6. SOME QUESTIONS

In light of the preceding discussion, LACC invites submissions relating to the following questions.

6.1 Should any or all of the following areas of knowledge be omitted from the Academic Requirements:

Civil Procedure Company Law Evidence Ethics and Professional Responsibility?

**Civil Procedure: Absolutely not.**

*The Civil Procedure legislation has been framed with the specific intention of codifying civil practice and procedure. The provisions are complex and, although it would be unrealistic to expect that even a well taught Unit could produce students who had an encyclopaedic knowledge of the area, such a Unit would familiarise students with the existence of the legislation and rules; would ingrain in them a clear appreciation of the fact that Courts will expect them to understand that the legislation and rules are not optional extras to accomplished professional practice, but are absolutely essential to such practice. A comfortable working grasp of the fundamentals of this legislation and rules is a non-negotiable requirement for any Barrister or Solicitor/Advocate and for any Solicitor whose practice embraces any aspect of civil litigation.*

**Company Law: Absolutely not.**

*Corporate law, corporate practice and corporate governance are things that have a huge impact across a whole range of legal professional practice, criminal law not by any means least among them*

**Evidence: I will say frankly that I cannot credit that this is a serious proposal.**

*It is, in a word, impossible to prepare any case, civil or criminal, trial or appellate, for presentation in Court and it is equally impossible to present any such case in any Court without the particular Counsel having an ingrained grasp of the fundamentals of the law of evidence. The Uniform Evidence Act has the appearance of a Code, but is not in fact a Code simply replacing the Common Law of Evidence. The Uniform legislation is complex and full of subtleties and nuances which cannot, by any stretch of the imagination, be mastered on the run, as it were. Again and again, the current law of evidence obtrudes into any and every case in ways not all of which can be predicted before the hearing commences and once that happens, then every case is apt to take on a life of its own, throwing up fine points of evidentiary law which cannot possibly be grasped clearly and argued convincingly in the absence of a thoroughly embedded grasp of at least the broad direction(s) in which to be heading and of exactly where to find the relevant provision(s).*

**Ethics and Professional Responsibility: I venture, once more, that I cannot credit that this is a serious proposal.**

*In support of that stance, I will say frankly something that used not to require any saying and I will say it in anecdotal form. When I was a very junior Barrister, I had occasion to discuss with a very senior colleague of unimpeachable professional integrity a certain Bar Council ruling that had been recently promulgated. After we had discussed the matter back and forth for a few minutes, my colleague looked me directly in the eye and said: “Of course, a gentleman would not have to be told”.*
I have not led so sheltered a professional life as not to appreciate the kind of politically correct firestorm that is likely to greet that statement in whatsoever context. I am, however, in good company: see, for example, per Kitto J in Ziems v The Prothonotary of the Supreme Court of NSW (1957) 97 CLR 279 at 298; approved subsequently by the High Court of Australia in Clyne v NSW Bar Association (1960) 104 CLR 186 at para 2 of the judgment per curiam. I add, in the spirit of being as well hanged for a sheep as a lamb, that only a person with a very anaesthetised awareness of the true requirements of legal professional ethics could seriously dispute that modern education is producing, albeit no doubt with exceptions, students who have never had any real contact with ethics, let alone any real contact with a sound ethical formation. It is nothing more than simple professional experience, whether in practice or on the Bench, that if there is one foundation that needs to be cemented firmly into place in any and every law student, it is a sound grasp of and a genuine commitment to the steady maintenance of, the requirements of ethical professional legal practice. From the very first lecture to a first year student, to the very last lecture to an almost-graduate, professional ethics should be front and centre.

6.2 If so, why?

Not applicable.

6.3 Should Statutory Interpretation be included as an Academic Requirement?

Yes. It is simple common sense to do so, given the seemingly unstoppable flow of Acts, Rules and Regulations. I do not accept, that it is necessarily the best or the only viable approach to create an entirely new academic subject.

