

Ethical Development During Supervised Legal Practice

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I INTRODUCTION

This paper discusses the potential for, and challenges associated with, the ethical development of junior lawyers in their early years of practice. Supervised Legal Practice is a statutory requirement in all Australian states and territories where newly admitted lawyers must work as an employee under supervision for a prescribed period. The duration of this prescribed period depends on the nature of pre-admission practical legal training and is two years (for those who completed a PLT course) or 18 months (for those who completed a traineeship or articles of clerkship).

The intended purpose of Supervised Legal Practice was a further stage of practical legal training, and it has been dubbed “the new articles”.² Despite this, the intended purpose has never been fully realised. The potential of this crucial early stage for ethical development appears to be stymied by a commercially driven legal sector where supervisory issues are impacted by billable hour regimes. Meanwhile, there is a growing realisation ‘that professional norms of behaviour are formed in large part through new lawyers’ experience of the legal community in which they come to practise’.³

This paper will begin with a brief overview of the statutory framework for Supervised Legal Practice in Part II. Part III will then consider existing literature in relation to the ethical development of law students and also the experience of junior lawyers in practice. Part IV will then report on part of the Queensland Legal Services Commission’s Supervision Practices Check conducted in 2013. Part V will then introduce supervision scholarship from other professional disciplines with a focus on the functions of supervision which, according to some scholars, includes assisting supervisees obtain “ethical maturity”.

Prior to moving on to the substantive aspects of this paper, an important distinction should be made between “Supervised Legal Practice” and the more general “Duty to Supervise”. The Duty to Supervise and Supervised Legal Practice have, at times, been lumped together as if they are one and

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² Jeff Giddings and Michael McNamara ‘Preparing Future Generations of Lawyers for Legal Practice: What’s Supervision Got to Do With It?’, (2014) 37(3) *University of New South Wales Law Journal* 1226, 1236.

³ Vivien Holmes et al, ‘Practising Professionalism: Observations from an Empirical Study of New Australian Lawyers’ (2012) 15 *Legal Ethics* 29.

the same.⁴ However, this paper proceeds on the basis that they are quite different. In particular, the Duty to Supervise is a general aspect of a lawyer's professional responsibility associated with management and oversight of all legal work for which they have responsibility. The Duty to Supervise features in professional conduct rules⁵, however, it exists independently from codified such rules. It stems from a 'lawyers' individual personal responsibility to a client'⁶ and is described in terms of being 'vigilant'.⁷ The duty to supervise is closely related with other civil liabilities in contract⁸, tort⁹ and equity¹⁰ as well as statutory obligations to employees.¹¹ The duty to supervise is also closely related to, and inseparable from other misconduct matters.¹²

In contrast, Supervised Legal Practice is best viewed as a continuation of legal training for newly admitted lawyers¹³, and not merely as a process of management and oversight. There is, of course, a natural overlap, where supervisors need to fulfil their "Duty to Supervise" obligations in relation to the legal work completed by a junior lawyer completing Supervised Legal Practice. However, the goals associated with Supervised Legal Practice are broader than those associated with the supervision of other employees such as a paralegal on one end of the spectrum, or a senior employed solicitor on the other side of the spectrum.

In this sense, Supervised Legal Practice has two overlapping ethical dimensions. First, the supervisor has a duty to provide the necessary supervision (Supervision Ethical Dimension). The Supervision Ethical Dimension is a complex and understudied area which essentially involves asking the question of what is effective or appropriate supervision.¹⁴ Secondly, there is a relationship between supervisor and supervisee which can, and should, assist the supervisee's ethical development.

⁴ See for example, Queensland Law Society, 'Guide to Effective Supervision in Legal Practice'. This guide does not clearly distinguish between supervision for the purpose of Supervised Legal Practice and supervision generally.

⁵ See for example, Australian Solicitors Conduct Rules r 37.

⁶ G E Dal Pont, *Lawyers' professional responsibility* (Thomson Reuters, 2013) 816

⁷ Ibid

⁸ Legal practitioners are subject to claims for breach of contract in performance of their retainer and negligence claims for failing in their duty of care. For an overview, see Ysaiah Ross, *Ethics in Law: Lawyers Responsibility and Accountability in Australia* (LexisNexus Butterworths, 2010) 308-337

⁹ A legal practitioner employer, like other employers, may be vicariously liable for actions of their employees. See G E Dal Pont, above n 6, 667

¹⁰ See Stephen Corones, Nigel Stobbs and Mark Thomas, *Professional responsibility and legal ethics in Queensland* (Lawbook Co. Thomson Reuters, 2008)

¹¹ The growing importance of 'psychological risk factors' in complying with occupational health and safety legislation need to be considered. For an overview of this concept in the legal practice environment, see Rebecca Michalak, *Beyond slips, trips and falls* (2013) 33(4) *Proctor* 22.

¹² In particular the issue of 'supervision of billing' which has arose in a NSW disciplinary case; *Legal Services Commissioner v Keddie* [2012] NSWADT 106

¹³ For further justification, see below at Part II(C).

¹⁴ The author is currently completing doctoral research which addresses significant aspects of the Supervision Ethical Dimension.

(Ethical Development Dimension). This paper is primarily concerned with the, less recognised, Supervisee Ethical Development Dimension.

II SUPERVISED LEGAL PRACTICE: THE STATUTORY FRAMEWORK

A *Legal Education, Supervision and Supervised Legal Practice*

The historical link between legal education and supervision has been outlined in detail elsewhere.¹⁵ The last 250 years has seen the apprenticeship-style, learning- from-experience, component of legal training heavily diminished and then shifted from the pre-admission period to the post-admission period. The current legal education framework is arranged in such a way that this component of legal training occurs during what is known as Supervised Legal Practice.¹⁶ However, there does not appear to be any structured, profession-wide arrangements, which foster training and development during Supervised Legal Practice. It is for this reason Supervised Legal Practice has been dubbed “the new articles”. Supervised Legal Practice places junior lawyers in the anomalous situation of being technically qualified and able to call themselves a lawyer. However, their practising rights are conditional upon completing a period of Supervised Legal Practice. Most junior lawyers are unlikely to have developed the practical know-how to legitimise their qualified, practising lawyer status.

