Submission to LACC concerning its review of academic requirements for admission to the legal profession

Summary of conclusions

Academic requirements for admission are statutorily prescribed. Amendment of the academic requirements should only occur to the extent to which it advances the policy of the legislation that prescribes the requirements. That policy is protecting the public interest in the proper administration of justice, and protecting clients of law practices. That policy is extremely important and there is no occasion to alter the policy. Factual matters concerning the practical operation of the academic requirements for admission should be taken into account only to the extent that they bear upon how effectively that policy is advanced.

Company law should continue to be compulsory.

Evidence and civil procedure could be dropped as compulsory requirements for admission, but only on two conditions: (1) the law relating to privilege continued to be an essential requirement for admission, and (2) any accredited law degree that did not make evidence and civil procedure compulsory for students must offer evidence and civil procedure as optional courses, with evidence and civil procedure being covered is fully as the Academic Requirements presently require.

Ethics and Professional Responsibility should continue to be compulsory, except that the trust accounting component should be a compulsory component of the PLT course rather than a compulsory component of the academic course.

Statutory interpretation should be included as an academic requirement.

Interpretation of documents generally should be made an academic requirement.

Alternative dispute resolution should not become an academic requirement for admission, because it is a PLT requirement, and is more appropriately taught in a PLT course.

The drafting technique of the English Foundations of Legal Knowledge should not be adopted. The form in which the Academic Requirements are presently expressed should be continued, except that the alternative short form description of the content of a particular subject matter should be deleted.

The only alteration to the Academic Requirements that seems practical to achieve consistency of standards and assessment regimes is to remove the short form description from the requirements, and to add to the academic requirements a requirement that a student has studied a certain number of substantive law topics, drawn from a fairly long list of options, where there was some specification of the minimum content of those topics.
It would be totally inappropriate to incorporate the Threshold Learning Outcomes into the Academic Requirements

**Submission**

The limited review of the 11 Academic Requirements that LACC is undertaking\(^1\) means that the present distinction between academic prerequisites for admission and practical legal training prerequisites is not in question.

**Relevant and Irrelevant Considerations in Adoption of Academic Requirements**

**The Statutory Policies**

The content of suitable academic requirements for admission can be decided only if one bears in mind the purpose that the law has in imposing statutory prerequisites upon a person being admitted as a lawyer. That purpose emerges from the statutes that make satisfaction of academic requirements a necessary precondition for admission.

In this submission I will focus on the legislative requirements for admission as a legal practitioner in New South Wales, for two reasons. First, the various jurisdictions in Australia in which lawyers are admitted to practice have legal rules that are similar in broad outline to the New South Wales ones. Second, if there were to be a peculiarity of New South Wales legislation that made a particular alteration to the Academic Requirements undesirable the need for Australia wide uniformity of the Academic Requirements would mean that that amendment probably could not be adopted.

Most people will need the services of a lawyer only when they are at some nodal point in their life. It might be when they are engaging in a particularly significant business transaction like buying or selling a property, making a will or entering into a new business relationship, or when they are engaged in a serious dispute. Because of this, a lawyer often has the capacity to make a serious difference to the entire future course of the client’s life, either for better or worse. The great potential that lawyers have to cause serious damage to their clients is one reason why legislation places controls, in the public interest, on who is entitled to practice law.

As well, courts and tribunals function far more efficiently when litigants before them are represented by competent advocates, and non-litigious transactions are carried out far more efficiently and thoroughly when competent lawyers are involved. At the risk of stating the obvious, there is therefore a serious public importance in lawyers being competent in their professional activities.

Part 2.2 of the *Legal Profession Act 2004 (NSW)* ("LP Act") makes it a crime for anyone other than a person who has been admitted as a legal practitioner to engage in legal practice, or to represent that he or she is a lawyer. Its opening section makes explicit the dimensions of the public interest that justify legislative controls on who is permitted to practice law:

**13 Purposes**

The purposes of this Part are as follows:

(a) to protect the public interest in the proper administration of justice by ensuring that legal work is carried out only by those who are properly qualified to do so,

(b) to protect clients of law practices by ensuring that persons carrying out legal work are entitled to do so.

The opening section of the Part of the same Act that governs the admission of legal practitioners likewise makes explicit the purpose of controlling entry to the legal profession:

**22 Purpose**

(1) The purpose of this Part is, in the interests of the administration of justice and for the protection of clients of law practices, to provide a system under which only applicants who have appropriate academic qualifications and practical legal training and who are otherwise fit and proper persons become qualified for admission and are admitted to the legal profession in this jurisdiction.

The 11 Academic Requirements have legislative force as prerequisites to admission as a legal practitioner in NSW because they have been adopted as part of "the academic requirements for admission" in clause 95 of the *Legal Profession Admission Rules 2005* ("LP Admission Rules"). They have been given this legislative force because they have been seen as advancing the purposes of promoting the administration of justice and protecting clients.

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2 Subject to some exceptions not presently material

3 Section 2.2.1 of the *Legal Profession Act 2004 (Vic)*, section 22 *Legal Profession Act 2007 (Qld)*, section 11 *Legal Profession Act 2008 (WA)*, section 12 *Legal Profession Act 2007 (Tas)*, section 15 *Legal Profession Act 2006 (ACT)* and section 17 *Legal Profession Act (NT)* are not materially different.

4 Section 2.3.1 *Legal Profession Act 2004 (Vic)*, section 28 *Legal Profession Act 2007 (Qld)*, section 20 *Legal Profession Act 2008 (WA)*, section 23 *Legal Profession Act 2007 (Tas)*, section 20 *Legal Profession Act 2006 (ACT)* and section 24 *Legal Profession Act (NT)* are not materially different.
articulated in sections 13 and 22 of the LP Act. Any amendment of the 11 Academic Requirements should be adopted only if that amendment is seen as advancing those purposes better, or if the 11 Academic Requirements are to any extent no longer necessary or appropriate to advance those purposes. There is no reason to suggest that the law should be changed, so that academic requirements for admission served any purposes other than the ones that the legislation now states.

It would be undesirable and inefficient for lawyers in practice not to have the sort of knowledge that would enable them to deal quickly and accurately with the range of legal problems that are likely to arise in the course of ordinary practice. A client who comes to a lawyer with a problem is entitled to a prompt and informed opinion on the available ways of dealing with the problem, and on the preferable way of dealing with it. It would be unsatisfactory for the client who wanted an answer, and inefficient and productive of excessive cost, if a lawyer had the skills to find out the law but lacked knowledge of the content of the law. If the objectives of section 13 and 22 of the LP Act are to be achieved a basic level of knowledge of the law is essential for any admitted lawyer. The only question concerns the content of that “basic level”.

Under clause 95 (3) LP Admission Rules various academic law courses offered by universities in NSW are recognised as satisfying the Academic Requirements. However the 11 Admission Requirements are not the totality of the academic requirements for admission. Another requirement is that an applicant has completed a tertiary academic course which includes the equivalent of at least three years full-time study of law.

Law Graduates Not Becoming Practitioners

There are several factors that are relevant to the content of the law courses offered by universities that should not influence the requirements for admission. One is that many law graduates will not practice as lawyers. While that fact shows the value of law degree, when a law degree is the academic prerequisite for admission it cannot affect the standards that are appropriate for those law graduates who do become practicing lawyers.

Transportability of Qualifications

Another consideration that should not influence the academic requirements for admission is a desire to make it easy for Australian law graduates to practice overseas, or for overseas trained lawyers to practice in Australia. The academic requirements exist to protect the Australian public and the proper operation of the Australian legal system. Those policy

\[\text{\textsuperscript{5} I will use “unit of study” to refer to a collection of lectures and readings on a particular topic that a student undertakes in a single semester, and “course” to refer to the totality and sequence of units of study that lead to a degree or diploma.}\]

\[\text{\textsuperscript{6} clause 95 (1) LP Admission Rules}\]
objectives should not be compromised by extraneous considerations that play no part of the legislative scheme.