My own preference would be for the establishment of a core subject to be known as Introduction to Law. I have advocated this in other contexts with, as I must ruefully admit, an absolute lack of success. Given that hope is a cardinal virtue and that persistence is at least sometimes a worthy characteristic, I venture to repeat the substance of the view put on those previous occasions:

“As to overall structure, the Unit should consist of four basic sections:

- a Preliminary Skills section;

- a Practical Overview section;

- a Legal and Constitutional History section; and

- an Interpretation (statute law)/ Analysis (case law) section.
Of the available 13 teaching weeks, I would allocate 2 weeks to each of the first two sections, 4 to the third section and 5 to the final section.

As to the first section, I would establish, concurrently with the Unit itself, an Elective called, perhaps, Remedial English Expression for Law Students. I would use the first 2 weeks of lectures as vehicles for explaining what any Law Student, let alone any professional, competent Barrister or Solicitor, in real practice MUST be able to do in the matter of understanding, of writing and of speaking GRAMMATICAL English. At the end of the second teaching week there would be a simple but properly rigorous test of every student’s English writing and comprehension. A student scoring less than 75%, (or, perhaps, 65%, although I would myself strongly favour the higher threshold), should be required, as a condition of continuing enrolment in the Unit proper, to take, concurrently with that Unit, the new Elective.

The second section of the Unit would lay down a carefully fashioned overview of:

- the concept of the Rule of Law as a non-negotiable building block of any society fit to be considered as civilised at all, never mind “progressive”, “enlightened” or any other of the currently fashionable tags that confuse dangerously the very different concepts of personal liberty and personal licence.

- the concept of justice: "... ... the constant and perpetual wish to render to everyone his due”, to borrow from the opening words of Justinian’s Codification.

- the concept of the Rule of Law as the essential vehicle for defining and then for vindicating whatever might be “due” in a particular context.

- the twin sources of the Rule of Law in Australia: Common Law, that is to say, law established by the Courts by a process of principled deduction from and of principled application of curial precedent; and Statute Law, that is to say, law legislated into being by Act of Parliament and/or by Rules and/or Regulations authorised by Act of Parliament.

- the role of the Courts in ensuring that justice according to law is both done and seen to be done: the absolute necessity, to that end, that the Courts and the Judges be and be seen to be Constitutionally independent.

These notions will be explored and explained as historical developments, later during the Unit.
- the current structure of Australian Courts. Their respective statutory bases and Rules of Court, (not, of course, in very fine detail, but as explanatory concepts).

The complementary but conceptually distinct notions of a particular Court's jurisdiction; its procedure and practice; and its powers and discretions.

- the correct denomination of parties before the various Courts.

- the recording of the proceedings of the Courts: reported and unreported decisions: the various series of authorised Law Reports - what do they actually look like? - how are they correctly referred to in Court? Where can they be located, both online and offline?

As to the suggested third section, its fundamental purpose is sufficiently apparent from its working title. It should be thorough and its overall thrust should be narrative, like all worthwhile history, rather than ideological - instruction rather than indoctrination.

As to the suggested final section, its fundamental purpose, too, is indicated sufficiently for present purposes by the working title given above.

In inviting the foregoing comparison, I point out that the bare comparison and contrast of the two templates leaves unaddressed some important teaching issues. I do not see how I can properly avoid taking them up, but I do so with some hesitation, first, because my own teaching experience, although it has continued since 2007, remains in practical terms, limited; and secondly, because I am apprehensive that my views will put me uncomfortably outside some current teaching requirements and assumptions at UWS. I repeat, therefore, that what I have to say is a purely personal opinion and does not imply in any way merely gratuitous criticism of those teaching colleagues who carry the heat and burden of the day in teaching Introduction to Law to invariably very large classes.