B *The Statutory Condition*

Supervised Legal Practice is a creature of statute found in the Legal Profession Acts in all states and territories.¹⁷ For the vast majority of newly admitted lawyers, those who have completed a PLT course, the period of supervised practice is two years. For those who have completed a traineeship /articled clerkship, the period is 18 months.

The Legal Profession National Law, which operates in the two largest states New South Wales and Victoria, defines Supervised Legal Practice as:

legal practice by a person who is an Australian legal practitioner—

(a) as an employee of, or other person working under supervision in, a law practice, where—

¹⁵ Giddings and McNamara, above n 2, 1227-1231

¹⁶ Ibid, 1236-1237

¹⁷ *Legal Profession Act 2006* (ACT) s 50; *Legal Profession Regulation 2007* (ACT) s 13; *Legal Profession Act* (NT) s 73; *Legal Profession Act 2007* (Qld) s 56; *Legal Profession Act 2007* (Tas) s 59; *Legal Profession Act 2008* (WA) s 50. In SA, the requirement is not contained in the *Legal Practitioners Act 1981* (SA) but in the *Rules of the Legal Practitioners Education and Admission Council 2004* (SA) r 3.1. For Victoria and New South Wales, see Legal Profession Uniform Law s49.

- (i) at least one legal practitioner associate of the law practice is an authorised principal; and
- (ii) the person engages in legal practice under the supervision of an authorised principal referred to in subparagraph (i); or
- (b) as a principal of a law practice (other than a community legal service), where the person engages in legal practice under the supervision of an authorised principal of the law practice; or
- (c) as a corporate legal practitioner or government legal practitioner, where the person engages in legal practice under the supervision of a person who holds, or is eligible to hold but is exempted from holding, an Australian practising certificate authorising the holder to supervise legal practice by others; or
- (d) in a capacity or in circumstances specified in the Uniform Rules for the purposes of this definition;¹⁸

The Legal Profession Uniform Rules also add

For the purposes of paragraph (d) of the definition of supervised legal practice in section 6 (1) of the Uniform Law, supervised legal practice in the case of an Australian legal practitioner who is an employee of a law practice (or who, though not an employee of the law practice, is working under supervision in a law practice) includes supervision by an employee of the law practice who holds an Australian practising certificate authorising the holder to supervise legal practice by others.¹⁹

The Legal Profession Uniform Rules also contain prescriptive rules in relation to how the relevant period (two years or 18 months) should be calculated²⁰. Overall, the definition of Supervised Legal Practice is tautological and hinges of the meaning of “supervision”. Supervision is not defined nor is there any supervisory framework other than the limited provisions outlined above.²¹ Furthermore, the term ‘Supervised Legal Practice’ has not been the subject of any useful, in terms of understanding the nature of supervision, judicial consideration.²²

¹⁸ *Legal Profession Uniform Law (NSW)* s 6.

¹⁹ *Legal Profession Uniform General Rules (NSW)* r7

²⁰ *Legal Profession Uniform General Rules (NSW)* r14

²¹ A definition of supervision, in relation to Supervised Legal Practice, is also absent in corresponding legislation in other Australian jurisdictions: *Legal Profession Act 2006 (ACT)* s 50 and *Dictionary and Legal Profession Regulation 2007 (ACT)* s 13; *Legal Profession Act (NT)* s 73 and s4 (Definitions); *Legal Profession Act 2007 (Qld)* s 56 and Schedule 2; *Legal Profession Act 2007 (Tas)* s 59 and s4 (Interpretation); *Legal Profession Act 2008 (WA)* s 50 and s3 (Terms Used). In SA, the requirement is not contained in the *Legal Practitioners Act 1981 (SA)* but in the *Rules of the Legal Practitioners Education and Admission Council 2004 (SA)* r 3.1 and r 1 (Preliminary). The South Australian rules use the term ‘supervised practice’.

²² The meaning of the “legal practice” has been considered in Queensland (*Legal Services Commissioner v Walter* [2011] QSC 132) and in Victoria (*Victoria Ltd v Maric & Anor* [2008] VSCA 46 (19 March 2008) and *Cornall v Nagle* [1995] 2 VR 188). In addition, the Supreme Court of the ACT examined s 50 of the *Legal Profession Act 2006 (ACT)*. However, the Court was not required to consider the provision in sufficient depth to make its finding useful to the meaning of supervision. The Court was only required to make a finding that the ‘the holder of an unrestricted practising certificate must be a person who is suitable to conduct a law practice as a principal and, other than as a supervised partner, to be qualified to engage in unsupervised legal practice’: *Barlow v Law Society of the Australian Capital Territory* [2013] ACTSC 68, [73] (Refshauge, Burns and Marshall JJ). Finally, there is a Tasmanian case dealing with an application for an exemption to the supervised legal practice period. However, this case focussed on the issue of whether the condition applies to a person wishing to

Given the lack of any clear statutory or judicial guidance on the issue, the Supervised Legal Practice condition is best understood by looking at the purpose of these provisions as outlined in policy documents in circulation prior to statutory implementation.

C *Interpreting the Statutory Requirement: A Purposive Approach*

The current Supervised Legal Practice regime is best understood in light of the fact that, in most instances, it comes after a practical legal training (PLT) program and PLT programs have virtually replaced articles of clerkship. For example, when recommending the replacement of articles of clerkship with PLT programs, the Martin Report accepted: ‘...the need for actual and supervised office practice in the handling of clients’ affairs’ still existed.²³

The Martin Report actually adopted the fairly natural stance that ‘apprenticeship training *by itself* is unsatisfactory, and that such education is inefficient’.²⁴ Even still, the instigation of PLT courses has led to opposition towards apprenticeship modes of training on grounds which are ‘philosophically’²⁵ motivated. Such opposition appears to relate to pre-admission supervised workplace training as an alternative to a PLT program and their stance on post-admission Supervised Legal Practice is unclear.