In any event, Australian law graduates are sought after by English and Hong Kong law firms, and have a reputation for being better trained than their English and Hong Kong counterparts. I am not aware of any basis for believing that Australian admission requirements have hampered the employability of Australian law graduates overseas.

Tendency of Practising Lawyers to Specialise

Another consideration is that it is common for practising lawyers to specialise to some extent; it is sometimes argued that this means that they do not need the full range of knowledge contained in the 11 Academic Requirements. One answer to that is that admission entitles them to practice across the full spectrum of legal practice\(^7\), and therefore they need the knowledge which would be basic were they to choose to practice in any part of the spectrum.

Another is that legal problems do not present themselves in practice in neatly segregated compartments. Very often solving a particular problem will require drawing on knowledge from several different areas of law. Therefore it is necessary for a practitioner to be aware of basic principles across the range of legal subject matter to be able to identify when a legal issue might arise that is relevant to the problem that a client brings to the lawyer. For example, there is a sufficiently high likelihood even in the course of negotiating the terms of a commercial agreement a lawyer might need to be aware of whether a particular communication would be the subject of legal professional privilege or client legal privilege if there were later to be litigation or a statutory notice to produce documents. The lawyer might also need to be aware of the sorts of communications that could waive a privilege. In acting for a land developer a lawyer needs to be able to identify issues about whether a particular statutory prohibition that affect the developer creates a crime. Whether a lawyer

\(^7\) Practitioners must also have a practicing certificate, but in NSW solicitors can obtain a practising certificate without demonstrating any additional knowledge or skills beyond those required for admission. The certificate when issued can restrict the holder to particular types of practice, including as an employee or practicing under supervision, but the restrictions are not imposed by reference to the type of legal subject matter that is dealt with: [http://www.lawsociety.com.au/cs/groups/public/documents/internetregistry/702990.pdf](http://www.lawsociety.com.au/cs/groups/public/documents/internetregistry/702990.pdf). Barristers are required to pass exams set by the Bar Council in practice and procedure, evidence and legal ethics, unless exempted, and then to pass a bar practice course that takes 4 weeks, before they are eligible to be issued with a barrister’s practicing certificate: section 56 LP Act. Further, the certificate when issued is subject to a condition requiring the completion of a period of reading, and that only limited types of matters may be conducted during the reading period: [http://www.nswbar.asn.au/coming-to-the-bar/reading-programme/conditions](http://www.nswbar.asn.au/coming-to-the-bar/reading-programme/conditions). When it is now extremely rare for a person to become a barrister without having first been a solicitor the appropriate admission requirements should be determined by reference to appropriate requirements for practice as a solicitor.
provides help to the disadvantaged or practices high-level commercial law, issues may well arise concerning the validity of administrative decisions.

Limiting the Range of University Courses

It is sometimes suggested that the admission requirements impose a practical restriction on the courses that universities offer, and to some extent discourage innovation and student choice. The suggestion is often put forward at a high level of abstraction, without providing examples of particular types of course that are stifled by the admission requirements and without explanation of why it would be important for such courses to be offered. That lack of detail cripples the persuasive power of the suggestion. Even so, the suggestion is made often enough for a response to be given to it.

It is fairly clear that market forces create a demand for universities to provide courses that lead to a qualification for practice. In consequence it can be accepted that the range of university courses that deal in some way with the law would probably be wider if there were no academic requirements for admission at all. But to the extent that there are some topics that any lawyer who is let loose on the public must know, if he or she is not to be a source of serious potential damage to clients, and an impediment to the proper operation of the legal system, the public interest requires that only courses that provide that knowledge be recognised as an adequate prerequisite for admission. To the extent that the consequence is that there is some similarity in the law courses that are qualifications for admission, and universities are curtailed in offering as wide a range of courses as they might if there were no Academic Requirements, that is just the consequence of the requirement that the public be protected from incompetent lawyers, and of the nature of the law. Universities can exercise their academic freedom by offering whatever courses relating to the law they choose: but if their choice, based on academic criteria, does not satisfy the public policy requirements that underlie the existence of admission requirements, those courses cannot be accredited as providing a graduate with adequate academic knowledge to be admitted.

There remains considerable scope for universities to vary the structure and content of their law courses while still complying with the Admission Requirements. Content that would satisfy the 11 Academic Requirements would be insufficient to fill the three years of full-time study (or equivalent) that is necessary. Even the teaching of units of study that will satisfy the 11 Academic Requirements can contain some scope for individuality and innovation in course design. In particular, there is no need for one of the 11 designated Academic Requirements to be taught as a single unit of study – so long as the required

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8 “The law is orthodoxy... It is difficult to think of any form of intellectual activity in which there is greater pressure to conform. The best evidence of this is the technique by which judges set out to justify their decisions. By the standards of most forms of intellectual endeavour, that technique is intensely conservative.” Hon A M Gleeson AC QC, "Sir Garfield Barwick Address 2014", [2014] Bar News (NSW Bar Association) p 35.
content is taught it can be scattered through two or more units of study. How a particular university chooses to arrange the content of the 11 Academic Requirements into individual units of study will depend on matters not contained in the Academic Requirements.

One can agree with Sir David Derham that a “university cannot be a mere vocational training school,” and recognise that there are many aspects of the practical operation and history of the law that are worthy of serious academic study. However the Academic Requirements do not prevent a university law school for teaching in accord with proper scholarly standards. To take one example, Sydney Law School is more than a mere vocational training school in offering, as part of a degree that is recognised as satisfying the academic requirements, optional courses that bear no resemblance to any of the 11 Academic Requirements. It teaches those subject areas that are mentioned in the 11 Academic Requirements in a way that goes beyond the requirements of current practice of the law and beyond what is necessary to satisfy the Academic Requirements. In these circumstances the practical restrictions that the Academic Requirements impose on the courses that universities offer are not of a kind that calls for any compromise of the public interest considerations that underlie the 11 Academic Requirements.

**Question 6.1 and 6.2 – omitting areas of knowledge from the Academic Requirements**

**The English position**

The suggestion that some areas of knowledge should be dropped from the Academic Requirements seems to be influenced by the limited content of the English Foundations of Law. For example, if a university wanted to offer a unit of study that included contrasting the way in which drunkenness operated as a defence in criminal law with the way it operated in equity as part of the law concerning catching bargains, and contrasting the way mistake operated as a defence in the criminal law with how it operated concerning contract formation and concerning the equity of rectification, it would be free to cover those elements of the Admission Requirements in that way.

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11 Eg the various jurisprudence subjects, Roman law, Mooting, Social justice clinical course, Japanese law, War law.

12 It is not uncommon for a subject to include some history of the law in the area, a discussion of the differences between the Australian law of the topic and that of other common law jurisdictions, and consideration of the rationale and desirability of the present law.

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Legal Knowledge\textsuperscript{13}. The Foundations of Legal Knowledge state the requirements for an English undergraduate law degree. However they cannot be translated into the requirements for an Australian undergraduate degree, because the structure of the English system legal education and qualification for admission is significantly different to the Australian structure\textsuperscript{14}. In Australia a law degree is sufficient to satisfy the Academic Requirements for admission, but in England it is not: an English law degree “has been seen as a program of general liberal education rather than a matter of professional formation”\textsuperscript{15}. English graduates intending to become solicitors must also complete a one-year Legal Practice Course. English graduates intending to become barristers must also complete a one-year Bar Vocational Course before being eligible for admission. Each of those courses is longer and more demanding than the PLT requirements for Australian admission. Importantly, unlike the Australian PLT requirements, they include the imparting of substantive legal knowledge. As well, in England after completing the legal practice course an intending solicitor must complete a 2-year period of on the job training, often called a training contract; it is only after completion of the training contract that the lawyer is eligible for admission as a solicitor. By comparison, and anomalously, intending barristers can called to the bar after completion of the Bar Vocational Course\textsuperscript{16}.

