

27 February 2020

Ms Megan Pitt  
Chief Executive Officer, Legal Services Council  
Commissioner for Uniform Legal Services Regulation  
PO Box H326  
AUSTRALIA SQUARE NSW 1215

By email: [submissions@legalservicescouncil.org.au](mailto:submissions@legalservicescouncil.org.au)

Dear Ms Pitt

**PROPOSED AMENDMENTS TO THE LEGAL PROFESSION UNIFORM ADMISSION RULES: REMOVAL OF THE WORD ‘FAME’**

1. The Law Council of Australia appreciates the opportunity to provide a submission in response to the proposed amendments to the Legal Profession Uniform Admission Rules (**proposed amendments**) and to consider the draft [Legal Profession Uniform Admission Amendment \(Fame and Character\) Rule 2019 \(draft Rule\)](#) and [marked-up changes](#).
2. The Law Council has consulted with its Constituent Bodies and notes a divergence of opinions provided in responses. The issue has not been able to be considered by Law Council Directors with the timeframe set for submissions, however we note the key arguments below.
3. The Law Council is grateful for the assistance of the Law Society of New South Wales, the Law Society of Western Australia, and Law Council Director Mr Greg McIntyre SC in the preparation of this submission.

**Fame versus character**

4. The Law Council notes that the proposal goes beyond the removal of the word ‘fame’ and rather impacts the established test of ‘good fame and character’.
5. The High Court in *Re Davis* explained ‘good fame and character’ as referring to “*the reputation and the more enduring moral qualities*” of the individual being considered for admission.<sup>1</sup>
6. The test of ‘good fame and character’ involves two aspects: ‘fame’ refers to a person’s reputation in the relevant community and ‘character’ refers to the person’s actual nature.<sup>2</sup> The use of both ‘fame’ and ‘character’ in this context accordingly

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<sup>1</sup> *Re Davis* (1947) 75 CLR 409, 420 per Dixon J.

<sup>2</sup> *McBride v Walton* (NSWCA 15.7.1994 per Kirby P); *Clearihan v Registrar of Motor Vehicle Dealers* (1994) 117 FLR 455, 459; *Attorney-General of the State of Queensland v Legal Services Commissioner & Anor*; *Legal Services Commissioner v Shand* [2018] QCA 66 [31].

draws a distinction between an individual's actual moral qualities versus the public perception of their moral qualities, the latter which may be neither accurate nor fair.<sup>3</sup>

### Relevant jurisdictional differences

7. In all states and territories in Australia, in addition to academic and related requirements, there are two threshold questions Admitting Authorities must consider for prospective legal professionals:
  - a. is the individual 'a fit and proper person';<sup>4</sup> and
  - b. (with the exception of South Australia) is the individual 'of good fame and character'<sup>5</sup>?
8. With the exception of the *Legal Profession Uniform Law (Uniform Law)* jurisdictions (New South Wales and Victoria), and South Australia, all other states and territories refer to both of these thresholds in their *Legal Profession Acts*.
9. The Uniform Law is unique among jurisdictions insomuch as it:
  - a. uses 'fit and proper person' as a threshold criterion for admission in section 17(1);
  - b. specifies in section 17(2) that the designed local regulatory authority (**DLRA**) have regard to matters specified in the *Uniform Admission Rules 2015 (Admission Rules)*; and then
  - c. refers to 'good fame and character' in Rule 10(1)(f) of the Admission Rules.<sup>6</sup>
10. The proposed changes would *prima facie* bring the Uniform Law jurisdictions and South Australia in closer alignment, noting the latter similarly refers to the 'fit and proper person' threshold<sup>7</sup> without the 'good fame and character' test. The proposed changes do not simply remove the reference to 'fame', but rather substitute it for:

10(f) whether the person has demonstrated satisfactorily the ethical and professional standards appropriate for an Australian lawyer.

and:

14(c) events that tend to establish that the applicant's readmission would not undermine public confidence in the integrity and honesty of the legal profession,

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<sup>3</sup> *Real Estate and Business Agents Supervisory Board v LJW* [2011] WASCA 35 [28] per Newnes JA, as highlighted by the Law Society of Western Australia in their submission to the Law Council of Australia.