The notion that PLT programs were to be supplemented by apprenticeship / supervised training is also reflected elsewhere. In 1994, the Law Council of Australia published a Blueprint for the Structure of the Legal Profession which positioned Supervised Legal Practice as a second stage of practical legal training and envisaged that it would include a ‘program of professional training’.²⁶

The Blueprint envisaged that professional responsibility would be a significant aspect of the type of professional training occurring during Supervised Legal Practice. The Blueprint sets out a number of principles in relation to post-admission supervised work. Particularly relevant for present purposes is Principle 8 which provides that:

practise as barrister and did not consider the meaning of “supervised”, see: *Cinar v Law Society of Tasmania* [2014] TASSC 44 (Blow CJ)

²³ Committee on the Future of Tertiary Education in Australia, Parliament of Australia, *Tertiary Education in Australia: Report* (1964) vol 2, (*‘Martin Report’*) [11.69].

²⁴ *Ibid* [11.50] (emphasis added) (citations omitted).

²⁵ College of Law *Submission to the Legal Services Council Admissions Committee* (30 January 2015) 7.

²⁶ Law Council of Australia, *Blueprint for the Structure of the Legal Profession: A National Market for Legal Services* (1994) (*‘Blueprint’*) 8–9.

Professional Training,

A lawyer must demonstrate a thorough understanding of the principles of professional responsibility evidenced in a knowledge and understanding of the:

- legislation which regulates lawyers in the jurisdiction in which the lawyer seeks an unrestricted right to practise,
- Acts, rules and regulations governing trust and controlled monies;
- relevant codes of conduct;
- nature of the fiduciary relationship with clients;
- confidential nature of the relationship with the client, including the concept of legal professional privilege;
- a lawyer's duties to the Court,
- practices governing relations between lawyers; and
- practices governing relations with other professions and third parties.²⁷

This paper does not necessarily seek to endorse Principle 8 as a curriculum or template for use during Supervised Legal Practice. Rather this is included to support the argument that one of the intended purposes of the current statutory Supervised Legal Practice regime was to assist students understand principles of professional responsibility. Despite this clear intention, there are currently no clear indications that Supervised Legal Practice is currently used on a profession-wide basis for systemized and thoughtful training in professional responsibility and/or the ethical development of supervisees. Overall, the extent to which a junior lawyer is presented with support in ethical development will depend on individual circumstances. This is despite growing empirical evidence highlighting the impact early workplace experiences have on professionalism and the relationship between supervision and wider ethical issues. This empirical evidence is considered below in Part III, Section B.

III BEYOND TEACHING ETHICS: UNDERSTANDING THE EXPERIENCE OF JUNIOR LAWYERS

A *Ethical Development During Law School and Beyond*

In the past decade there has been a renewed focus on teaching ethics in legal education in Australia and there is now a substantial body of academic literature covering the topic.²⁸ A significant

²⁷ Ibid 11

²⁸ Kim Economides and Christine Parker 'Roundtable on Legal Ethics in Legal Education: Should It Be a Required Course?' (2011) 14(1) *Legal Ethics* 109-124; Kieran Tranter, Francesca Bartlett, Lillian Corbin, Mike Robertson and Reid Mortensen (eds) *Reaffirming Legal Ethics: Taking Stock and New Ideas* (Routledge 2010); Francesca Bartlett, Reid Mortensen and Kieran Tranter (eds) *Alternative Perspectives on Legal Ethics and the Legal Profession* (Routledge, 2010); Mike Robertson,

component of that literature considers the place of legal ethics in the law degree curriculum as well as appropriate methods for teaching ethics in the University setting. In this regard, despite the hard work of legal academic and practitioners alike over the preceding decades, the Law Admissions Consultative Committee (“LACC”) has recently raised the possibility of scrapping legal ethics from the undergraduate curriculum.²⁹ This proposal has been met with widespread opposition as documented in a number of submissions to the LACC.³⁰

Included in those submissions are comments that:

- a review of the law curriculum should address ‘the appropriate links between the different stages of legal education. Practical Legal Training (PLT) should be complementing and building on coverage of fundamental concepts in the LLB/JD phase...’ AND
- ‘engagement with ethical issues is far too important to be left until the PLT stage of legal education’³¹

This paper endorses that view and goes one step further to assert that there is significant scope for a capstone stage of ethical development during Supervised Legal Practice. However, such development is most likely to occur by experiencing and reflecting on ethical theory and professional responsibility issues which have already been introduced in the academic component and then contextualised in PLT.³²

Beyond the issue of the place of legal ethics in the academic curriculum, there are two other lingering issues regarding teaching legal ethics relevant to the present discussion. Neither of these issues are new but both highlight the “Achilles heel” of a system dominated by teaching ethics in the classroom, or online, as the case may be. Writing nearly a decade ago Rhodes describes these issues as follows:

Lillian Corbin, Kieran Tranter and Francesca Bartlett (eds) *The Ethics Project in Legal Education* (Routledge, 2010); Ross Hyams, 'On Teaching Students to Act Like a Lawyer: What Sort of Lawyer' (2008) 13 *International Journal of Clinical Legal Education* 21; Josephine Palermo and Adrian Evans, 'Australian law students' values: how they impact on ethical behaviour' (2005) 15(1-2) *Legal Education Review*; Adrian Evans and Josephine Palermo 'Preparing Australia's future lawyers: an exposition of changing values over time in the context of teaching about ethical dilemmas' (2006) 11(1), *Deakin Law Review* 103.

²⁹ Law Admissions Consultative Committee *Review of Academic Requirements for Admission to the Legal Profession* <http://www1.lawcouncil.asn.au/LACC/images/pdfs/01.12.14_-_Review_of_Academic_Requirements_for_Admission.pdf>

³⁰ Law Admissions Consultative Committee, Law Council of Australia *Review of Academic Requirements* <<http://www1.lawcouncil.asn.au/LACC/index.php/review-of-academic-requirements>> See for example, submissions by: The Honourable Brian Sully QC, Legal Ethics Academic Lawyers – Australian National University; Griffith Law School; Queensland Law Society and Law Institute of Victoria.

