LACC Review of Academic Requirements

This submission is in relation to Qn 6.1 and 6.2: whether Ethics and Professional Responsibility ('Ethics') should be omitted from the Academic Requirements for admission. It has been prepared and endorsed by the academic lawyers listed at the end of the submission.

For the reasons explained below, we strongly oppose any change to the status of Ethics and Professional Responsibility as one of the Academic Requirements for Admission to the Legal Profession.

Rationale for the review in relation to Ethics is not clear

1. We note at the outset that the rationale given by LACC for its review in relation to Ethics is not clear. LACC notes that
   a. Ethics is not a mandatory academic requirement in England, Wales, Scotland [this is incorrect in relation to Scotland\(^1\)] or India. It is required in Canada.
   b. Ethics is taught at PLT level.

   But these matters of themselves do not explain why LACC considers it necessary to review the requirement for mandatory Ethics at LLB/JD level. It would be helpful if LACC had more clearly set out its rationale for change in this area. For instance, is LACC satisfied with the general level of ethical competence and leadership in the legal profession? Does LACC consider that the knowledge and capacities involved in ethical behaviour can be taught effectively at PLT level with no prior academic ethics study? Does LACC believe that legal workplaces can (and do) sufficiently supply the contexts and skills for ethical deliberation and practice? What does LACC believe is needed to better ensure that lawyers behave ethically and what role, if any, would it see academia playing in this? A clearer rationale for change would allow stakeholders to offer more directed and productive responses.

2. LACC seems to justify its suggestion that Ethics not be mandatory at LLB/JD level by reference to the current situation in England. The reason for this emphasis on what is happening in England, as opposed to Canada, the USA or Scotland is not clear. Even if comparisons with England are useful, LACC emphasises the current position in England in relation to Ethics (ie Ethics is not currently a mandatory academic requirement), when LETR has suggested change in this area. LACC itself notes that the LETR report emphasised the ‘centrality of professional ethics and legal values to practice in any capacity’\(^2\) and that ethics was rated as more important than any other area of knowledge by surveyed legal practitioners. LETR recommended the enumeration of appropriate learning outcomes in respect of professional ethics, but refrained from suggesting Ethics be added as a discrete element to English academic requirements, because research did not reveal a consensus to include it.\(^3\) LACC suggests that the reason for LTER’s recommendation (to include required learning outcomes, but not to require a discrete course) may have been the desire to avoid a lengthy debate.\(^4\) This is hardly a good reason to omit an Ethics component from the required curriculum in Australia (no debate necessary, if we leave it in). Further, it is not

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\(^1\) \url{http://www.lawscot.org.uk/media/295010/foundation-programme-guidelines.pdf}, 30

\(^2\) LACC Review of Academic Requirements for Admission to the Legal Profession (‘LACC Review’), 7

\(^3\) ibid

\(^4\) ibid
clear how LETR’s ‘appropriate learning outcomes’ differ in concept from the Australian TLOs relating to Ethics.\(^5\) It seems Australia has already adopted a position akin to that which LETR is recommending, and is in fact a leader in this area.

3. It is curious that LACC did not refer to the US requirements or research. This is possibly because graduates of the US JD degree are not required to do a PLT equivalent. Nevertheless, the US experience and research is informative. The Carnegie Foundations’ *Educating Lawyers* report (‘Carnegie Report’) notes that:

> Since the 1970’s all [law] students [in the USA] have been required to take a course in professional responsibility and legal ethics. But in the 1990s the American Bar Association made it clear that, from its point of view, this single course requirement is not sufficient. In two highly visible reports - those of the McCrate Commission and the American Bar Association Professional Committee - the American Bar Association urged law schools to *increase* their attention to professionalism and ethics.\(^6\) [Emphasis added. The Carnegie report itself reached a similar conclusion.]

4. Further, Stuckey’s *Best Practices for Legal Education* report\(^7\) emphasises the particular importance of law schools helping students to explore and understand the ethical and moral dimensions of legal work.\(^8\) Stuckey’s report also includes a strong call for law schools to emphasise the teaching of professionalism.\(^9\)

**LLB and JD TLO’s emphasise the importance of teaching Ethics**

5. LACC appears to accept the value of the TLOs, which have been endorsed by CALD.\(^10\) There is a strong emphasis on Ethics in the TLOs for both the LLB and JD. Since there are only six TLOs for each degree, the emphasis (italicized below) on Ethics is very significant; Ethics is the only area of knowledge mentioned in TLO 1 that is considered important enough to expand on in its ‘own’ TLO.

**LLB TLO 1: Knowledge**

Graduates of the Bachelor of Laws will demonstrate an understanding of a coherent body of knowledge that includes:

- (a) …
- (b) *the broader contexts within which legal issues arise*, and
- (c) *the principles and values of justice and of ethical practice in lawyers’ roles*.