I accept, as of course, that a decision has been taken in principle to embed in teaching at UWS the concept of "blended learning". I believe that more time needs to pass before any reliably definitive assessment can be made of the teaching value to the students of this teaching. I will venture,
however, this opinion: whatever might prove to be the case in other Units, the teaching of Introduction to Law and its concurrent remedial Elective should be academically solid face-to-face teaching. I could teach my own Advocacy Unit otherwise than face-to-face, but with nothing remotely approaching what I am assured by each year’s student feedback is achieved by face-to-face teaching both in the formal lecture component of the Unit and in the practical, simulated in-Court presentations. I believe very strongly that first year students must be brought to understand that in the professional practice of Law they will be dealing with real flesh and blood PEOPLE and that there are many and essential things that simply cannot be done in that context by any IT however technologically dazzling it might be.

I advert, next, to the matter of a Lecture/Workshop mix of teaching method.

My own Advocacy Unit does combine, of course, both elements of that mix, but that is because of the particular design and intended scope of the Unit as explained in the Unit Learning Guide.

About such a basic and critically important Unit as a refashioned Introduction to Law Unit, I am not convinced that a similar mix is what is needed. Given the nature and the scope, as previously herein explained, of what I believe the Unit should be teaching, it would seem to me that the students would benefit much more from the discipline of having to attend lectures; to listen and to make notes; to think and to question during the lecture which, if done correctly, is apt to teach some basic good manners as well as some basic study skills; and then to sit, finally, for a rigorous, closed-book, unpampered written examination in the marking and grading of which there will be factored into the final mark and grade, marks of real substance for reasoned discussion, for correct grammar and for correct spelling and punctuation. I believe very strongly that the best service we could do our first year students in a refashioned Unit would be to encourage them, tactfully but resolutely, to prefer discipline to indulgence, and to set themselves from the very inception of their studies the goal of being true professionals rather than dilettanti having the time of their lives at ‘Uni’.

6.4 Is any other area of knowledge, not presently included in the Academic Requirements, now of such basic potential importance to the great majority of practitioners today, that no law graduate should be permitted to practise without it?

Yes. At least some solid grounding in the essentials of Advocacy is, in my view, essential. I accept that it will be very hard to organise this in the context of current pressures on class sizes. I do perceive, however, that something needs to be provided that is better than what seems to be currently available. Mooting is a great idea, but it is in the nature of things that only a small number of enthusiastic and ambitious students will be bothered to take part. A short-back-and-
sides ten minutes or so in which each of 100+ students can, for instance, “make a bail application” is, at best, well-intentioned tokenism. It needs to be borne steadily in mind that practically every graduate who actually takes up professional legal practice, even if set upon becoming rich and famous by concentrating on high-end corporate law, national and, of course, international will have, sooner or later, to run a bail application; enter a plea; make a submission on sentence; ask for an adjournment; argue an interlocutory application; argue a costs question and so forth. It is not an answer to say that Counsel can be briefed on every such occasion. Even when the instructions and the considerable funds necessary to authorise the briefing of Counsel are in hand, the instructing Solicitor or, alas, Clerk, will be expected by the client, and will be obliged as a matter of professional ethics, to earn his eye-watering hourly rate by at least having the knowledge necessary to support professionally the work of Counsel.

6.5 If so, should any such area be added to the Academic Requirements?

I hesitate to say, simply and bluntly, yes. I do understand the practical difficulties. I do believe, however, that if there is now to be a really useful root and branch revisiting of basic academic requirements, then it should be examined at a properly precise level, what might be done to improve upon what is currently available. I believe it to be a mistaken approach to leave the matter of training in Advocacy to the College of Law phase. It seems to me that students who go to the College having had some worthwhile previous solid formation in the basics of Advocacy will be likely, on that very account, to benefit much more than might otherwise be the case from the courses taught at the College.