³¹ Ibid submission by Griffith Law School.

³² Unfortunately at present it is unclear whether legal ethics and professional responsibilities are effectively contextualised during PLT. The LACC proposal seem partially based on a notion that the same thing is being taught at the Academic Stage and then during PLT.

- 'The consensus among experts in professional responsibility is that courses in the subject are among the most difficult to teach'.³³
- 'The best way to improve ethical judgment is generally through engagement with real problems, involving real clients'³⁴

The second issue, in particular, resonates well with clinical educators who have made significant inroads to linking ethical training with real practice.³⁵ This literature is likely to provide useful insights in relation to realising the potential for ethical development during Supervised Legal Practice. However, newly admitted lawyers face a number of systemic issues which are quite different to those of the later year law student completing a structured clinical course with appropriate support mechanisms.³⁶ Therefore, in addition to revisiting the pedagogical insights provided by the clinical legal education literature in relation to teaching ethics, it is necessary to consider the issues facing newly admitted lawyers stemming from the practice environment and how these issues impact ethical issues. Section B below provides an overview of some these practice-based issues.

B *Professional Development of Newly Admitted Lawyers*

This section outlines some recent empirical studies which reveal certain experiences of junior lawyers. The socialising effects law school has on students is well known.³⁷ However, the early years of practice may be just as, or perhaps, even more important in terms of forging professional identities and encouraging ethical behaviour.

A study by Holmes et al³⁸, which included interviews with 11 newly admitted legal practitioners in the Australian Capital Territory, identified that appropriate supervision is crucial to development of

³³ Deborah L. Rhode, 'Teaching Legal Ethics' (2007) 51(4) *Saint Louis University Law Journal* 1043, 1047

³⁴ *Ibid*, 1052.

³⁵ See for example: Anna Cody, 'What Does Legal Ethics Teaching Gain, if Anything, From Including a Clinical Component?' (2015) 22(1) *International Journal of Clinical Legal Education*; Barry Yau 'What's Ethics Got to Do With It?' Requiring Students to be Cognisant of Ethical Parameters in Commercial Practice' (2013) 6 *Journal of the Australasian Law Teachers Association*; Tony Foley et al, 'Teaching professionalism in legal clinic—what new practitioners say is important' (2012) 17 *International Journal of Clinical Legal Education* 12. Although the clinical approach to teaching legal ethics has widespread support, it is not without sceptics. For an overview of the literature covering both sides of the argument see: Kevin Kerrigan, 'How Do You Feel about This Client-A Commentary on the Clinical Model as a Vehicle for Teaching Ethics to Law Students' (2007) *Int'l J. Clinical Legal Educ.* 7, 8.

³⁶ For example, legal externships are the form of clinical legal education which most closely resembles early legal practice. However, these courses are often structured in a way where the academic supervisor provides additional support by monitoring the supervision they receive and in the form of legal ethics seminars and as a mediator between supervisor and supervisee should any disputes arise.

³⁷ For an overview of the empirical evidence, see: Joshua J. A. Henderson and Trevor C. W. Farrow, 'The Ethical Development of Law Students: An Empirical Study' (2009) 72(1) *Saskatchewan Law Review* 75, 95

³⁸ Holmes et al, above n3, 53

autonomy and task competence. This finding should be considered in light of that study's overall finding that:

new lawyers can and do incorporate the more traditional notions of professionalism into the professional identities they construct for themselves, *if they are so guided by the ethical and professional environments in which they practise.*(emphasis added)³⁹

This presents both challenges and opportunities for Supervised Legal Practice. This paper argues that not only is supervision in the early years important in terms of autonomy and competence but goes to the very core of training in professional responsibility and ethical development. Firstly it should be remembered that competence itself is a central aspect of lawyers' professional responsibility⁴⁰ and ethical behaviour. Secondly, as already realised by legal ethics teachers, ethical matters are inseparable from the practise of law itself.⁴¹ In this case, if supervision is the appropriate medium for developing autonomy and task competence, supervision is also the appropriate medium for working through ethical issues that relate to actual experiences.

However, previous research indicates that junior lawyers face structural problems which may hinder their ability to work through ethical issues with their supervisor as part of their day to day work. In particular there is evidence that:

- 'Senior lawyer understandings of the integrity of the "ethical community" of their firm, or of the bureaucratic supports for ethical behaviour, are not necessarily experienced the same way by more junior lawyers.'⁴²
- Junior lawyers feel 'less personally able to raise, discuss, and resolve ethical issues than the most senior lawyers'⁴³
- Lawyers who experience ethical concerns about billing with supervisors generally do not handle such concerns by discussing the matter with their supervisor.⁴⁴ This issue is significant for two at least reasons. Firstly, junior lawyers seem uncomfortable discussing a pervasive contemporary

³⁹ Ibid, 55.

⁴⁰ G E Dal Pont, above n 6, 109-111

⁴¹ Rhode, above n 34.

⁴² Christine Parker and Lyn Aitken, 'Queensland Workplace Culture Check: Learning from Reflection on Ethics inside Law Firms' (2011) 24 *Geo. J. Legal Ethics* 399, 429

⁴³ Ibid 430

⁴⁴ Christine Parker and David Ruschena, 'Pressures of Billable Hours: Lessons from a Survey of Billing Practices inside Law Firms' (2011) 9 *U. St. Thomas L.J.* 619, 642. These indications are stronger in light of similar findings by Fortney⁴⁴ in relation to survey data from 487 law firm associates in Texas. See Susan Saab Fortney, 'Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements' (2000) 69 *UMKC L. Rev.* 239. Fortney identified that supervisees were reluctant to discuss billing concerns with supervisors and that supervisors may not be properly scrutinising associate billing practices (at 256-257). Fortney also argued that the pressure of billable hours is associated with a decline in mentoring and supervision because training and supervision activities are essentially an unprofitable and timely opportunity cost (at 281-283).

legal issue with their supervisors.⁴⁵ Secondly, billing practices appear to be viewed as an opportunity cost where supervision loses out.