It is apparent, from LACC’s Call for Submissions\textsuperscript{17} that LACC is well aware that academic content relating to Civil Procedure, Company Law, Evidence and Ethics and Professional Responsibility is taught, in large part, to English lawyers before they are admitted. (Prospective English solicitors are required to study Civil and Criminal Litigation, Business Law and Practice, and Professional Conduct and Accounts, but they are not required to study Evidence as a separate subject. English barristers must study all of that subject matter, save only that Company Law is optional.) Even if there were a desire for the Australian admission requirements to mimic the English ones (and I see no reason why they should, when the basic level of training of newly-admitted Australian lawyers is higher than that of

\textsuperscript{13} LACC’s Call for Submissions p 4 - 5

\textsuperscript{14} See Andrew Boon and Julian Webb, Legal Education and Training in England and Wales Back to the Future? (2008) Journal of Legal Education volume 58 No 1 p 79, accessible at Http://www.academia.edu/172408/Legal_Education_and_Training_in_England_and_Wales_Back_to_the_Future. That article contains a valuable account of the history of English legal education and admission requirements, which show many differences from the historical pattern in Australia. As an alternative to obtaining a law degree, in England it is possible for a person who has a degree in a non-legal field of study to do a one-year course in law, called the graduate diploma in law, which entitles the holder to go on to the practical training courses.

\textsuperscript{15} Boon and Webb, op. cit., p 116.

\textsuperscript{16} Provided they have eaten the required number of dinners at an Inn of Court. While intending barristers must spend a year training in chambers, known as pupillage, after being called, it is not a requirement for admission.

\textsuperscript{17} The final full paragraph on page 5, the second paragraph under the heading Company Law on p 6, the final paragraph on page 6 and the second paragraph under the heading Ethics and Professional Responsibility.
English lawyers) the content of the Foundations of Legal Knowledge is not the totality of the academic requirements for admission in England, so they cannot be transplanted into the Australian legal education and admission context.

**Company Law**

Company law should continue to be required knowledge of every legal practitioner. Corporations are an all-pervasive feature of modern society. The vast majority of business or property transactions would have a corporation as one or more of the parties to them. To advise clients properly concerning a vast array of common commercial transactions a lawyer must be able to identify the circumstances in which the actions of a natural person will also bind\(^{18}\) a corporation for which that natural person purports to act, must know the consequences of the limited liability of a corporation, and must be able to identify the risks of dealing with a corporation by reference to the procedures of winding up and other responses to corporate insolvency like appointment of administrators. Many small businesses are organised as corporations, or as trusts with a corporate trustee. A lawyer advising a client who is contemplating a business venture needs to be in a position to advise the client about whether a corporation is the appropriate vehicle for that venture – which requires knowledge of the incorporation process, and the practicalities of operating a corporation, including corporate financing. Many clients will already be shareholders in or officers of corporations, and lawyers must know the basics of the law governing the internal administration of companies to be able to advise those clients. Family law practitioners often confront issues arising under corporate law. Aspects of company law also frequently enter into litigation, both civil and criminal, so that litigators as well as transactional lawyers could not adequately fulfil their role without a knowledge of company law.

**Evidence and Civil procedure**

There can be no doubt that academic study of both evidence and civil procedure is necessary for those lawyers who will become litigators, whether as barristers or solicitors. However, litigators are a minority of practicing lawyers. It is not uncommon for a non-litigator to refer a client to another practitioner if a matter becomes litigious. Indeed, if a practitioner who knew that he or she lacked experience in litigation were to undertake litigation for a client without warning about his or her inexperience the practitioner might well be guilty of unsatisfactory professional conduct.

There is a real prospect that aspects of the knowledge contained in the 11 Academic Requirements (other than evidence and civil procedure) might be needed to deal adequately with a particular legal problem that a client brings to a commencing lawyer.

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\(^{18}\) whether for purposes connected with contract, tort, crime, equitable obligation or statutory obligation

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However aspects of the law of evidence and civil procedure are to a large extent not likely to impinge upon a legal problem that is not a litigious one. For these reasons, I doubt that the full content of the present requirements of civil procedure and evidence in the 11 Academic Requirements should continue to be required for every admitted practitioner.

However, there is one aspect of the law of evidence that is sufficiently basic to be required of every practitioner because it can affect much of the non-litigious work that lawyers do. It is the law relating to privilege. As I have already suggested at page 5 above, any lawyer should be aware of the circumstances in which communications with the client, or on behalf of the client, might be the subject of either client legal privilege or legal professional privilege. Any lawyer should be aware of how the law concerning without prejudice communications operates, and about the privilege against self-incrimination or self-exposure to a penalty. Even if a lawyer is not a litigator, there is a sufficient chance of that lawyer’s client being the recipient of a subpoena or a statutory notice requiring the disclosure of documents or information to require the lawyer to be in a position to advise about the availability of any privilege in answering the notice. The law about privilege needs to be taken into account even in a lawyer’s ordinary work of carrying through transactions. It would depend on what other modifications were made to the 11 Academic Requirements as to whether this requirement to study the law concerning privilege was included in some other topic heading in the Academic Requirements, or whether it was left as a free-standing requirement that universities could fulfil in whatever way they saw fit.

To cater for the significant minority of students who either intend to become litigators, or want to keep open the option of becoming litigators, it would be essential for accredited university courses to offer optional units of study, of equivalent content to the evidence and civil procedure topics that the 11 Academic Requirements now require. It is only by a formal course of study that an adequate knowledge of those subjects be attained – picking it up on the job is not adequate. Further, it is important that alterations to the Academic Requirements do not result in it becoming necessary for lawyers who intend to act as litigators to take supplementary courses, no doubt at extra cost, to obtain the qualifications for which there is a practical necessity, even if not a legal one. The barriers to entry to the legal profession are already alarmingly high, and a modification of the admission requirements ought not result in an increased barrier to entry. While the NSW Bar Association requires intending barristers to pass examinations in evidence and practice and procedure before undertaking the readers course, there is no formal teaching as a prerequisite for those examinations – they operate as a check that the content of university

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19 Under the Evidence Act 1995, relating to circumstances in which evidence is adduced in a court or tribunal

20 Under the common law, which applies in those circumstances where the Evidence Act does not, and is “is not merely a rule of substantive law. It is an important common law right or, perhaps, more accurately, an important common law immunity.”: The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission [2002] HCA 49; (2002) 213 CLR 543 at [11]
or LPAB study of evidence and civil procedure was adequate and is still fresh in the mind of the applicant. The requirement for a university to offer those at least optional units of study should be one of the conditions of accreditation. No doubt, if evidence and civil procedure were no longer compulsory requirements for admission some law schools would choose to continue to make them compulsory requirements for the degree of that law school.

Acceptance of my views concerning evidence and civil procedure might bring a consequential change in the practical legal training requirements. Civil Litigation Practice is at present a compulsory practice area in the PLT requirements. Acceptance of my views might mean that Civil Litigation Practice would cease to be a compulsory component of the PLT course, but if that happened it should instead be an optional component.

**Ethics and Professional Responsibility**

The current version of the *LP Admission Rules* calls this area of knowledge “Professional Conduct (including basic Trust Accounting)”21.

There can be no room for doubt that any practitioner must know the extent of his or her professional duty to the law, to the courts, to clients, and to fellow practitioners. Ethical problems can arise in connection with any area of legal practice. There is a real risk that a practitioner might not realise an ethical issue had arisen if the practitioner had not had a systematic study of the types of ethical issues a lawyer can face, and how those issues are dealt with. Ethical issues often require quick and decisive action once they have arisen, action of which a graduate forewarned by a course of study is more likely to be capable. Subject to one qualification, this area of knowledge should continue to be a requirement for admission.