6.6 Should the drafting technique used in the Academic Requirements be amended in any way?

I do not believe that I have, as yet, sufficiently detailed knowledge of the current drafting to answer this question in a useful way, except perhaps to say that there ought to be a deliberate attempt, consistently made throughout any redrafting, to use simple, grammatical English. I agree wholeheartedly with a comment of the recently deceased and great Australian scholar, Pierre Ryckmans: “Intellectual impostures always require convoluted jargon, whereas fundamental values can normally be in clear and simple language.”

6.7 If so, how?

See 6.6.

6.8 In the light of the development of the TLOs, should the Academic Requirements 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?

Unquestionably, yes.

I have touched upon this concept in my answers 6.4 and 6.5. I believe strongly that there are additional matters that should be constant features of the teaching of Law at any University deserving of that status.
First, a resolute insistence upon the use by every student at every level of academic development of clear, simple, grammatical English scraped clean of administrative mumbo-jumbo. A Barrister or a Solicitor must be able to articulate convincingly to any Court and to the understanding of any client or relevant witness, the point of any submission that is being made or of any question that is being asked. These abilities are not, at least not in most cases within my own experience, functions of mere intelligence or a lack thereof. They are results achieved by building upon a foundation of patient, consistent and disciplined academic instruction and formation.

Secondly, upon a similar insistence upon a similar facility in written expression.

Thirdly, upon a resolute encouragement of a purview that goes beyond getting the minimum qualifying marks with the least effort. There should be a resolute insistence upon the need to cultivate the mind by an embedded practice of reading good literature, ancient and modern, poetry and prose; and by at least some serious attempt to leaven the stresses and miseries of current life and work with the civilising effects of the great arts.

Fourthly, the encouragement, above all by example, of a proper formality. The barbarous modern practice of students addressing, even if uninvited, (and they ought never be invited, in my view), by Christian name a teacher old enough to be their parent, even their grandparent, ought to be firmly disestablished. A Barrister or Solicitor who so addresses a Judge in Chambers, or in casual conversation otherwise, is sailing in dangerous waters. “Good manners” are not dirty words. They are as essential for a proper professional as are the core academic areas of legal knowledge.

Fifthly, the encouragement, above all by example, of a sense of correct and appropriate dress. There is no point in any ideological frothing at the mouth about this matter. Practitioners are expected, indeed required, by every Court to dress correctly and to have a correct deportment and general address. In my own experience clients and witnesses, also, know a slob when they meet one and do not normally respond by proper cooperation.

I cannot stress too strongly my firm conviction, based upon some 52 years of practising as Solicitor, Barrister and Queen’s Counsel, of sitting for almost 18 years as a Supreme Court Judge and of teaching at UWS since 2007, that these matters are not mere whims and fancies. They are characteristics that identify a well-balanced and correctly formed professional practitioner in any Profession, but emphatically so in the case of the Legal Profession.

6.9 How might the Academic Requirements be altered or supplemented to resolve some or all of the problems of consistency of standards referred to above; and, in particular,

Please refer to the preceding answer.

6.10 How might the Academic Requirements be altered or supplemented to ensure that appropriate and consistent assessment regimes exist to certify that each successful student has demonstrated the common required knowledge and skills in each Academic Requirement to a common minimum standard?

First, by insisting upon face-to-face teaching as the academic norm, especially for first year students.
Secondly, by reinstating as the academic norm, rigorous closed book examinations calling for essay-type answers demonstrating not mere rote learning, but understanding of the relevant topic and subject.

Thirdly, by abandoning, clearly and frankly, any encouragement to students to work upon the basis that they have some inherent right never to fail an examination; that Universities are so frightened of being pilloried for insisting upon proper academic rigour that they are prepared to “adjust”, or “scale”, or otherwise to anticipate unjustified whingeing about, marks; and that a sufficiently aggressive invocation of those currently universal buzz-words: “discrimination”, “disadvantage”, “personal issues”, “employment pressures”, will almost certainly result in some adjustment sufficient to turn a borderline Fail into a borderline Pass.