- ‘Supervisory activities do not appear to be built into routines of legal practice and are often viewed as subservient to fee-earning duties’.⁴⁶
- Generally supervisors are insufficiently prepared for providing effective supervision such that there is a need for better ‘training of supervisors’.⁴⁷

This previous research summarised in the five dot points immediately above stem from a series of surveys or “ethics checks” conducted by the Queensland Legal Services Commission.⁴⁸ The last two of those four points, relate to research reporting on one of those ‘ethics checks’, the QLSC Supervision Practices Check 2013 (the “QLSC 2013 Supervision Survey”). The next part of this paper reports on additional aspects of the QLSC 2013 Supervision Survey which are particularly relevant to the present discussion.

IV THE QLSC SURVEY – ETHICS AND SUPERVISION

A *The Focus of Supervision*

Question 22 asked supervisors to self-report on what they considered was the focus of their supervision. Respondents were asked to rank a number of factors using a Likert-type scale. The means for each factor are shown in Table 1 below. Overall, “ethical behaviour” ranked highly, third overall below “potential risks”, and “client management and service”.

Table 1: Question 22. (Supervisor Question) To what extent do you focus on the following in your supervision? 1 (not at all) to 5 (a great deal)

	N	Minimum	Maximum	Mean	Std. Deviation
Potential risks	121	1.00	5.00	4.4959	.70857
Client relationship management and service	120	3.00	5.00	4.4917	.60801
Ethical behaviour	120	1.00	5.00	4.4750	.88842

⁴⁵ ‘Systemic billing malpractices’ are arguably the single most important ethical issues facing the legal profession today. See for example Queensland Legal Services Commission Annual Report 2012-2013

⁴⁶ Giddings and McNamara above n 2, 1255

⁴⁷ Ibid

⁴⁸ For an overview of the ‘ethics checks’ see Queensland Legal Services Commission *Ethics checks for law firms* <<https://www.lsc.qld.gov.au/ethics-checks>> For further information regarding the use of these “ethics checks” in academic-oriented research, see Parker and Aitken above n 42, 409-418

Timely processing of matters	120	2.00	5.00	4.2917	.70289
How your supervisee is coping	120	1.00	5.00	4.0917	.86962
Application of legal reasoning	118	1.00	5.00	4.0085	1.04182
Compliance with your firm's systems	121	1.00	5.00	3.9256	.96752
Productivity and time recording	119	1.00	5.00	3.4622	1.07978
Billing	118	1.00	5.00	3.2881	1.21319

This high ranking of “ethical behaviour” should however be considered in conjunction with the results of Question 43 which posed a similar question to supervisees⁴⁹ in relation to what they perceived as the focus of the supervision they receive. The results are presented in Table 2 below. Overall, supervisees perceived “ethical behaviour” to be less of a focus. This indicates a possible discord in relation to the focus intended by the supervisor and the perceptions of supervisees.

Table 2: Question 43 (Supervisee Question) To what extent does the supervision you receive focus on the following? Please choose from 1 (not at all) to 5 (a great deal)

	N	Minimum	Maximum	Mean	Std. Deviation
Potential risks	170	1.00	5.00	3.7118	1.15865
Client relationship management and service	167	1.00	5.00	3.5988	1.24213
Application of legal reasoning	170	1.00	5.00	3.4529	1.40608
Timely processing of matters	169	1.00	5.00	3.4260	1.19355
Compliance with your firm's systems	170	1.00	5.00	3.3412	1.24085
Productivity and time recording	169	1.00	5.00	3.1834	1.34809
Ethical behaviour	167	1.00	5.00	3.1078	1.36669
Billing	166	1.00	5.00	3.0783	1.47295
How your supervisee is coping	165	1.00	5.00	2.6000	1.26780

B *The Aims of Supervision*

Question 53 was a similar type of question, posed to both supervisors and supervisees, to rate the importance of a number of proposed aims of supervision. The results are presented in Table 3 below. “Promoting ethical practice” rated highly, third after “Enhancing quality” and “Risk management”. As this question was completed by all respondents, it was possible to compare results based on supervisory status. See Table 4 below which shows a cross-tabulation of the “Promoting Ethical Responses” by supervisory status. This cross-tabulation is set out in Table 4

⁴⁹ This survey did not direct questions at specific pairs of supervisor-supervisee. As such the supervisees answering Question 43 were not necessarily the supervisees of those answering Question 22.

below. The results provide an indication that overall supervisors rated promoting ethical practice more importantly than did supervisees.⁵⁰

Table 3 – Question 53 (Supervisor and Supervisee). How would you rate the importance of the following possible aims for supervision? 1 (not very important) to 5 (very important)

	N	Minimum	Maximum	Mean	Std. Deviation
Enhancing quality – this could relate to accuracy, timeliness, value for money, ethical soundness or suitability for task	209	1.00	4.00	3.5885	.55735
Risk management	210	1.00	4.00	3.5810	.61529
Promoting ethical practices	209	1.00	4.00	3.5598	.59446
Encouraging work practices that are sustainable in the long-term	209	1.00	4.00	3.5455	.58761
Discouraging bad workplace conduct such as bullying	210	1.00	4.00	3.5048	.67948
Mentoring junior staff	210	1.00	4.00	3.4429	.65554
Monitoring workloads	210	1.00	4.00	3.3810	.62455
Managing employee wellbeing	210	1.00	4.00	3.3238	.71879
Fostering resilience in employees	209	1.00	4.00	3.2440	.72905
Identifying and supporting staff facing personal difficulties	209	1.00	4.00	3.0813	.80149

Table 4 - Promoting Ethical Practices Cross Tabulation by Supervisory Status

	Promoting ethical practices				Total
	Not very important	Neutral	Important	Very important	
Both - I supervise staff and I am supervised by others			35.0%	65.0%	100.0%
I supervise others but am not supervised		2.2%	30.4%	67.4%	100.0%
I am supervised and do not supervise others	1.0%	6.8%	36.9%	55.3%	100.0%

⁵⁰ This difference was not significant if the significance level is set at the commonly used significance level of 0.05. The result for the Chi Square test was: Pearson Chi Square 7.414; df 6; Asymp Sig. 0.284. However, given the overall lack of empirical evidence regarding ethical behaviour as a component of supervision, this association is significant to the extent that it is worthy of further consideration.

