'Fame and Character' Requirements: Productive or Persecutive?

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Introduction

For an aspiring lawyer to be admitted to practice in Australia, they must satisfy admission requirements regarding their 'fame and character' (FAC). The purpose of FAC requirements is to protect the public and maintain high standards in the legal profession. However, these requirements have been criticised for failing to achieve these aims. This article will seek to address and, as far as possible, settle this debate. I will first outline the current nature of FAC requirements, and then discuss the ways in which FAC requirements can ideally achieve their purpose. I will counterbalance this with a consideration of the practical limitations preventing this potential from being fulfilled. Ultimately, this assessment will conclude that to some extent, FAC requirements protect the public and uphold the standards expected in the legal profession. However, this extent is limited by deficiencies in the practical assessment and application of these requirements. These deficiencies must be remedied if FAC requirements are to continue playing an important role in safeguarding the integrity of the legal profession.

II What Are the Current FAC Requirements?

To be admitted as a legal practitioner in Australia, applicants must satisfy requirements regarding their eligibility and suitability. Eligibility requirements concern the applicant having completed sufficient education and training. Suitability requirements are less objective and seek to ensure applicants are 'fit and proper' for legal practice.[1] To meet this standard, applicants must be of

[1] Francesca Bartlett and Linda Haller, 'Disclosing Lawyers: Questioning Law and Process in the Admission of Australian Lawyers' (2013) 41 (2) *Federal Law Review* 228.

'good fame and character'.[2] What constitutes 'good fame and character' has developed through the common law, but remains a question of fact rather than law.[3] Generally, a person of good character will also enjoy good fame, and vice versa. However, these two concepts are distinct and should not be treated interchangeably.[4] Fame refers to a person's reputation in the community,[5] whereas character, as defined in *Singh v Auckland District Law Society*, is 'the sum of [one's] mental or moral qualities' and is 'a distinctive and inherently immutable state'.[6]

As exemplified by this definition, various judicial remarks indicate a common tendency in law to consider character as absolute. However, this view is clearly limited and unimaginative. Anecdotally, character is often influenced through encounters with certain individuals and experiences. Indeed, instances of readmission provide tangible evidence that good character can be re-earned.[7]

Although all Australian jurisdictions have a common standard of suitable fame and character that an applicant must reach, there is great inconsistency in determining how this standard is satisfied. Common requirements across jurisdictions include a Police History Check, character references, reports on student conduct, responses to suitability questions, and disclosure of any relevant matters which might bear on the applicant's suitability.[8] However, there is no conclusive list of what constitutes a 'relevant matter'. Instead, applicants have a duty to disclose any past or present matters which might reasonably be considered to reflect poorly on the applicant's fame and character.[9] Naturally, the breadth of this requirement can be problematic. For example, two

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[2] See*: Legal Profession Act 2006* (ACT) s 11; *Legal Profession Uniform Law* (NSW) s 17; *Legal Profession Uniform Admission Rules 2015* r 17.

[3] Linda Haller and Francesca Bartlett, 'Views from inside: A comparison of admission process in New South Wales and Victoria before and after the 'uniform law' (2016) 41 (1) *Monash University Law Review* 114.

[4] Gino Dal Pont, 'Ethics column: Lawyers in (good) character' (2016) 43 (3) *Brief* 6.

[5] Gino Dal Pont, 'Ethics column: Lawyers in (good) character' (2016) 43 (3) *Brief* 6.

[6] *Singh v Auckland District Law Society* [2002] 3 NZLR 392 45.

[7] Gino Dal Pont, 'Ethics column: Famous for the wrong reasons' (2017) 44 (5) *Brief* 6.

[8] See: *Legal Profession Uniform Admission Rules 2015* r 10, r 16 - 20.

[9] Ibid r 17.

candidates may possess the same characteristic or experience, however one may deem the matter to be relevant, while the other may not.

