Ms McLeay,

**Embedding Ethics in Continuing Professional Development Activities for Victorian Lawyers
– Consultation Paper**

Thank you for the opportunity to make a submission in response to your consultation paper on Embedding Ethics in Continuing Professional Development (CPD) Activities for Victorian Lawyers. ACC Australia is the peak body representing the in-house legal profession in Australia, corporate, non-profit and government, and we provide our views from that perspective.

The recommendation

Your consultation paper seeks stakeholders' views on how the Victorian Legal Services Board + Commissioner (Board) can best implement Recommendation 84 from the Royal Commission into the Management of Police Informants:

(T)he Victorian Legal Services Board and Commissioner, within six months, issues clear guidance about how legal ethics education should be embedded in the four compulsory fields of continuing professional development, including through the use of practical, scenario-based learning.

Why is this important?

As noted in our submission to the Board's Review of CPD in Victoria (dated 6 August 2020), our members advised that they have encountered difficulty finding CPD activities that were relevant to their learning and development needs in relation to ethics. We consider this is because ethics training is often:

- provided in a standalone session designed to ensure practising lawyers receive the required ethics point;
- focused on the content of the rules or regulations (such as the Australian Solicitors' Conduct Rules) but fails to address situations that do not neatly fit within those rules;
- not tailored to the specific audience in mind, noting that the types of ethical issues faced by lawyers in private practice, corporate, non-profit and government will differ (and even more so depending on the area of practice itself); and
- delivered by lawyers.

Although not all these factors are directly relevant to Recommendation 84, we strongly support the Board implementing this recommendation as we believe it will drive the profession and industry to rethink the traditional model of delivering ethics training and improve learning outcomes for lawyers.

What does ACC Australia think?

We have responded to several specific discussion points raised in your consultation paper below.

Embedding Ethics content into non-Ethics CPD subject areas

1. *The extent (if any) to which ethical issues arise and are currently included in non-Ethics CPD activities*

In our experience, ethical issues are not regularly discussed as part of non-Ethics CPD activities.

2. *How could ethics be more widely included in non-Ethics CPD activities*

We consider ethical issues should be tied more closely to the substantive area of law or practice that is the subject of the CPD activity. For example, a CPD seminar on mergers and acquisitions might discuss the challenges of working closely with senior management through a due diligence process and the types of issues that arise during a transaction relating to disclosures, materiality, risk, acting for multiple corporate entities and the different interests of directors and shareholders. Where possible, the discussion of ethical issues or dilemmas should be incorporated throughout the content or as part of a scenario-based discussion and reflection on the content.

3. *Identifying different types of ethics content, such as basic principles and recurring scenarios, emerging or new ethics challenges, and advanced ethics for more complex legal projects and challenges, or for people who might deal with ethical issues on a regular basis, e.g. a firm's ethics coordinator or general counsel.*

It is important for lawyers to be aware of and understand the ethical framework of the profession, including the established rules, legal principles, their duties and obligations and the potential consequences. While there is still a need for the content that is typically delivered in ethics training today, this should be supplemented by ethics training that is tailored to the specific audience in mind (private practice, corporate, non-profit or government) and area of practice (litigation, employment, public law etc.).

Additional areas that warrant specific consideration include:

- exploring the question of “can we” versus “should we”;
- training for leaders in creating an ethical culture within their team and organisation;
- understanding your own personal ethics; and
- problem-solving and where to go for help.

4. How to cater for the ethical challenges faced by lawyers not in private practice

Tailored ethics training is key to ensuring that in-house lawyers in corporate, non-profit or government organisations are equipped with the skills to identify and respond to ethical issues that arise in their practice. Some examples of the particular issues faced by in-house lawyers are:

- greater proximity to client – in-house lawyers may be more likely to feel pressured to reach a particular view or outcome and fill the role of “trusted adviser” to senior executives;
- less independence – in-house lawyers may find it harder to maintain independence and impartiality when embedded within a business area in their organisation;
- conflict with business / organisational imperatives – in-house lawyers may be pressured to “turn a blind eye” in relation to decisions or actions which give rise to legal risks and legal ethical issues;
- isolation – sole in-house lawyers or in-house lawyers in small teams are more isolated from the legal profession and may find it harder to discuss ethical issues openly with colleagues or clients;
- identifying the client – in-house lawyers may struggle to identify what is in their client’s best interests, as against the best interests of senior management, shareholders and other stakeholders (and these may conflict);
- managing conflicts – in-house lawyers may have more limited options to manage potential conflicts (particularly in small teams or where a conflict occurs at the general counsel level); and
- scope of advice – in-house lawyers are often expected or required to give advice on commercial and policy matters.

