THE LAW SOCIETY
OF NEW SOUTH WALES

Ms Heather Moore
CEO and Commissioner for Uniform Legal Services Regulation
Legal Services Council
10 O'Connell Street
SYDNEY NSW 2000

2 November 2023

Dear Heather

Consultation on proposed amendments to the Admission Rules and draft Council guideline – foreign lawyers

The Law Society of New South Wales makes the following comments in relation to the proposed amendments to the Legal Profession Uniform Admission Rules 2015 (**the Admission Rules**) and draft Council guideline on conditional admission.

Our proposal on conditional licensing warrants consideration

Reducing barriers to foreign lawyers practising in Australia is a key priority for the Law Society and, save for a few matters discussed below, we are strongly supportive of the proposed amendments to the Admission Rules to further this priority.

However, we also recognise that these amendments are only a partial solution to addressing the obstacles fronting both foreign lawyers and their prospective Australian employers. We once again urge the Legal Services Council (**LSC**) to consider our conditional licensing proposal as a practical means to address barriers to foreign lawyers while ensuring appropriate consumer safeguards are in place.

For this purpose, I once again attach our letter, dated 22 June 2022, summarising the workshops we held with law firms and enclosing our proposal regarding conditional licensing of foreign lawyers.

Legal practice experience threshold

The proposed rule 6A(2)(a) and (b) refers to foreign lawyers having had at least seven years' experience of engaging in legal practice.

As previously submitted, we remain of the view that the experience threshold for foreign lawyers should be five years, inclusive of any training contract.

In the vast majority of cases, such a level of experience is sufficient to ensure the person is competent and suitable for admission, and would better address the current acute difficulties of the legal profession in engaging foreign lawyers.

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A five year legal practice experience threshold would also better reflect the rapidly changing nature of the law and legal landscape. With 5 years post qualification experience, a practitioner is likely to have sufficiently developed broader competencies beyond the legal knowledge acquired during under-graduate education. These broader competencies, generally developed through practical experience in real world legal environments rather than at an undergraduate level, are widely recognised as being critical to effective and competent legal practice.

It is desirable for lawyers to recognise that relying solely on the information they learned in law school is likely insufficient to support a strong modern legal practice. Equally, it is important for solicitors to understand the limitations of their own legal expertise.

Our view is that the vast majority of lawyers with 5 years' post qualification experience would generally have a broader range of competencies than an undergraduate at admission, enabling their awareness of limits of expertise in respect of knowledge of local law. Practically, this means it is very likely that if a practitioner with 5 years' experience is asked to provide advice outside their speciality, they will know to either gain relevant expertise or refer that work to a more suitable practitioner. Having this understanding equips lawyers to practice safely, even when doing so in a foreign jurisdiction.

Determining substantial equivalence

As stated in our submission dated 21 July 2021, it is important for there to be a shared understanding of the factors determining whether a legal system and regulatory framework is 'substantially equivalent' to those of this jurisdiction, as referenced in rule 6A(2) and (3). Such a determination should not require a black-letter comparison of the particular areas of law, as this would be inconsistent with the policy intention behind the revised rule.

An inflexible determination of 'substantial equivalence' would also disregard growing consensus that the core academic requirements for law students (commonly referred to as the Priestley 11) – which have remained largely static since its introduction in 1982 - require reconsideration.[1]

A strict application of substantial equivalence would also negate the reality and desirability of legal education being a lifelong and ongoing process, and that the Priestly 11 by and large are focussed on legal knowledge rather than the broader capabilities needed for legal practice. They do not, for example, adequately prepare students for the impact of technology on the law.[2] Arguably, they also do not prepare lawyers to work collaboratively across disciplines, communicate clearly or understand the needs of clients.

[1] Professor S Kift and K Nakano, *Reimagining the Professional Regulation of Australian Legal Education*, research commissioned by the Council of Australian Law Deans, 1 December 2021
[2] As above.

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Experience in holding money on trust

Reiterating our comments in our earlier submission, our view is that it is neither necessary nor appropriate for the Board to consider the foreign lawyer applicant's experience in holding money on trust at proposed rule 6A(2)(iv).