<sup>4</sup> *Legal Profession Uniform Law* (NSW & Vic) section 17(1)(c);  
*Legal Profession Act 2006* (ACT) section 26(2)(b);  
*Legal Profession Act 2007* (Qld) section 35(2)(a)(ii);  
*Legal Profession Act 2008* (WA) section 26(1)(a)(ii);  
*Legal Practitioners Act 1981* (SA) section 15(1)(a);  
*Legal Profession Act 2006* (NT) section 25(2)(b); and  
*Legal Profession Act 2007* (Tas) section 31(6)(b).

<sup>5</sup> *Uniform Admission Rules 2015* (NSW & Vic) rule 10(1)(f);  
*Legal Profession Act 2006* (ACT) section 11(1)(a);  
*Legal Profession Act 2007* (Qld) section 9(1)(a);  
*Legal Profession Act 2008* (WA) section 8(1)(a);  
*Legal Profession Act 2006* (NT) section 11(1)(a); and  
*Legal Profession Act 2007* (Tas) section 9(1)(a).

<sup>6</sup> As highlighted by the Law Society of Western Australia in their submission to the Law Council of Australia.

<sup>7</sup> *Legal Practitioners Act 1981* (SA) section 15(1)(a).

And add the following:

(m) whether the person's admission in this jurisdiction would undermine public confidence in the integrity and honesty of the legal profession.

and:

(cl) events since the applicant's name was removed from that roll that tend to establish the applicant has demonstrated satisfactorily the ethical and professional standards appropriate for an Australian lawyer,

11. These changes focus the relevant matters for consideration, as outlined in case law such as *Council of the Law Society of New South Wales v Parente*.<sup>8</sup>

### **Matters for consideration**

#### **A. Consistency**

12. Noting again the comments above at paragraph 9, at the time the Uniform Law was being developed, the Law Council noted the following:

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.<sup>9</sup>

13. While the Law Council at that time did not express a view as to the specific retention of ‘fame’ in this context, the Law Council has a longstanding policy preference for uniformity and consistency where appropriate. To the extent that the proposed changes are in the pursuit of consistency, the Law Council agrees that internal consistency within the Uniform Law would be beneficial.
14. However, in consultation the Law Society of Western Australia (**LSWA**) submitted that, in this instance, making the Admission Rules consistent with the Uniform Law is an “*irrelevant*” consideration. This is on the basis that the decision to omit ‘good fame and character’ from the Uniform Law was simply a reflection of Parliament leaving admission criteria to “*the rule makers*”.
15. It is also notable that the removal of ‘fame’ in this context may achieve internal consistency within the Uniform Law but would not facilitate greater consistency between Uniform and non-Uniform Law jurisdictions.

#### **B. Longevity and recognised meaning**

16. The LSWA opposed the removal of the reference to ‘good fame and character’. This is on the basis that the phrase has been in use for a significant period of time and has “*recognised meaning*”.

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<sup>8</sup> [2019] NSWCA 33.

<sup>9</sup> Law Council of Australia Submission, ‘Proposed Admission Rules under the Legal Profession Uniform Law’ (4 February 2015),4.

17. LSWA emphasises that the importance of this recognised meaning is the delineation between the individual's good 'fame' or good reputation on one hand, and their true character on the other, which may not in reality reflect that reputation.<sup>10</sup> LSWA further submit that the continued benefit of retaining 'good fame and character' is demonstrated by the proposed additions (addressed at paragraph 10 above), which highlight the same considerations relevant to 'good fame and character'.
18. LSWA accordingly submitted that, in light of the above, that the case for the removal of 'fame' had not been sufficiently made out.