Total	0.5%	3.8%	34.9%	60.8%	100.0 %
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C Key Indications

Overall these results point towards a general acknowledgement that ethical practice is an important component of supervision. This in itself is encouraging in terms of realising the potential of Supervised Legal Practice as a medium for ethical development. However, beyond first glance, these results suggest there remains much to be done in order to maximise the potential for ethical development during Supervised Legal Practice. There is at least three reasons was this is so.

Firstly, as outlined above, there appears to a discord between the perceptions and attitudes of supervisors and supervisees. Overall, supervisors appear more positive in terms of what supervision can and does achieve in relation to ethical behaviour and promoting ethical practices. Practically, it is irrelevant if supervisors think there supervision is aimed at promoting ethical practice, if this view is not shared as strongly by supervisees. After all, it is supervisees who are the recipients of the perceived ethical development, and it is difficult to see if this aim can be achieved if there, if supervisees are unclear that they are receiving it.

Secondly, while supervisors encouragingly rate ethical practice/ ethical behaviour relatively high on the agenda, it is important to consider the factors which are highest on the agenda. In terms of the perceived 'focus' of their supervision, 'ethical behaviour' falls below 'potential risks' and 'client relationship management and service'.⁵¹ This result is consistent with the legal profession's prevailing risk-management approach to supervision.⁵² In addition, it also potentially raises fundamental ethical issues. While supervisors clearly need to ensure supervisees act in the client's best interests, this is not their paramount duty. Also, even though risk management can be associated with good practice, it is not illogical to view it as a means for protecting a firm's own interests. A cynical interpretation of the results of Table 1 would be to view the first aim of supervision as protecting the firm's interests, followed second by the relationship with the client, and then thirdly, ethical behaviour. Although, this paper doesn't necessarily suggest that this cynical interpretation is correct, it does highlight that this prioritising of other matters above ethical behaviour, is potentially incongruous with ethical practice.

⁵¹ See Table 1 above.

⁵² See Part V below.

Thirdly, these results need to be considered in the context of the previous research summarised above.⁵³In particular, the existing empirical evidence indicating problems in relation to how supervisees raise ethical issues, especially billing. Furthermore, supervision is not performed routinely and supervisors often lack training in supervision. If all these issues are engaged together then in order to maximise the potential for ethical development during Supervised Legal Practice, it seems that other factors, beyond recognition of ethics, need to be addressed. This paper argues that despite the superficial acknowledgement of ethical practice/ ethical behaviour being a feature of supervision, a more pervasive issue may be a lack of understanding in relation to the functions of supervision. In this regard, even though lawyers have been talking about supervision for hundreds of years,⁵⁴ there is a lack of any significant framework for understanding the nature and/or purposes of supervision.

Some of the problems associated with poor supervision of junior lawyers may, to the extent they are caused by the professions collective ethical frailties, only be rectified via a directive approach. In addition, this paper argues, the legal profession can take important lessons from other professions which have produced significant supervision scholarship. Part V, will provided an outline of some of the potentially relevant lessons for the legal profession in relation to using Supervised Legal Practice as a vehicle for ethical development.

V A FUNCTIONAL UNDERSTANDING OF SUPERVISION: A FORUM FOR DEVELOPING ETHICAL MATURITY

Except in the context of clinical legal education, the legal profession has largely treated supervision as a component of practice management, where the primary concerns are risk management, productivity and profitability.⁵⁵ Supervisory structures in contemporary practice management cater primarily for delegating, monitoring and checking. This same general treatment applies also to Supervised Legal Practice. Some State/Territory Law Societies have published Supervised Legal Practice policies or guidelines.⁵⁶ These guides deal predominantly with administrative matters such,

⁵³ See Part III(B) above.

⁵⁴ Giddings and McNamara, above n 2, 1227-1231

⁵⁵ *Ibid*, 1238.

⁵⁶ See: Legal Services Board of Victoria, *Supervised Legal Practice Rules 2006* <<http://www.lsb.vic.gov.au/documents/LSBSupervisedRules2006.pdf>>; Legal Services Board of Victoria, *Supervised Legal Practice Policy* (March 2012) <[http://www.lsb.vic.gov.au/documents/RRP_012_Supervised_Legal_Practice_Policy_V1_\(Mar_12\).pdf](http://www.lsb.vic.gov.au/documents/RRP_012_Supervised_Legal_Practice_Policy_V1_(Mar_12).pdf)>; Law Society of New South Wales, *Supervised Legal Practice Guidelines 2014* <<http://www.lawsociety.com.au/cs/groups/public/documents/internetregistry/661361.pdf>>;

Restorative – ‘encouraging emotional experiencing and processing’⁶¹

Normative – ‘case management and quality control issues’⁶²

The legal profession’s focus of monitoring, risk management and profitability are consistent with a focus on the ‘normative’ function of supervision. Recent legal professions scholarship⁶³ has identified the importance of effective supervision in relation to the formative function which is given, what appears to be, tokenistic treatment in professional guidelines.⁶⁴ However, it seems that the legal profession may have failed to fully recognise (if at all) the ‘restorative’ function of supervision.⁶⁵ Ethical issues and professional responsibility cannot easily be reduced solely to the ‘restorative’ function and the associated ‘emotional experiencing and processing’. In fact, given the relationship between ethics and competence, professional responsibility issues are likely to straddle all three functions. However, ‘combining the multiple functions is at the heart of good practice’.⁶⁶ Therefore, it is difficult to see how lawyers can supervise effectively, especially in terms of fostering ethical development, without acknowledging the ‘restorative’ function of supervision.