5. *Does the one point minimum requirement present any challenges to expanding the ethics repertoire? Should the VLSB+C promote its willingness to allow half points to be counted towards the regulatory requirement, e.g. a half hour on ethics within a longer CPD session devoted to other topics? Would this approach encourage providers to include Ethics CPD issues in more short form activities lasting for one or two hours?*

We consider the current requirement for one ethics point encourages CPD providers to prepare standalone ethics sessions as a way for lawyers to easily earn their point. We encourage the Board to promote and consider alternative ways for lawyers to achieve the required ethics point, including aggregating smaller ethics components of non-Ethics CPD activities to make up one point. It will be important to provide clear guidance about how lawyers can record and satisfy the requirement to encourage uptake.

6. *Alternatively, would inclusion of smaller mini-ethics ‘sprints’ or discussion question of 10-15 minutes duration be something CPD providers might adopt without the points incentive?*

The CPD framework that supports legal professional development is fundamentally based around a points system which provides much of the focus for legal learning. It is likely that without the points incentive lawyers will not be motivated to undertake mini-ethics ‘sprints’ nor CPD providers to adopt them.

7. *What types of activities that focus on the wider elements of ethics are currently available for lawyers and their firms / organisations?*

Activities that focus on the wider elements of ethics may be undertaken on a more ad hoc basis within an organisation and may be connected to a broader discussion in relation to organisational culture and values, in particular integrity. For example, a legal team may set up a discussion on the wider ethics elements as part of their in-house learning program. Mentoring is also a form of learning activity which may (and often does) focus on ethics. Particularly as this is a trusted and confidential relationship, mentees can bring ethical dilemmas often faced in their organisations for impartial discussion and guidance.

A wider approach to Ethics

8. *How should the guidance promote the broader issues around professional ethics? Should it be limited to raising awareness of such issues and encouraging lawyers to seek out relevant activities that might qualify as Ethics CPD?*

We consider the guidance could provide context by drawing on recent commentary in Courts, Royal Commissions, inquiries and the media about the legal profession, ethical issues and the perception of the industry. It is important for the profession to understand the “problem” to motivate changes in behaviour.

9. *To what extent, if any, could a generic course on personal ethics count towards Ethics CPD? Or could it be counted under the Professional Skills or Practice Management streams?*

We encourage the Board to promote and consider alternative ways for lawyers to achieve the required ethics point. Ethics training provided by lawyers tends to focus on the content of the rules established to ensure ethical conduct, but does not consider what ethics means beyond this. Training that focuses on the values or principles underpinning those rules may promote greater awareness and understanding of ethical issues amongst lawyers, particularly where the issues they face do not neatly fit within the established rules or guidance. Our response to ethical issues is personal and influenced by our own individual characteristics meaning that other experts, such as psychologists or academics, may be better placed to provide training and insight on these topics. This is often done effectively in training on wellbeing, resilience and professional skills, such as presentations and public speaking.

10. *Could sessions or activities promoting the development of organisational ethics and systems be included in the Practice Management stream? Could such sessions be counted towards either Ethics CPD or Practice Management CPD, at the discretion of the participant?*

Most traditional ethics training focuses on ethics from an individual perspective, rather than from the perspective of the legal team or organisation. Training targeted at leaders could focus on how to model and create an ethical culture within a team, including setting expectations and ethical issue spotting. There may also be opportunities to draw on ethics resources and training geared towards boards and senior executive teams to broaden in-house lawyers' understanding of ethics culture within organisations. This type of training could count towards either the Practice Management or Professional Skills CPD requirement.

CPD Learning Modes

11. *How should the guidance identify the values of accomplished presenters / facilitators?*

We discuss earlier in this submission that ethics training is traditionally delivered by lawyers, however, we consider there is an opportunity to explore ethics training provided by, or in conjunction with, other specialists. For example, ethics training could be incorporated into other CPD activities relating to professional skills, leadership, resilience, wellbeing, legal practice management. Where ethics training is embedded in substantive law CPD activities, lawyers are well placed to discuss ethical issues that arise in practice based on their own experiences and a panel of lawyers across private practice, corporate, non-profit and government would ensure diversity of views and experiences.

Please contact Chris Drummer, Director, Policy, Projects and Advocacy, ACC Australia and Asia Pacific c.drummer@acc.com or 0411264734 at first instance should you have any questions

Yours faithfully



Tanya Khan

Vice President and Managing Director

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