First, a lack of experience in holding trust money can be dealt with at the point the practising certificate is issued. It should not preclude an exemption being granted. Any foreign lawyer applicant who wishes to practise as a principal of a legal practice must first complete an accredited practice management course, which covers dealing with trust money and trust records. Accordingly, inclusion of this specific requirement appears to be an unjustified barrier to entry.

Second, many, if not all, local legal practitioners seeking admission are unlikely to have had practical experience dealing with trust money and trust records. The only experience will be that acquired during practical legal training. Requiring experienced foreign lawyers to have had practical experience in holding trust money would therefore place a steeper admission perquisite on foreign lawyers than for locally qualified practitioners.

Cessation of conditional admission

We are aware of instances in the past where there has been uncertainty as to the appropriate process for foreign solicitors whose period of conditional admission has lapsed. For example, whether such persons are entitled to renew their practising certificate or must once again apply to be admitted into the NSW legal profession. We therefore suggest that the draft Council guideline be revised to contemplate the cessation of conditional admission.

Implementation

It is important that these changes are closely monitored to ensure that they lead to an increase in the uptake of admissions with exemptions, or conditional admission, which have long been under-utilised. Given the critical labour issues facing the profession, the impact of the changes should be closely monitored for a short period, and if there is no improvement, further consideration should be given to more comprehensive reform.

If you or your team have any questions or require any further information, please contact Bobbie Wan, Team Leader, Professional Support and Regulatory Policy at bobbie.wan@lawsociety.com.au or (02) 9926 0158.

Yours sincerely

Cassandra Banks
President

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22 June 2022

Dear Megan

Summary of workshops to address barriers to foreign lawyers practising in Australia

In my letter to you dated 18 May 2022, I foreshadowed that the Law Society would be hosting workshops with several law firms to discuss proposals we have developed to address barriers to foreign lawyers practising in Australia.

I am pleased to inform you that the workshops were well received by representatives of the legal profession and we wish to share with you their feedback, as well as our proposals which we have now further honed following consultation.

Just under 20 large and medium sized law firms attended our workshops held on the 19th and 24th of May 2022. In relation to the current employment market, these firms expressed:

- More and more Australian lawyers are interested in going overseas, particularly to the US. The demand from the US has also had indirect effects on the Australian legal market, as US law firms pulling from the London market has led to UK firms increase its demand for Australian lawyers.

- Now that COVID restrictions are relaxing, many Australian practitioners are going overseas for one to two years to see family, and their positions are difficult to backfill.

- The lack of overseas lawyers coming from overseas has increased demand for local lawyers, such that mid-sized firms are now competing with large firms for candidates. Even firms who did not previously look to hiring foreign lawyers are now keen to recruit from the overseas market.

- Australian law firms are having difficulty finding the right candidates locally and are therefore keen to recruit well qualified lawyers overseas, even for areas that did not typically in the past have much appetite for foreign lawyers, such as litigation and employment law. Law firms are now having to look more broadly to find the right candidate.

After discussing this feedback from the workshops, the Council for the Law Society felt it important to emphasise that the issues affecting the profession are both current and acute, with the impacts being felt across the profession. The Council therefore considers there is an urgent need to progress these reforms expeditiously, and preferably this year.

Proposal 1 - Rectify the use of conditional admission

As stated in my previous letter, the Law Society is keen to have conditional admission rectified so that its application can be used by Designed Local Regulatory Authorities (**DLRAs**) to foreign lawyers seeking local admission. We suggest that this may be done by amending section 17 of the Uniform Law to allow a DLRA to recommend a compliance certificate to be provided to a foreign lawyer who has not completed their academic and or training prerequisites, provided that:

- appropriate conditions are placed on their compliance certificate under s 20 of the Uniform Law, for example, that the foreign lawyer:
    - complete the remaining academic requirements, and
    - is supervised by an appropriately qualified Australian practitioner until those qualifications are completed, and
- they are a fit and proper person to be admitted to the Australian legal profession.