B *Towards Ethical Maturity*

According to Hawkins and Shohet, facilitating ethical development requires more than providing ad hoc mentoring, guidance, words of wisdom or other vague notions of support. They argue that it involves the following two ethical responsibilities:

- ‘The first ethical responsibility of supervision is to help the supervisee ethically reflect on their practice from both internal and external perspectives ...’⁶⁷
- ‘The second ethical responsibility is to help the supervisee not just resolve current ethical dilemmas, but also to use ethical challenges to develop their ethical maturity.’⁶⁸

In relation to the second responsibility, Hawkins and Shohet argue that developing ethical maturity involves more than giving specific advice in terms of the right course of action. To provide additional

⁶¹ Ibid

⁶² Ibid

⁶³ Holmes et al above n 3

⁶⁴ See above n 56

⁶⁵ As covered in Part IV above there is some indication that junior lawyers are not provided with the appropriate avenues to discuss ethical problems with their supervisor. In addition, poor supervision is associated with problems in relation to lawyers’ well-being and satisfaction, see: Colin James, ‘Lawyer Dissatisfaction, Emotional Intelligence and Clinical Education’ (2008) 18 *Legal Educ. Rev.* 123. James has identified: Most lawyers stress is related to management issues including poor quality mentoring and supervision. The legal workforce is highly mobile with failure of senior lawyers to guide or supervise junior lawyers as a common reason for attrition.

⁶⁶ Hawkins and Shohet, above n 58, 62

⁶⁷ Ibid

⁶⁸ Ibid

support, supervisors must first have an understanding of what is meant by ethical maturity. Carroll describes ethical maturity as follows:

Ethical maturity involves having the reflective, rational and emotional capacity to decide actions are right and wrong or good and better, having the resilience and courage to implement those decisions, being accountable for ethical decisions made (publicly or privately), and being able to learn from and live with the experience.⁶⁹

Carroll proposes the following five step model of ethical maturity:

1. Fostering ethical sensitivity and thoughtfulness (moral education)
2. Ethical discernment and decision making (moral judgment)
3. Ethical implementation (ethical capability and moral duty)
4. Ethical accountability (moral defence)
5. Ethical sustainability and peace (living with the ambiguities of ethical decision making)⁷⁰

Rather than prescribing a specific course of action for helping a supervisee at each step, Carroll seems to favour leaving it to individual supervisors to reflect on the relevant issues and devise the appropriate steps.⁷¹ As noted above, previous research has called for training of supervisors.⁷² This paper argues, more specifically, that such training, especially for those supervising junior practitioners, should cover, what Hawkins and Shohet have described⁷³ as, the two ethical responsibilities of supervision.

In addition, the handling of professional responsibility matters and ethical development as outlined in the arrangements for Supervised Legal Practice in other disciplines are also worthy of consideration. These are discussed briefly in the Part C immediately below.

C ARRANGEMENTS FOR SUPERVISED PRACTICE IN OTHER DISCIPLINES: LESSONS FROM PSYCHOLOGY

In Australia, three established health professions each have a system similar to Supervised Legal Practice, where junior practitioners are placed in the anomalous situation of technically being qualified, licensed or registered to practice, however, their practice rights are conditional upon

⁶⁹ Michael Carroll, 'Ethical maturity: Compasses for life and work decisions-Part I' (2011) 17(3) *Psychotherapy in Australia* 34, 41

⁷⁰ *Ibid* 41-43

⁷¹ Carroll does however, include a series of suggestions for each stage which were suggested by participants at a workshop he conducted – see Carroll, above n 69, Appendix 1.

⁷² See above n47 and surrounding text.

⁷³ See above n 67 and 68.

completing a designated period of supervised practice. These three professions are: Psychology⁷⁴, Medicine⁷⁵ and Pharmacy⁷⁶. Common to all three professions, supervised practice occurs as part of a training program called an “internship”.⁷⁷

Of these three professions, psychology stands out as being most useful in terms of providing lessons for the legal profession. Psychology and related psychotherapy professions dominate the interdisciplinary field of Clinical or Professional Supervision.⁷⁸ In addition, there are two useful similarities with the legal profession. Firstly, psychology, like law is a widely applied social science. Just as not all lawyers defend criminals in court, not all psychologists are working with people experiencing mental health problems (although many do). Rather ‘psychologists can work at an individual, group or organisational level and their ability to positively influence human behaviour is called on by businesses, market research companies, and consulting firms.’⁷⁹ This is similar to the wide variety of settings lawyers work.

Secondly, while there are a variety of pathways to practice as a psychologist in Australia⁸⁰ the “4+2” pathway is particular analogous to the current requirements for admission as a lawyer. For students completing this pathway, after completing an accredited two-stage sequence of academic study, aspiring psychologists are eligible for provisional registration. They are then required to complete two years of supervised practice, as part of an “internship”, before being eligible for general registration. This pathway to psychology practice (in terms of the relevant academic stages, requirement for supervised practice, and length of supervised practice) is virtually the same as the standard pathway to legal practice. Given psychology’s major contribution to the substantial literature concerning supervision theory and practice, it is not surprising that the two years of supervised practice for psychologists is supported by comprehensive guidelines.⁸¹ These guidelines

⁷⁴ See Australian Psychology Society, *Study pathways* <<https://www.psychology.org.au/studentHQ/studying/study-pathways/>>

⁷⁵ Medical Board of Australia *Australia and New Zealand medical graduates*

<<http://www.medicalboard.gov.au/Registration/Types/Provisional-Registration/medical-graduates.aspx>>

⁷⁶ Pharmacy Board of Australia *Internships* <<http://www.pharmacyboard.gov.au/Registration/Internships.aspx>>

⁷⁷ There are of course a number of other professions where aspiring practitioners are required to complete practical experience during their academic studies; however that practical experience is usually prior to any official qualification, licensure or right to practice. Hence the use of “supervised practice”, “provisional registration” or “restricted practice” for newly qualified practitioners is limited to only a few professions.