Somewhat troublingly, this broad disclosure discretion appears to function as an additional test of character. By choosing themselves which matters to disclose, the applicant provides an insight into their past conduct and their present ability to demonstrate candour and honesty.[10] For example, revealing more than is necessary may reflect favourably on an applicant, as it suggests that they are ethically self-aware.[11] Candour and honesty, in addition to obedience to the law, are also crucial factors which suggest good fame and character. Bartlett and Haller suggest that this is because 'these characteristics are seen as inimical to the proper practice, and appearance, of law because lawyers occupy such an important role.'[12] Hence, failure to demonstrate honesty in admission disclosures has repeatedly been used by the courts to indicate an applicant's poor good fame and character. This point is clearly demonstrated in *Re H*,[13] in which the court denied the applicant's application for admission on the basis of his lack of candour about his past misconduct, rather than the conduct itself.[14] Overall, transparency regarding the misconduct, rather than the nature of the conduct, often leads to refusal of admission.[15]

III How Do FAC Requirements Protect the Public and Maintain High Standards in the Legal Profession?

FAC requirements unquestionably protect the public and maintain high standards in the legal profession to some extent. There are three ways in which this is evident. First, public interest

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[10] Debra Mullins, 'Warts and All: The Impact of Candour in Assessing Character for Admission to the Legal Profession' (2009) 28 (2) *University of Queensland Law Journal* 368.

[11] *Frugtniet v Board of Examiners* [2002] VSC 140.

[12] Francesca Bartlett and Linda Haller, 'Disclosing Lawyers: Questioning Law and Process in the Admission of Australian Lawyers' (2013) 41 (2) *Federal Law Review* 232.

[13] [2002] QCA 129.

[14] Debra Mullins, 'Warts and All: The Impact of Candour in Assessing Character for Admission to the Legal Profession' (2009) 28 (2) *University of Queensland Law Journal* 366.

[15] Francesca Bartlett and Linda Haller, 'Disclosing Lawyers: Questioning Law and Process in the Admission of Australian Lawyers' (2013) 41 (2) *Federal Law Review* 237.

demands that legal practitioners conduct themselves ethically, legally, and in the best interest of society and the courts.[16] Thus, FAC requirements ensure the just and effective operation of the legal system by restricting admission to individuals who will expectantly uphold the necessary standards of ethics and conduct. This is important because, as argued in *Frugtniet v Board of Examiners*, 'the entire administration of justice … depends upon the honest working of legal practitioners who can be relied upon to meet high standards of honesty and ethical behaviour.'[17] If legal practitioners are acting wrongfully, the course of justice will be perverted. Similarly, the legal system cannot function if clients, colleagues, courts and the public are unable to confidently trust their legal practitioners.[18] However, the role of FAC requirements is predicated on the assumption that past misconduct indicates future misconduct. This assumption is not binding, given that past misconduct does not disqualify an applicant from admission if they can demonstrate that their character and fame has since been redeemed.[19] But to this extent, FAC requirements remain imbued with a degree of discretion necessary for maintaining justice.

Secondly, FAC requirements secure public faith in the legal system. It is commonly accepted that a legal system is legitimated by public faith that it will protect society by pursuing just outcomes. This faith will be undermined if the public does not believe that their legal practitioners are fit to perform this vital role. Therefore, Doyle CJ has suggested that the legal profession can only continue to protect the public if it is 'comprised of persons whose conduct would not undermine confidence of the ordinary member of the public in the profession.'[20] This conclusion appears to be both intuitively and logically sound. By confirming that an applicant satisfies FAC requirements, the legal profession 'holds that person out to the public as a fit person to be entrusted … with their affairs and confidences, and as a person in whose integrity the public

[16] *Re Application for Admission as a Legal Practitioner* (2004) 90 SASR 551 555.
[17] *Frugtniet v Board of Examiners* [2002] VSC 140 9.
[18] *New South Wales Bar Association v Cummins* [2001] NSWCA 284 22.
[19] *An application for admission by B as a Legal Practitioner* [2016] ACTSCFC 2 23.
[20] *Re Application for Admission as a Legal Practitioner* (2004) 90 SASR 551 556.

should be confident.'[21] However, the significance of character requirements should not be underestimated. While past conduct is important, it is similarly crucial that the legal profession can have confidence that new applicants will not undermine public confidence through their future conduct.