This proposal may also require a revision to be made to the LSC's proposed General Rule 11A to provide that section 20 of the Uniform Law may be applied to conditionally admit foreign lawyers who have not yet completed their prerequisite requirements for a compliance certificate as described by section 17(a) of the Uniform Law.

This proposal will also likely require careful consideration of a number of factors to ensure that it is operational, including, for example:

- that the conditions imposed on admission by the Court are congruent with Uniform Law definitions
- that definitions imposed by the admissions bodies are able to be replicated by DLRAs, noting the limitations in Rule 16
- that the duration of conditional admission is appropriate and there is consistency with the issuance of practising certificates
- costs associated with revoking conditions of admission are not a barrier to seeking removal.

It is important to note that the purpose of this proposal is not to create a new pathway for admissions or relax existing admission requirements for foreign lawyers. Rather, the intent is to rectify the admission process so that admitting authorities are empowered to use section

20 as intended, allowing foreign lawyers with requisite experience to obtain conditional admission. It is not envisaged that implementation of this proposal would restrict the discretion of admitting authorities or limit their ability to refuse the provision of a compliance certificate to inappropriate candidates.

Proposal 2 – Temporarily expand the scope of practise for Australian-registered foreign lawyers in Australia without being admitted in Australia.

Workshop participants were particularly interested in the possibility of broadening the scope of practice for Australian-registered foreign lawyers without the need for admission. The implementation of this proposal would of course be accompanied by appropriate restrictions and conditions. We also suggest placing a limitation period of three years with an option to extend for an additional 12 months if reasonably required.

Currently, very few firms (if any) rely on the limited exemptions in section 69 of the Uniform Law that enable an Australian registered foreign lawyer to give advice on Australian law that is necessarily incidental to the practise of foreign law.

Law firms expressed to us the view that:

- Many foreign lawyers do not seek admission as they do not intend on staying beyond 3 years when they first apply to work in Australia
- The admissions process is administratively burdensome and arduous
- Foreign lawyers are recruited to work in specific practices, such as mergers and acquisitions, banking and finance, and are not required to complete the Australian Priestly 11 to do their job well. Such lawyers are also highly unlikely to stray from the areas of practice for which they were recruited
- Foreign lawyers working for an Australian firm do not intend on practising foreign law

The conditions that should be placed by the DLRA in allowing an Australian-registered foreign lawyer to practise in a limited area in Australia include that the Australian registered foreign lawyer:

- is in the employ of an Australian law firm that has an DLRA approved program to oversee the advice provided by the foreign lawyer
- the foreign lawyer should identify in external communications they are a foreign registered lawyer who relies on the new exemption
- prior to commencing practice in Australia, the foreign lawyer's employer informs the DLRA of the area of work or specified project that the foreign lawyer will be engaged to do, and these details are noted on the foreign lawyer's Australian-registration certificate

- cannot appear in court without seeking leave, and
- is limited to using this new provision to practise in Australia for a total of three years, subject to the extension outlined above.

Importantly, this does not allow foreign lawyers to establish their own practice, or provide an alternative path-way to provide full practice rights after the three year period, without them gaining either full admission or conditional admission.

If progressed, this proposal will require close consideration of a number of issues, including ensuring supervision requirements do not present a barrier for more senior practitioners, how the 'DLRA approved program' suggested above would be regulated or monitored and professional indemnity requirements, to name a few.

We are of the view that it would be optimal for both of our proposals to be considered for implementation as soon as possible. Of course, any proposals for legislative reform in this area must ensure that consumers of legal services are adequately protected. However, easing barriers to foreign lawyers will bring significant benefits to the legal profession as a whole, including ensuring that the NSW legal profession continues to be known as a centre of excellence.

In view of the urgency of this matter, I have also provided a copy of this correspondence to the Attorney General, the Hon Mark Speakman MP SC.

I look forward to discussing our proposals in more detail with you. In the meantime, if you have any questions, please do not hesitate to contact Bobbie Wan, Team Leader, Professional Support and Regulatory Policy, at bobbie.wan@lawsociety.com.au or (02) 9926 0158.

Yours sincerely

Joanne van der Plaat
President