The qualification is that the content of the Professional Conduct area of knowledge in the Academic Requirements includes a substantial component of trust accounting. However, notwithstanding that this trust accounting material appears in the Academic Requirements, accredited degrees in New South Wales are not required to teach the trust accounting component of Professional Conduct22. This is because there is a specific item 5.14, Trust and Office Accounting in the PLT requirements contained in the Sixth Schedule of the *LP Admission Rules*.

As well as a sound understanding of ethics, any person entering the legal profession and practising as a solicitor should have an understanding of how trust accounting works, both in receiving and expending money and in payment of costs from money held on trust. Only

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21 *LP Admission Rules*, fifth schedule

22 Cl 43(4) (a) and 44(1) (c) *LP Admission Rules*
with this knowledge can fundamental fiduciary obligations to the client be performed adequately.

It is quite uncommon for someone to commence practice as a barrister without first having had a period of practice as a solicitor. As well, barristers sometimes become solicitors. Thus there is a sufficient likelihood of knowledge of trust accounting being essential to make it apply to all intending legal practitioners. In any event, any barrister needs the rudimentary understanding of accounting that is involved in solicitors trust accounting to be able to deal with litigation involving financial accounts.

Whether the trust accounting component of the present Professional Conduct (including basic Trust Accounting) item continues to be part of the Academic Requirements, or is incorporated in the PLT requirements, is a matter of indifference, as a matter of policy, so long as it is taught somewhere as a compulsory prerequisite for admission. As a matter of practicality, when trust accounting is now taught in the context of a PLT course, it would be desirable to remove trust accounting from the 11 Academic Requirements and make minor alterations to the PLT requirements for Trust and Office Accounting to make explicit that the content presently required by the trust accounting element of Professional Conduct (including basic Trust Accounting) is included in the PLT requirements.23

**Question 6.3 – inclusion of Statutory Interpretation as an academic requirement**

Statutes have become the dominant source of law. There is no area of the law that is unaffected by statutes in one way or another. In the last several decades there has been an explosion of writing, both academic and judicial, about the principles of statutory interpretation, and statutory interpretation has become the task that courts are called on to perform most frequently.24 No practising lawyer, whether practising as a solicitor or as a barrister, can avoid interpreting statutes.

Human language has an intractable capacity for imprecision, so that the meaning of a statute is frequently not clear on its face. Interpretation is necessary to arrive at its meaning. Principles of interpretation provide an authoritative set of guides to ascertaining the meaning of the statute, and deciding how the statute relates to the pre-existing law,

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23 Item 1 in the PLT requirements has performance criteria that include that the lawyer has identified and applied "duties to supervise and report in relation to trust monies", and "duties and obligations of maintaining a trust account". The specified content concerning trust accounting in the Academic Requirements contains text preceded by "Areas covered should include" that is probably covered by the more general wording that I have just quoted from the PLT requirements, except possibly "the ramifications of breach of trust". It would be prudent to add to the general language in the PLT requirements "including", followed by the more specific wording now found in the Academic Requirements

24 see Joseph Campbell and Richard Campbell, "Why statutory interpretation is done as it is done" (2014) 39 Aust Bar Review 1 at 1-3

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both judge-made and statutory. Several such principles might be relevant to the interpretation of a particular statute. It is only by studying the principles as a coherent whole that one can come to an understanding of which are the relevant principles to apply in a particular situation, and can come to appreciate the manner in which the principles interact. Knowledge of these principles, understood as a body of doctrine, is essential for achieving the public purposes for which academic prerequisites to admission are prescribed. Statutory interpretation should be included as an academic requirement for admission.

**Question 6.4 and 6.5 – inclusion of any other area of knowledge as an Academic Requirement**

**Interpretation of documents generally**

In my view principles of interpretation of documents other than statutes should also be an academic requirement for admission. Problems of interpretation frequently arise in ordinary legal practice concerning contracts, trust deeds, treaties, wills, and grants of interests in land. They also arise concerning unilateral documents like notices issued pursuant to a statutory or contractual power. Academic writing has appeared in the last few decades concerning the principles of interpretation of such private documents, and it is a constant theme in judgments of superior courts. Similar problems arise concerning the interpretation of private documents as arise concerning the interpretation of statutes, and similar principles are used to solve the interpretative problems, but the principles are often somewhat different to those used in statutory interpretation to take account of the ways in which the particular document concerned differs from a statute. A better understanding of the principles of statutory interpretation arises by appreciating the extent of the similarities and differences between principles of statutory interpretation and principles for interpretation of various private instruments. Principles of interpretation of private instruments are very conveniently be taught in the same unit of study as statutory interpretation, and ideally would be taught in that way.

**Alternative Dispute Resolution**

I mention Alternative Dispute Resolution here because, at page 3 of LACC’s Call for Submissions mention is made of the Productivity Commission expressing a view in a Draft

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26 e.g. the extent to which extrinsic evidence can be used as an aid to interpretation, the significance of ambiguity, and the role of context and purpose.
Report that Alternative Dispute Resolution should be a compulsory core subject. That Draft Report has now been overtaken by a Final Report\textsuperscript{27}. The Final Report asserts:

“The current education and training undertaken by lawyers reflects a court and statute focus on formal, rights-based law. There is no specific requirement for the study of alternative dispute resolution (ADR) and in some cases lawyers are not fully informed about the range of dispute resolution options available (chapter 8). As such, changes to legal education and training requirements are needed to ensure that legal professionals can better match the most appropriate resolution option to the dispute type and characteristics.”\textsuperscript{28}

The Final Report is equivocal about whether in the Commission’s view ADR should be a compulsory part of a law course. It says at one point:

“... law degrees should include a core subject that trains students to identify clients’ needs, and offer a range of solutions, including ADR where appropriate.”\textsuperscript{29}

However almost immediately afterwards, after noting LACC’s submission that PLT requirements since 2003 had included “assessing the merits of the case and identifying dispute resolution options” the Report says:

“... there may also be a need for an increased focus on ADR in the \textit{continuing professional development stage} of legal education, to cover those who completed their education before 2003 and to ensure that practitioners continue to develop and maintain their ADR knowledge and skills .... Rather than simply adding to the existing workload of law students (and thus potentially increasing the cost to graduates), this change should be introduced as part of other, wider reforms to legal education focusing on skills-based degrees and considering the balance between the three stages of legal education.”\textsuperscript{30}

The ultimate recommendation of the Commission on this topic does not specifically recommend incorporation of ADR in university courses, but it leaves open the possibility that ADR might be incorporated in university courses. The ultimate recommendation is:

“The Law, Crime and Community Safety Council, in consultation with universities and the professions, should conduct a systemic review of the current status of the three stages of legal education (university, practical legal training and continuing professional development). The review should commence in 2015 and consider the:

\begin{itemize}
\item The Law, Crime and Community Safety Council, in consultation with universities and the professions, should conduct a systemic review of the current status of the three stages of legal education (university, practical legal training and continuing professional development). The review should commence in 2015 and consider the:
\end{itemize}


\textsuperscript{28} Final Report Vol 1 p 247.

\textsuperscript{29} Final Report Vol 1 p 248

\textsuperscript{30} Final Report Vol 1 p 248, emphasis added

Last printed 3/03/2015 4:30 PM
• appropriate role of, and overall balance between, each of the three stages of legal education and training

• ongoing need for each of the core areas of knowledge in law degrees, as currently specified in the 11 Academic Requirements for Admission, and their relevance to legal practice

• best way to incorporate the full range of legal dispute resolution options, including non-adversarial and non-court options, and the ability to match the most appropriate resolution option to the dispute type and characteristics into one (or more) of the stages of legal education

• relative merits of increased clinical legal education at the university or practical training stages of education

• regulatory oversight for each stage, including the nature of tasks that could appropriately be conducted by individuals who have completed each stage of education, and any potential to consolidate roles in regulating admission, practising certificates and continuing professional development. Consideration should be given to the Western Australian and Victorian models in this regard.