### C. Outdated?

19. Law Council Director and Executive member, Mr Greg McIntyre SC, responded in his capacity as Director to the consultation as follows:

My view is that the word 'fame' is no longer an appropriate word to include in regulations relating to conduct of legal professionals and is best replaced by the words proposed for Rules set out in the memorandum from the CEO dated 20 December 2019.

20. We note that the 'words proposed' as referred to by Mr McIntyre are those relayed in paragraph 10 above.
21. A similar sentiment is expressed by the Law Society of New South Wales (**LSNSW**) in their direct submission dated 14 February 2020, where it is submitted:

The Law Society agrees that the term 'fame' is outdated and does not oppose it being removed from the Admission Rules.

22. The Law Council also repeats the LSNSW's submission that:

...there was discussion of the word 'fame' in the judgement of *Council of the Law Society of New South Wales v Parente* [2019] NSWCA 33<sup>11</sup>. You may also be aware of the discussion in *Council of the Law Society of New South Wales v Michael Arthur Hislop* [2019] NSWCA 302, which refers to an element of 'public disgrace' being incompatible with the concept of good fame (at 43).<sup>12</sup>

23. This notion of 'public disgrace' is relevant to the policy position, encapsulated by the proposed changes (see paragraph 10 above), of 'not undermin[ing] public confidence in the integrity and honesty of the legal profession'. This wording also reflects the aforementioned decision of *Council of the Law Society of New South Wales v Parente*:<sup>13</sup>

Particularly is that so where the older terminology was itself imprecise and required care in its application. The only benefit in the reference to "fame", which was used

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<sup>10</sup> See *Re Davis* (1947) 75 CLR 409, 416 per Latham CJ; and *Real Estate and Business Agents Supervisory Board v LJW* [2011] WASCA 35 [28] per Newnes JA, which was discussed above.

<sup>11</sup> See *Council of the Law Society of New South Wales v Parente* [2019] NSWCA 33 [12].

<sup>12</sup> *Council of the Law Society of New South Wales v Michael Arthur Hislop* [2019] NSWCA 302 [43]:  
*It is of course clear that unfitness may be manifested by conduct not directly connected with professional practice, because such conduct may show that the practitioner lacks requisite personal qualities for membership of the profession, including that a lawyer be of "good fame and character". Conviction for a serious offence, particularly if accompanied by a sentence of imprisonment, is often incompatible with "good fame and character", not only because of the underlying conduct, but also because of the public disgrace involved.*

<sup>13</sup> [2019] NSWCA 33 [12].

in the sense of “reputation”, was that it drew attention to one purpose of the disciplinary powers, which was (and is) to maintain public confidence in the integrity and honesty of the profession. Questions of reputation remain relevant in that respect.

24. It is arguably noteworthy that the decision of *Council of the Law Society of New South Wales v Parente* expressly states that the use of ‘fame’ is outdated.

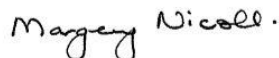
#### **D. Implementation**

25. We note the LSNSW’s submission dated 14 February 2020. The Law Council agrees with and repeats the recommendations:
- a. That any changes to the Admission Rules ought to be done in conjunction with Rule 13 of the Legal Profession Uniform General Rules 2015 (**General Rules**)<sup>14</sup> for consistency.
  - b. That any changes to the Admission Rules and General Rules to commence simultaneously, to avoid any period of time “during which the admission boards and the DRLAs responsible for issuing practicing certificates are applying different factors”.
  - c. That the admission boards and DRLAS ought to be consulted in respect of timeframes for commencement of any amended rules and whether lead-in time is required for implementation.

#### **Contact**

Should you have any queries, please contact Tarryn Gaffney on 02 6246 3752 or [Tarryn.Gaffney@lawcouncil.asn.au](mailto:Tarryn.Gaffney@lawcouncil.asn.au) .

Yours sincerely



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<sup>14</sup> Regarding ‘Consideration of application for grant or renewal of Australian practising certificate’.