⁷⁸ Allyson Davys and Liz Beddoe, *Best Practice in Professional Supervision: A Guide for the Helping Professions* (Jessica Kingsley Publishers, 2010) 11–14

⁷⁹ Australian Psychology Society *What does a psychologist do?* <<https://www.psychology.org.au/studentHQ/careers/what-does-a-psychologist-do/>>

⁸⁰ See above n 73.

⁸¹ Psychology Board of Australia, *Guidelines for 4+ 2 Internship programs for provisional psychologists and supervisors* (“Psychology Board 4 +2 Internship Guidelines”)

for psychologists completing two years of supervised practice are considered in the following paragraphs.

Unlike in the legal profession, where professional responsibility and ethics appears to be a neglected component of Supervised Legal Practice, these matters feature strongly in the Psychology Board 4+2 Guidelines. The internship ‘comprises eight core capabilities’ including ‘ethics, legal and professional matters.’⁸² In addition, regarding the core knowledge aspects of the internship, the Internship Guidelines provide ‘The application of this knowledge *together with an understanding of professional ethics and standards* is the basis of the professional practice of psychology.’⁸³ However these objectives do not exist merely as lofty ambitions. Firstly, they form part of an overall program of training comprising ‘three main components’⁸⁴ which are completed under the auspices of an approved supervisor. A brief summary of each component is set out below together with commentary on the potential each component provides for ethical development.

Three Main Component of Supervised Training for Psychologists

Component ⁸⁵	Commentary ⁸⁶
176 hours of Supervision ⁸⁷ - Up to 75% of this “Supervision” must be provided by a principal supervisor -At least 66% must be direct, individual, face-to-face supervision. -Supervision must be regular (at least one hour per week),	Over two year period this equates to, including the maximum eight week leave provision in the Guidelines, an average two hours supervision per week. These sessions are in addition to the incidental supervision that should occur during the actual Supervised Practice (See next row). This takes place away from the immediate stresses of client work. This provides a structured personalised forum to focus on all the eight core capabilities including ethical matters. Scheduling this time potentially avoids the conflict between client-service and supervisee training. It provides an ample opportunity to help supervisees reaching ethical maturity.

⁸² Psychology Board 4+2 Internship Guidelines, above n 80,17.

⁸³ Ibid.

⁸⁴ Ibid,1.

⁸⁵ This information has been extracted from a more detailed table on p1 of the Psychology Board 4+2

⁸⁶ This commentary is the author’s own.

⁸⁷ Supervision is defined the Psychology Board 4+2 Internship Guidelines (above n 80, 13) as ‘ an interactive process between the provisional psychologist and the supervisor. It provides the provisional psychologist with a professionally stimulating and supportive opportunity for growth. Supervision for the internship program involves a special type of mentoring relationship in which direction and instructive critique is given by supervisors to assist provisional psychologists to achieve their professional goals. Supervisors oversee provisional psychologists’ application of particular procedures for given tasks and this process is fundamental to provisional psychologists achieving the core capabilities of the internship program.

<p>2784 hours of Psychological Practice (Supervised Practice)</p> <p>- Direct client contact must comprise at least 40% of this time and the remainder must be spent on client-related activities.</p>	<p>This component forms the bulk of the internship. Importantly, the requirement for direct client contact provides, amongst other things, opportunity for supervisees to be faced with ethical issues which can then be dealt with in formal supervision.</p>
<p>120 hours of Professional Development which includes activities such as workshops, courses, seminars, lectures, conferences, classroom activities, role plays and literature reviews</p>	<p>This is significant more than the 30 hours of CPD required by unrestricted psychologists⁸⁸. Currently the CPD requirements for lawyers completing Supervised Legal Practice, a mere 10 hours, is the same as for unrestricted practitioners.</p>

Secondly, all core capabilities including ‘ethics, legal and professional matters’ are subject to assessment. The ethics core capability assessment includes: (a) a report outlining six occasions where the supervisee has identified their professional limitations; and (b) a report describing six ethical dilemmas. Overall the internship program facilitates structured practice-based training for psychologists during the first two years of practice. Generally speaking, it provides a useful example for the way in which training during Supervised Legal Practice can be structured around actual practice experience.⁸⁹ Specifically, significant number of hours of individualised face to face supervision sessions, provides an appropriate forum for supervisors to help supervisees step towards ethical maturity.

VI CONCLUSION

Supervised Legal Practice is the final stage of legal training and presents opportunity for enabling ethical development. For reasons that remain unclear, training during Supervised Legal Practice has not, as was originally intended, evolved or been organised in a manner akin to internships found in other professions that utilise supervised practice. While there is some evidence that legal practitioners consider ethics development to be an important part of supervision, in the absence of any profession-wide structure supporting these early years of practice, junior practitioners are faced with a practice-environment that is detrimental to their ethical development.

⁸⁸ Psychology Board of Australia *Continuing professional development registration standard* <<http://www.psychologyboard.gov.au/Standards-and-Guidelines/Registration-Standards.aspx>>

⁸⁹ This is not to suggest that the Psychology 4+2 model is practical and without fault. Rather, it demonstrates a useful example in terms of the detailed considerations for an Internship program centred on Supervised Practice. In fact the Australian Psychology society has raised a number of concerns regarding the practical implementation of the 4+2 Internship model. See Australian Psychological Society, *Guidelines for the 4+2 internship pro: An APS submission to the PsychBA* (January 2012)

Supervised Legal Practice is an underutilised stage of professional training suffering from a fundamental misunderstanding of the functions of supervision. By adopting a multi-functional understanding of supervision found in scholarship from professional disciplines, as well as taking guidance from the structured arrangements comprising psychology internships, the legal profession could effectively utilise Supervised Legal Practice as a means for assisting junior lawyers reach ethical maturity. What remains problematic is how legal practitioners, especially those in practice environments structured around the billable hour, could accommodate best practices in supervision.