The Law, Crime and Community Safety Council should consider the recommendations of the review in time to enable implementation of outcomes by the commencement of the 2017 academic year.31

In light of the equivocation in the Productivity Commission’s report, and at the risk of considering what might ultimately prove to be a non-issue, I should express my view that it would be inappropriate for Alternative Dispute Resolution to be part of the compulsory academic requirements for admission.

I do not doubt that every commencing lawyer should be aware that there are procedures other than litigation for the resolution of legal disputes, and should have a measure of skill concerning those procedures. However, the manner in which alternative dispute resolution is carried out is more a matter of having practical skills, rather than knowing academic content. That is a sufficient reason why it should not become part of the required legal knowledge for beginning lawyers – and the Academic Requirements are concerned with required legal knowledge.

The statement of the required practical training for commencing lawyers32 makes clear beyond argument that knowledge of the existence of, and ability to engage in, alternative dispute resolution is already a requirement for admission, but not an academic

31 Recommendation 7.1 Final Report Vol 1 p 254

32 Law Admissions Consultative Committee Practical Legal Training Competency Standards for Entry-Level Lawyers commencement date 1 January 2015, appearing as the sixth schedule to the LP Admission Rules
requirement. Appendix 1 to this paper collects, over 5 pages, the many passages from the PLT requirements would result in a student having knowledge and experience of ADR. These passages are far more extensive than “assessing the merits of the case and identifying dispute resolution options”. The Productivity Commission’s statement that “there is no specific requirement for the study of alternative dispute resolution (ADR)” is true so far as the academic requirements are concerned, but false so far as the PLT requirements are concerned.

**Question 6.6 and 6.7 – drafting technique used in the Academic Requirements**

Adopting the form of description of academic requirements that appears in the English *Foundations of Legal Knowledge* would be foolishness of a high order. A mere subject name gives only the slightest indication of the scope, breadth or depth of the contents of what is actually taught under that name. Prescribing academic requirements in that way would be nothing like adequate to provide any confidence that the policy objectives of prescribing academic requirements would be satisfied.

In any event, the English are contemplating moving to a fuller prescription of the content of the “underpinning knowledge of the law which we will require intending solicitors to demonstrate before qualification”. Appendix 2 to this submission reproduces the presently proposed English statement. It is vastly more specific than the Foundations of Legal Knowledge about the areas of knowledge that are required.

The form in which the Academic Requirements are presently expressed should be continued, but alternative short-form description of the content of a particular subject matter should be deleted. Each of the short form descriptions states that it provides “guidelines”. If the academic requirements for admission are to fulfil the purpose for which the legislation establishes them, they should be mandatory, not mere guidelines.

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33 At page 20 below

34 identified at pages 4-5 of LACC’s Call for Submissions


36 At page 30 below

37 In *Norbis v Norbis* (1986) 161 CLR 513 at 520, Mason and Deane JJ said: “the term "guidelines" ... Is familiar enough in the bureaucratic and administrative world, where it denotes rules or standards which are not binding and may be relaxed when it is expedient to do so in order to do justice in the particular case.”
Further, the imprecision of the short form descriptions has the effect that certain important areas of knowledge could be omitted from a course that satisfied the short forms. For example, concerning criminal law:

- the requirement of the short form that there be “examination of... offences against the person” could be satisfied by examining sexual offences alone. In contrast, the requirement of the long form, that there be study of “homicide and defences” and “nonfatal offences against the person and defences” is more specific about the particular offences against the person that are required. It is also more specific about the defences that must be included than is the reference in the short form to “various defences”.

- The element in the short form of “selective treatment should also be given to various defences” could be satisfied by confining attention to particular statutory defences to particular statutory crimes. That would not be adequate.

- The short form contains no equivalent of item 8 in the long form (“selected topics chosen from attempts, participation in crime, drunkenness, mistake, strict responsibility”).

- The short form requirement of selective treatment to “elements of criminal procedure” could be satisfied by studying the manner of selecting a jury and the manner of taking evidence on the voir dire. Item 9 in the long form has the benefit of identifying the important elements of criminal procedure, and requiring that at least two of them be studied.

Concerning property:

- the long form description requires treatment of “acquisition and disposal of proprietary interests”, while that topic is not mentioned in the short form

- the long form description make study of concurrent ownership, and mortgages, compulsory, while the short form makes their study optional

**Question 6.8 – incorporation or recognition of the TLOs (or alternative measures of skills and personal attributes) in the Academic Requirements**
The text of the Threshold Learning Outcomes (TLOs) appears in Attachment 1 to the LACC discussion paper of 24 June 2011 *Reconciling Academic Requirements and Threshold Learning Outcomes*\(^ {38}\).

The TLOs should not be included as part of the academic requirements for admission.

TLOs 2 to 6 express desirable aspirations about the attributes that a graduate of a course of study of the law in a university should have, and a law school’s effort to foster those attributes in its students might be seen as one of the ways in which a university “cannot be a mere vocational training school”. However, whether they should be incorporated into the academic requirements for admission must take into account the manner in which the academic requirements for admission are deployed in the legal admission process.

Under rule 95 (3) *LP Admission Rules* completion of an accredited law degree is one way in which an applicant for admission can satisfy the academic requirements. Accreditation of a law degree occurs pursuant to rule 43. The Accreditation Sub-Committee of the Legal Qualifications Committee decides whether to recommend accreditation of the degree by reference to whether the degree is one:

“requiring the completion of at least three years full-time study of law, and a satisfactory level of understanding and competence in the areas of knowledge set out in rule 95 (1) (b) and the Fifth Schedule except for the trust accounting component of Professional Conduct”.

The Legal Qualifications Committee considers a recommendation of the Accreditation Sub-Committee, and in turn makes a recommendation to the Legal Profession Admission Board about whether the degree should be accredited or not accredited \(^ {39}\). The final decision is made by the Board\(^ {40}\). Necessarily, the decisions of the Committee and the Board would be made by reference to whether they were satisfied that the requirements for accreditation had been met.

The process by which accreditation is continued, after being initially granted, is that the Head of each law school offering an accredited law degree notifies the Board, annually, of:

“(a) any material alteration which has been made to the curriculum for the degree,

(b) any material alteration which is proposed to be made to the curriculum for the degree, and

(c) his or her opinion as to whether the requirements for the award of the degree include the demonstration of a satisfactory level of understanding and competence in the areas of


\(^{39}\) Rule 43(5)

\(^{40}\) Rule 43(6)
At present there are workable and objective tests for whether a degree should be accredited. Accreditation depends on whether the course outlines of the units of study offered by a university can be matched against the descriptions of the 11 Academic Requirements, and a view formed about whether the required areas of knowledge are covered. If linguistic or structural differences between the course outlines and the Academic Requirements create a doubt about whether one of the 11 Academic Requirements has been met, the university can be asked to explain where in its course offerings that particular requirement is satisfied. The annual statement of opinion of the Head of the law school provides satisfaction that the teaching actually conducted conforms with the Academic Requirements.

The accreditation of degrees, in accordance with these objective tests, is fundamental to whether a particular applicant for admission has satisfied the academic requirements for admission. Whether the applicant has obtained a degree from an accredited university is also objectively ascertainable.

If the TLOs were to become part of the academic requirements for admission, and the passing of an accredited course continued to be sufficient to demonstrate compliance with the academic requirements for admission, before granting accreditation to a course first the Committee, and then the Board, would need to satisfy itself that a university course was one whose graduates (the first of whom would not appear until some years after the accreditation was first granted) would possess the attributes set out in TLOs 2 to 6. It seems unlikely in the extreme that the Committee and the Board (both bodies under the chairmanship of a judge, and with other judges amongst the members) could ever be satisfied of those matters. How could the Committee or the Board be satisfied that graduates of a course that has not yet begun would be “able to ... apply legal reasoning and research to generate appropriate responses to legal issues”, “think creatively in approaching legal issues and generating appropriate responses”, “able to ... make a reasoned choice amongst alternatives”, or “able to ... reflect on and assess their own capabilities and performance ... to support personal ... development”? There would be similar problems about the Committee or the Board being satisfied that graduates of the course would satisfy various other of the TLOs.