The final argument in favour of FAC requirements is more controversial - namely, that FAC requirements further the ethical education of applicants. This assertion is based on three postulations. First, the critical self-reflection demanded by the application process can develop applicants' ethical awareness of their own suitability for the legal profession. Second, encouraging applicants to make free and open disclosures may develop their sense of civic responsibility.[22] Third, the stringency of the process makes clear to new lawyers that the legal profession is devoted to promoting ethical behaviour and preserving an ethical reputation. Empirical evidence of this claim is limited, however, a growing body of qualitative research suggests that ethical education is generally an unanticipated, albeit welcome, consequence of FAC requirements.[23] This attribute should be considered secondary to the gatekeeping role performed by FAC requirements, when justifying their importance. Nevertheless, qualitative evidence is increasingly demonstrating that ethical education is a favourable supplementary benefit which helps to tip the overall balance in favour of imposing these requirements.

IV How Are FAC Requirements Failing to Meet Their Potential?

Evidently, FAC requirements have the potential to play an important role in protecting the public and maintaining high standards in the legal profession. However, this potential is limited by the way in which the requirements are applied and assessed. First, the way that FAC requirements

[21] Ibid.

[22] Colin James and Saadia Mahmud, 'Promoting academic integrity in legal education: 'Unanswered questions' on disclosure' (2006) 2 (2) *International Journal for Educational Integrity* 12.

[23] Linda Haller and Francesca Bartlett, 'Views from inside: A comparison of admission process in New South Wales and Victoria before and after the 'uniform law' (2016) 41 (1) *Monash University Law Review* 130.

are evaluated varies significantly between Australian jurisdictions. Admitting bodies in each State or Territory are granted different powers via statute, as well as significant discretion in evaluation. As a result, each jurisdiction demands a different range and depth of information from applicants. For instance, Victorian applicants must provide student conduct reports from every tertiary institution they attended. Conversely, NSW applicants need only attach a student conduct report if they have been subject to academic disciplinary action.[24] This is despite that fact that NSW and Victoria have both adopted 'Uniform Law', which was developed to standardise the admissions process across jurisdictions.[25] Indeed, the Uniform Law has two fundamental weaknesses in its effectiveness. First, it has currently only been adopted by NSW and Victoria. Second, there are still inconsistencies between the NSW and Victorian jurisdictions, as demonstrated above. This is largely because, although the Uniform Law standardises the powers available to each admitting body, it does not require those powers to be exercised. For instance, admission boards in NSW and Victoria are empowered to compel an applicant to appear in person before the Board. This is central to the Victorian application process, but has not been formally incorporated into the NSW process.[26] The gulf that remains between the processes used in each jurisdiction is reflected by the fact that, although the Uniform Law permits joint determination of Disclosure Guidelines, NSW and Victorian admission authorities continue to publish separate guidelines.

Inconsistency in FAC requirement evaluation has the potential to undermine the effectiveness of those requirements three ways. First, applicants may be discouraged from applying due to their confusion about the requirements. Additionally, applicants in tougher jurisdictions, such as Victoria, may be more disincentivised than applicants in other jurisdictions. FAC requirements

[24] Linda Haller and Francesca Bartlett, 'Views from inside: A comparison of admission process in New South Wales and Victoria before and after the 'uniform law' (2016) 41 (1) *Monash University Law Review* 120.

[25] Ibid 111.

[26] Ibid 116.

are intended to regulate rather than obstruct, and discouraging applicants who might otherwise have been successful would be counterproductive.