Nor does there seem to be any way in which, if the TLOs were not made part of the criteria for accreditation of a course, the Committee could satisfy itself, by evidence other than

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41 Rule 44(1)

42 section 680 and clauses 5 and 6 of schedule 2 of the LP Act concerning the Board, clause 16 LP Admission Rules concerning the Committee
having passed an accredited degree, that an applicant for admission possessed the attributes set out in TLOs 2 to 6. Administrative unworkability provides a sufficient reason why the TLOs should not be made an academic requirement for admission.

Quite apart from that, there is a large element of evaluation and opinion in the terms in which the TLOs are expressed, and a lack of precision. For example:

- Just what is required to have a “developing ability to respond to ethical issues”, or a “developing ability to exercise professional judgment”? The language suggests that the ability is incomplete, but the extent to which the ability must be developed is quite imprecise.

- How does one tell whether a person has an “ability to reflect upon ethical issues”, or an “ability to reflect upon the professional responsibilities of lawyers”? Is a shallow and superficial ability good enough? If not, what is required, and how does one tell whether the student has acquired it?

- Whether communication is “effective, appropriate and persuasive”, or collaboration has been conducted “effectively” is to a large extent a matter of opinion.

It would be possible to form an opinion about whether a graduate had achieved TLOs 2 to 6 only by reading into the language of the TLOs a mass of unexpressed implications and assumptions from context. This can be understood by comparing TLOS 2 to 6 with the Early Years Learning Framework for Australia. The Early Years Learning Framework is designed to provide objectives that educators should seek to achieve in children’s learning from birth to 5 years. It includes objectives such as that children should:

1.3 develop knowledgeable and confident self-identities

1.4 ... learn to interact with others with care, empathy and respect

2.1 ... develop ... an understanding of reciprocal rights and responsibilities necessary for active community participation

2.4 ... become socially responsible ...

4.1 ... develop dispositions for learning such as curiosity, cooperation, confidence, commitment, enthusiasm, persistence, imagination and reflexivity

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44 ibid p 5
4.2 ... develop a range of skills and processes such as problem solving, inquiry, experimentation, hypothesising, researching and investigating

4.3 ... transfer and adapt what they have learned from one context to another

4.4 ... resource their own learning through connecting with people, place, technologies and natural and processed materials

5 ... are effective communicators

5.2 ... engage with a range of texts and gain meaning from those texts

5.5 ... use information and communication technologies to access information, investigate ideas and represent their thinking”

Comparison of these objectives with those of TLOs 2 to 6 shows how both the Early Years Learning Framework, and TLOs 2 to 6, derive a large part of their meaning by implication from context. One can understand the difference between what is cooperation for a 5 year old, and effective collaboration for a law graduate, only by reading in pre-existing expectations of how a 3 year old could co-operate, and how a law graduate could co-operate effectively. Similarly the difference between what counts as a 5 year old being an effective communicator, and a law graduate being an effective communicator is understood only by reading in pre-existing expectations. The dimensions and degree of those expectations are not specified by the language of the objectives, and could differ significantly from person to person.

Aspirations can be expressed in terms like those of TLOs 2 to 6, without doing any harm. However it is bad social policy to make an important matter like whether a person is able to enter a particular profession depend on such imprecise criteria, or to give statutory force to such imprecise language.

Dealing with the specific terms of question 6.8, I cannot think of any way in which “the Academic Requirements should “be altered or supplemented also to take account of intellectual skills and personal attributes necessary to process and deploy the areas of knowledge prescribed by the Academic Requirements in legal practice” which would not suffer from the same deficiencies that the TLOs would have as an addition to the Academic Requirements.

**Question 6.9 and 6.10 - possible alteration of Academic Requirements to achieve consistency of standards and assessment regimes between different institutions**

One small contribution to consistency of achievements of graduates of different law courses would be made by removal of the short form description in the 11 Academic Requirements (or whatever takes their place).
The only way of improving consistency in the breadth and depth of law subjects studied during a law course is to increase, to a greater or lesser extent, the degree of regulatory control over the content of law courses. Any such move is likely to be highly contentious, and bitterly opposed by the universities.

The present requirement for accreditation which is expressed in the New South Wales rules as requiring the course to include “the equivalent of at least three years full-time study of law” is imprecise about what counts as “study of law”. As a matter of ordinary English, that expression could include study of legal history, the philosophy of law, and sociological study of how the law operated in practice in a society. A crude measure for increasing the breadth of law subjects studied during the law course would be to add a requirement to the academic requirements for admission that an applicant should have studied a certain number of substantive law subjects, drawn from a fairly long list of options. However, unless there was specification of the required minimum content of such subjects, it would be a superficial measure, and would not provide any assurance about the depth of study of any such subject.

Alternatively, it would in theory be possible to add to the criteria for accreditation of a degree wording such as that in the opinion of the Committee or the Board (as the case may be) it “offers courses of study of substantive law of such breadth and depth as to be likely to produce graduates with sufficient knowledge of the law to be fit to practice as lawyers.” Such a test would provide scope for consistency in the breadth and depth of degrees that were accredited by a particular admitting authority. However the lack of objectivity of such a requirement makes it undesirable. As well, it would trigger a need for the process for re-accreditation to be made more complex than it already is. Now, under Rule 44, the Committee must consider only a limited range of material, concerning the objective content of courses offered, in deciding whether to re-accredit. If formation of an opinion about the depth and breadth of the course as a whole was part of the process of original accreditation, it would seem that it ought to play a part in the re-accreditation process as well. It is adequate for the Committee to accept the assurance of the Head of a law school that a course as actually taught provides a satisfactory level of understanding and competence of an objectively defined subject matter, because it is reasonable for an administrative body like the Committee to rely on the word of a responsible person concerning something that is largely a matter of fact. However it would come close to the Committee abdicating its own functions if it did not engage in some independent consideration, in deciding whether to continue accreditation of a course, of whether the course as a whole made its graduates fit for admission.

It is hard to see how it is possible to have a regulatory regime that would promote consistency of standards between institutions. The relevant standards are those of the depth of the content of the courses offered, and the assessment. Short of specifying the content of the courses in detail, I cannot think of any objective measure of depth of content.
It is the nature of law that student assessment cannot be carried out by any process that is reducible to an objective checklist. The only way of ensuring that there is comparability of assessment standards between different institutions would be an audit process, whereby a sample of student exam scripts or assessment tasks were re-marked by an external examiner. This seems hardly practical. Would students be deprived of their marks until the external examiner had completed his or her task? If the external examiner disagreed with the original mark or grade, what mark or grade would the student receive from the institution in which he or she was enrolled? If the audit process showed repeated differences between the original mark or grade and the external examiner’s mark or grade, what would be done about the mark or grade of those students whose work had not been considered by the external examiner? In particular, would those students be considered to have achieved a satisfactory standard for admission?

In the secondary school system of each State and Territory comparability of standards of the multitude of different schools is achieved through an external examination at the end of the school course. In theory it would be possible to require all intending lawyers to sit and pass a common exam, perhaps in just one or two subjects as a check on the adequacy of their knowledge, and for that examination to be externally marked. However the practical difficulties of achieving that would be enormous, a significant bureaucracy would be needed to administer it, and the requirement to pass that examination would provide yet another cost barrier to entry to the legal profession. It is already too hard for someone who is talented but not wealthy to qualify as a lawyer. As well, if only one or two subjects were to be examined externally, it is predictable that students would give special attention to those subjects, so that the results of the external examination were not typical of the student’s work or ability.

Having thought through the ways in which consistency between institutions might be promoted, the only ways that seem practical are those mentioned in the first and third paragraphs of this answer to questions 6.9 and 6.10.

I assume that in asking question 6.9 and 6.10 at all LACC has some basis for believing that some law schools might be producing lawyers of inadequate quality, and that one or more admitting authorities are letting them get away with it. It is worth recording that my quite limited experience of graduates of different law schools has not led me to have any similar belief. Of course some law schools are better than others, but that is quite different to whether any law school is producing graduates with inadequate knowledge to practice. It may be worthwhile for LACC to give further consideration to whether there is a real practical problem, relevant to the minimum standards of knowledge of newly admitted lawyers, about consistency of standards between universities. If there is, it might be more appropriate to draw to the attention of the admitting authorities concerned that a degree course that it has accredited seems to produce inadequate graduates, and to suggest that
that admitting authority tighten its accreditation procedures, rather than alter the Admission Requirements.

J C Campbell

25 February 2015
Appendix 145

Extracts from LACC’s Statement of PLT Requirements (2015 version)46 concerning ADR’s role in PLT

Lawyers Skills is a compulsory subject. The specified skills include:

7. Facilitating early resolution of disputes • identified the advantages and disadvantages of available dispute resolution options and explained them to, or been involved in explaining them to, the client.

• performed in the lawyer’s role, or been involved in or observed that performance, in the dispute resolution process effectively, having regard to the circumstances.

• documented any resolution as required by law or good practice and explained it, or been involved in explaining it, to the client in a way a reasonable client could understand.

Explanatory Notes concerning Lawyers Skills include:

“In the Performance criteria for Element 7, “dispute resolution options” includes:

• negotiation;
• mediation;
• arbitration;
• litigation;
• expert appraisal.”

45 Discussed at page 15 above


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**Problem Solving** is a compulsory skill in the PLT requirements. Identified skills include:

- developed creative options and strategies to meet the clients objectives
- identified the advantages and disadvantages of pursuing each option or strategy
- assisted, or been involved in assisting, the client to choose between those options in a way consistent with good practice
- develop the plan to implement the client’s preferred option
- acted, or been involved in acting, to resolve the problem in accordance with the client’s instructions and the lawyers plan of action

Exercise of those skills, concerning a dispute, would inevitably involve giving consideration to alternatives other than litigation for the resolution of a dispute.

**Ethics and Professional Responsibility** is another compulsory PLT subject. Its content includes:

- identified any applicable rules of professional conduct
- taken action which complies with those rules

The application of that skill in practice would include consideration of both the *Barristers Rules* and the *Solicitors Rules*. Rule 38 of the *Barristers Rules* requires:

“38. A barrister must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the barrister believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client’s best interests in relation to the litigation.”

Rule 7.2 of the *Solicitors Rules* requires:

“7.2 A solicitor must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the solicitor believes on reasonable grounds that the

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client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation.”

Civil Litigation Practice is a compulsory PLT subject. Part of its requirements are:

<table>
<thead>
<tr>
<th>“Element”</th>
<th>Performance criteria</th>
</tr>
</thead>
</table>
| **1. Assessing the merits of a case and identifying dispute resolution alternatives** | • assessed the strengths and weaknesses of both the claimant’s and opponent’s cases.  
• identified the facts and evidence required to support the claimant’s case.  
• advised the client of relevant rights and remedies in a way that a reasonable client could understand.  
• *identified means of resolving the case, having regard to the client’s circumstances.*  
• where possible, confirmed in writing any instructions given by the client in response to initial advice.  
• identified and complied with the relevant limitation period. |
| **2. Advising on costs of litigation** | • identified any litigation funding options and a means of reducing or recovering costs.  
• identified alternative types of costs orders and how they may be affected by formal and informal offers of compromise and the manner of conducting the litigation.  
• *advised the client of relevant cost considerations in a way that a reasonable client could understand.* |

(italics added)

Explanatory Notes to that specification of skills state

“In the Performance criteria for Element 1, “means of resolving a case” includes:

• negotiation;
• mediation;
• arbitration;
• litigation;
Several of the optional practice areas also make reference to alternative dispute resolution. The requirements for **Employment and Industrial Law** include:

<table>
<thead>
<tr>
<th>“Element”</th>
<th>Performance criteria</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Assessing the merits of the dispute and identify the dispute resolution alternatives</td>
<td>The lawyer has competently:</td>
</tr>
<tr>
<td></td>
<td>• identified the relevant facts.</td>
</tr>
<tr>
<td></td>
<td>• assessed the strengths and weaknesses of the dispute according to the relevant law.</td>
</tr>
<tr>
<td></td>
<td>• identified all means of resolving the dispute, having regard to the client’s circumstances.</td>
</tr>
<tr>
<td>2. Advising client on procedures</td>
<td>• advised the client of means of avoiding a dispute, where appropriate.</td>
</tr>
<tr>
<td></td>
<td>• advised the client of available steps to strengthen the client’s position.”</td>
</tr>
</tbody>
</table>

Explanatory Notes to the specified skills concerning Employment and Industrial Relations Law include:

“In the Performance criteria for Element 1, “means of resolving the dispute” includes:

- negotiation;
- mediation;
- conciliation;
- arbitration;
- litigation.”

**Family Law Practice** is another optional practice area. The specification of its skills include

<table>
<thead>
<tr>
<th>Element</th>
<th>Performance criteria</th>
</tr>
</thead>
<tbody>
<tr>
<td>“1. Advising on matters relating to children and property</td>
<td>The lawyer has competently:</td>
</tr>
<tr>
<td></td>
<td>• elicited information necessary to identify the client’s options.</td>
</tr>
</tbody>
</table>
|                                               | • informed the client of *all relevant*
available options, in a way that a reasonable client could understand.
• identified any pre-action procedures that apply to the matter.
• taken any steps necessary to enable the client to obtain access to those procedures.”

(italics added)

Planning and Environmental Law Practice is another optional practice area. Its requirements include:

<table>
<thead>
<tr>
<th>Element</th>
<th>Performance criteria</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>The lawyer has competently:</td>
</tr>
</tbody>
</table>

1. Assessing the merits of the matter and ... advising the client
   • identified, or been involved in identifying, all options and developed a plan of action in accordance with the client’s instructions.
   • alerted, or been involved in alerting, the client to the need to identify the commercial, political and public relations implications of any proposed action...

4. Representing the client in resolving a planning matter or environmental claim
   • identified appropriate means of resolving the matter to the satisfaction of the client and discussed them, or been involved in discussing them, with the client.
   • completed all preparation required by law and good practice.
   • represented, or been involved in representing, or observed the representation of, the client effectively in any negotiation, mediation, hearing or other proceedings.
While these quotations are from the 2015 version of the PLT requirements, substantially identical requirements also appeared in the PLT requirements that appeared in the first version of the *LP Admission Rules* in 2005, and subsequent versions\(^4^9\).