Second, although admission is a State-based process, it confers a nation-wide qualification to practice law.[27] This clearly limits the value of imposing higher requirements in certain jurisdictions compared to others, because every applicant ultimately joins the same Australian pool of lawyers. Making the fair assumption that applicants in tough jurisdictions are not inherently of particularly poor character, imposing higher standards in any jurisdiction becomes ultimately pointless.[28]

Third, confusion about what is required greatly increases the likelihood that applicants will fail to disclose necessary information. This is particularly problematic because, as discussed above, the extent of disclosure has become an increasingly important criterion for evaluation. However, it also makes it less likely that important information affecting an applicant's appropriateness for admission will be revealed. There are multiple cases where eventual exposure of inappropriate non-disclosure led to a practitioner's removal from the roll. However, it can be fairly assumed many more instances of inappropriate non-disclosure go undetected. The jurisdictional inconsistencies outlined above may heighten this problem. In 2009, Victorian applicants were 17 times more likely than NSW applicants to make a disclosure.[29] This likely arises from disparities in strictness of disclosure requirements in the two jurisdictions. As analysts including Bartlett and Haller have persuasively suggested, this data may indicate that 'NSW potentially has more 'unsuitable' applicants slip through their admission process than in Victoria.'[30]

Fourth, FAC requirements do not guarantee applicants will meet ethical and conduct standards once admitted to practice. As explained by Tigran Eldred, '[by] presuming that an applicant's past

[27] Francesca Bartlett and Linda Haller, 'Disclosing Lawyers: Questioning Law and Process in the Admission of Australian Lawyers' (2013) 41 (2) *Federal Law Review* 229.

[28] Ibid.

[29] Ibid 257.

[30] Ibid 260.

behaviour is predictive of a particular disposition that suggests future conduct, the process fails to account for the situational variables that are highly influential in how decisions are made. '[31] Just because an applicant has no prior history of misconduct does not preclude the experience of legal practice from revealing the worst of their character. This is evidenced by the fact that legal practitioners are regularly subject to disciplinary action, despite having previously demonstrated good character. For instance, the appellant in *A Solicitor v Council of the Law Society of New South Wales*[32] had previously demonstrated wholly good character, but was removed from the roll following an indecent assault conviction. It would be simply ridiculous to claim that only admitting applicants of supposedly good fame and character can guarantee that these applicants will not engage in future misconduct.

Finally, evaluating character and fame under the same umbrella has the potential to compromise the value of either assessment. Fame is easily earned but difficult to alter. It is therefore possible an applicant of good character at the time of their application may have bad fame based on past misconduct. For instance, in *Hilton v Legal Profession Admission Board*, [33] an application for readmission was refused because of the applicant's prior conviction for conspiracy to bribe. It was undisputed that the applicant has been reformed and was now of good character. However, it was ruled that readmitting a person of poor fame 'would undermine public confidence in the standards expected of the legal profession'.[34] This approach protects public faith in the legal system, but prevents the legal profession from benefiting from the applicant's contemporaneous good character and significant capabilities. Further, fame is beyond the total control of the applicant because it is ultimately in the hands of the public. An applicant who significantly improved their character could still experience the ongoing punishment of being precluded from admission as a result. It is not difficult to see the ways in which this could be significantly unjust.

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[31] Tigran W Eldred, 'Insights from Psychology: Teaching Behavioural Legal Ethics as a Core Element of Professional Responsibility' (2016) *2016 Michigan State Law Review* 757, 773.

[32] (2004) 216 CLR 253.

[33] [2016] NSWSC 1617.

[34] Ibid 116.

V Conclusion

'Fame and character' admission requirements have been implemented in Australia to protect the public and maintain high standards in the legal profession. I have argued that FAC requirements have great potential to achieve these purposes. This is because they ensure legal practitioners have necessary qualities, preserve public faith in the legal system, and strengthen ethical awareness of applicants. However, this potential is ultimately limited because of deficiencies in the way that those requirements are applied and assessed. On balance, it is clear that public protection and maintenance of legal standards would be poorer if FAC requirements did not exist. However, relevant deficiencies must be remedied if these objectives are to be fully met. It is essential that all Australian admission bodies work together in order to adopt clear, standardised requirements for all Australian applicants in order to achieve these objectives.

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