Appendix 2 - currently proposed English statement of “underpinning knowledge of law”

Annex C - Statement of Underpinning Legal Knowledge

1. Ethics, professional conduct and regulation, including money laundering and solicitors accounts
   - 1a. The ethical concepts governing the solicitor's role and behaviour, including as expressed in the law, and the economic, social and cultural influences that can bias independent and ethical judgement
   - 1b. The SRA Principles
   - 1c. The Code of Conduct:
     - commitment to the rule of law and proper administration of justice
     - duties and responsibilities owed to clients
     - running the business
     - interacting with the regulator
     - duties to others
   - 1d. Money laundering
   - 1e. Financial services
   - 1f. Solicitors' accounts
     - identification of office/client money
     - receipts into and payments out of office and client account/money
     - payment of deposit interest
     - accounting systems and internal controls
     - recording transactions and preparation of financial statements
     - regulatory controls
   - 1g. Obligations to report relevant to a solicitor's practice

2. Wills and administration of estates
   - 2a. Pre-grant practice
     - validity, revocation and alteration of wills and codicils
     - total and partial intestacy
     - identification of property passing by will, intestacy or outside of the estate
     - valuation of assets and liabilities and the taxable estate
   - 2b. Application for a grant of representation
     - the necessity for and main types of a grant
     - the powers and duties of personal representatives and their protection
     - the main types of oath for executors or administrators

50 Discussed at page 23 above
the prior submission of inheritance tax account to HMRC before grant is obtained and payment of tax shown due on account

- **2c. Post-grant practice**
  - collection and realisation of assets, and claims on the estate
  - raising funds and the payment of all tax and debts
  - pecuniary legacies, vesting of gifted property in the beneficiaries entitled and distribution of the residuary estate

### 3. Taxation

- **3a. Income tax**
  - who is chargeable (residence/domicile)
  - what is chargeable (types of income/main reliefs and exemptions)
  - how is charge levied (deduction at source/PAYE/self-assessment)
  - outline of anti-avoidance provisions

- **3b. Capital Gains Tax**
  - who is chargeable (residence/domicile)
  - what is chargeable (calculation of gains/ allowable deductions/ main reliefs and exemptions)
  - how is charge levied (self-assessment/recovery through PAYE system/agents)
  - outline of anti-avoidance provisions

- **3c. Inheritance Tax**
  - Key principles
    - basis of charge to tax (potentially exempt gifts/lifetime chargeable gifts/transfers on death)
    - main exemptions/reliefs
    - outline of anti-avoidance provisions (reservation of benefit regime, restrictions on deductibility of certain debts/ encumbrances)
    - person liable to make returns and payment

- **3d. Corporation Tax**
  - Key principles
    - chargeability to corporation tax
    - tax treatment of company distributions or deemed distributions to shareholders
    - payment and collection of tax (self-assessment)
    - outline of anti-avoidance legislation

- **3e. Value Added Tax**
  - key principles relating to scope, supply, input and output tax
  - registration requirements and issue of VAT invoices
  - returns/payment of VAT and record keeping

### 4. Business Law and Practice (including company/commercial law)

- **4a. Business structures**
- **4b. Legal personality and limited liability**
- **4c. Procedures required to incorporate a company/form a partnership/LLP and the approvals and other steps required under companies and partnerships legislation to enable the entity to commence operating**

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• 4d. Corporate governance
  o rights, duties and powers of directors and shareholders of companies
  o procedures relating to company decision making and meetings
  o minority shareholder protection rights
• 4e. Raising capital, including company borrowing
• 4f. Insolvency (corporate and personal insolvency)

5. Property
• 5a. Key concepts of real property
• 5b. The property legislation of 1925; registered and unregistered land
• 5c. Estates and interests in land: freeholds, leases, mortgages, easements; and rights over land: licences, tenancies at will
• 5d. The trust of land and co-ownership
• 5e. Adverse possession
• 5f. The landlord/tenant relationship; leasehold covenants; enfranchisement
• 5g. Real property and human rights
• 5h. Tax considerations relevant to property transactions

6. Torts
• 6a. Negligence:
  o duty of care and breach of duty of care
  o causation and remoteness of damage
  o problematic areas, including pure economic loss and psychiatric illness damage
• 6b. Breach of statutory duty and product liability
• 6c. Nuisance, and the rule in Rylands v Fletcher
• 6d. Trespass to the person
• 6e. Defamation
• 6f. Vicarious liability
• 6g. Remedies, including damages and injunctions
• 6h. Defences, including consent and contributory negligence

7. Criminal law and evidence
• 7a. Elements of offences - actus reus and mens rea. Factors affecting culpability: e.g. insanity, automatism and intoxication. Capacity to commit offences
• 7b. Modes of liability: secondary participation, vicarious and corporate liability
• 7c. Specific offences: public order offences, fatal, non-fatal and sexual offences against the person, property offences
• 7d. Inchoate offences: assisting and encouraging crime, attempt and conspiracy
• 7e. Defences: self-defence, necessity, duress. Partial defences to murder - loss of control, diminished responsibility
• 7f. Evidence, including burden and standard of proof, bad character and hearsay
• 7g. The European Convention of Human Rights, particularly articles 5 and 6
8. Criminal litigation

- 8a. Criminal Procedure Rules, their overriding objective, and their application
- 8b. Pre-trial procedures, including plea before venue and allocation
- 8c. The role of the defendant’s representative in police stations both as own client and as duty solicitor and the role of the defendant’s solicitor at court under the duty solicitor scheme
- 8d. Custody, review and detention limits under PACE and the role of the custody officer
- 8e. Key steps for making an application for a representation order
- 8f. Key steps for making or contesting a bail application
- 8g. The trial process
- 8h. Sentencing
- 8i. Appeals

9. Contract Law

- 9a. Formation, including offer and acceptance, consideration, intention to create legal relations, certainty
- 9b. Variation and promissory estoppel
- 9c. Privy of contract and rights of third parties
- 9d. Terms, including terms implied by common law and statute
- 9e. Interpretation of contracts
- 9f. Exemption clauses and unfair terms
- 9g. Vitiating factors: including mistake, misrepresentation, duress and undue influence
- 9h. Termination of contract for breach or frustration
- 9i. Remedies: damages, award of an agreed sum, specific performance, injunctions
- 9j. Restitution for unjust enrichment (especially in the context of termination of a contract)

10. Trusts and equitable wrongs

- 10a. Difference between legal and equitable interests
- 10b. Creation of express trusts
- 10c. Resulting trusts
- 10d. Constructive trusts
- 10e. Charitable and non-charitable purpose trusts
- 10f. Trustees: their appointment, removal, powers, duties and liabilities
- 10g. Fiduciary duties and remedies for breach of these duties
- 10h. Knowing receipt of trust property and dishonest assistance in breach of trust or fiduciary duty
- 10i. The rights, remedies and powers of beneficiaries, including proprietary remedies after tracing
- 10j. Equitable remedies: specific performance, injunctions, rescission, rectification and proprietary remedies

11. Constitutional law and EU law (including Human Rights)

- 11a. The basic institutions (the Crown and Parliament, central government, devolved institutions, EU institutions and the judiciary) and principles of the British Constitution
- 11b. The nature, status and procedure for passing primary and delegated legislation
- 11c. Government accountability (and in particular the relationship between the Government and Parliament)
- 11d. Parliamentary sovereignty
• 11e. Separation of powers (including judicial independence)
• 11f. The rule of law
• 11g. The place of EU law in the constitution
• 11h. Human Rights Act 1998 and key principles of anti-discrimination legislation
• 11i. Judicial control of the Executive, in particular the process and principles of judicial review.

12. Legal system of England and Wales
• 12a. The main legal institutions (including the main legal professions)
• 12b. Sources of law:
  o legislation
  o case law
  o European context
• 12c. Rules of interpretation
• 12d. Legal services
• 12e. Funding of legal services

13. Civil litigation
• 13a. Different options for dispute resolution: litigation, arbitration, mediation and other forms of alternative dispute resolution
• 13b. Funding
• 13c. Costs consequences, possible liability for costs and cost recoveries
• 13d. Preliminary considerations: limitation, jurisdiction and applicable law
• 13e. The Civil Procedure rules, including Practice Directions, Forms and Court Guides
• 13f. Pre-action steps, court structure and choice of court, issue, service, acknowledgment of service, judgments in default and summary judgment, drafting and service of statements of case, disclosure, part 36 and other settlement offers, interim applications and interim remedies, preparing for trial, settlement
• 13g. The court's case and costs management powers and duties
• 13h. Evidence: expert witnesses and witnesses of fact
• 13i. Key elements of trial procedure
• 13j. Methods of enforcement and enforcement procedures
• 13k. Rights of appeal and appeal procedures