**LLB TLO 2: Ethics and professional responsibility**

Graduates of the Bachelor of Laws will demonstrate:

- (d) *an understanding of approaches to ethical decision-making*,
- (e) *an ability to recognise and reflect upon, and a developing ability to respond to, ethical issues likely to arise in professional contexts*,

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\(^5\) [Link to document](http://www.utas.edu.au/__data/assets/pdf_file/0007/456829/altc_standards_LAW.pdf)


\(^8\) Ibid 69.

\(^9\) Stuckey and Others, above n 6 chapter 2.

\(^10\) LACC Review, 2
(f) an ability to recognise and reflect upon the professional responsibilities of lawyers in promoting justice and in service to the community, and
(g) a developing ability to exercise professional judgement

**JD TLO 1: Knowledge**
Graduates of the Juris Doctor will demonstrate an advanced and integrated understanding of a complex body of knowledge that includes:
(a)...;
(b) *The broader contexts within which legal issues arise*;
(c) *The principles and values of justice and of ethical practice in lawyers’ roles*; and
(d) Contemporary developments in law, *and its professional practice*.

**JD TLO 2: Ethics and professional responsibility**
Graduates of the Juris Doctor will demonstrate:
(a) *An advanced and integrated understanding of approaches to ethical decision making*;
(b) *An ability to recognise and reflect upon, and a developing ability to respond to, ethical issues likely to arise in professional contexts*;
(c) *An ability to recognise and reflect upon the professional responsibilities of lawyers in promoting justice and in service to the community*; and
(d) *A developing ability to exercise professional judgment*.

Further, LLB TLO 6 and JD TLO 6 deal with ‘self-management’, which is a vital skill for ethical professional practice.

6. LACC quotes LETR in noting that ‘traditional [practising] professions are now a minority career destination for law graduates, and university law schools also have their own legitimate and distinctive objectives for the degree’.11 Be that as it may, this is no reason to remove Ethics from the academic requirements for admission, because ethical formation remains essential for future lawyers. Ethics courses which are taught as envisaged by the TLOs will focus on legal professional ethics, but they also provide ethical decision-making skills and character development that are of equal use and importance in any career.

**Can PLT courses cover Ethics adequately, if Ethics is dropped as a requirement at LLB/ JD level?**

7. It appears that, if Ethics is omitted as an academic requirement, LACC envisages that the Ethics learning assumed by the TLOs would occur at PLT level. This will not happen, because the PLT has such tight time limits: PLT in Australia is the equivalent of approximately 6 months full time study.12 LACC itself notes, in relation to statutory interpretation, that supplementary teaching at PLT level is difficult to accommodate ‘in the tight framework of most PLT courses’.13 Any requirement that PLT pick up the substance of the Ethics TLOs will compromise PLT’s ability to teach to the LACC Competency Standards for Entry Level

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12 in England, Ethics is taught in the equivalent of PLT in a 12 month full time course

13 LACC Review, 10
Lawyers. These standards assume a significant amount of background Ethics knowledge/reflection.¹⁴

8. Further, LACC is assuming that all graduates seeking admission have completed a PLT course. However, PLT coursework is only mandatory in the ACT, NSW and Tasmania. All other Australian jurisdictions have a 12 month traineeship option (or some form of articles) as an alternative path to satisfy practical training requirements for admission. LACC’s own recommendations (embodied in law in Queensland) are for traineeships to include 90 hours of external tuition, and we assume few trainees receive more than 90 hours external tuition. If Ethics tuition occurs only at PLT level, those doing traineeships will receive no ethics preparation in their LLB/JD and only a few hours focus on Ethics in ‘external tuition’, which is clearly insufficient ethical preparation for legal practice.

9. PLT rightly focuses on how ethical principles (from case law and conduct rules) apply in practice and how to conduct oneself in practice as an ethical professional. Its focus is on enforceable rules of professional responsibility. There is very little, if any, time at PLT level to consider in depth important issues such as lawyers’ role in the legal system, the structure and regulation of the legal profession, lawyers’ responsibilities for access to justice and pro bono, the principles behind the professional conduct rules, models of ethical decision making, the impact of context and non-rational cognitive processes on ethical decision making, etc. If ethics are to be taught properly, then the discipline of ethics must be invoked, involving conceptual and theoretical frameworks, and general and then applied moral reasoning. All this takes time and is properly suited to the academic phase only.

10. Ethics is too important to be left until PLT. As the UK practitioners surveyed by LETR acknowledged, ethics underpins every aspect of legal practice. The challenges to the legal profession maintaining its ethical focus (which is the very thing that allows it to call itself a profession and not just a business) have increased as legal practice has become more complex and more globalised.¹⁵ This means that, more than ever, education for the profession of law practice requires what the Carnegie Report refers to as ‘ethical-social apprenticeship’ over several years:

   [T]he research makes quite clear that higher education can promote the development of more mature moral thinking, that specially designed courses in professional responsibility and legal ethics do support that development, but that unless they make an explicit effort to do so, law schools do not contribute to greater sophistication in the moral judgement of most students.¹⁶

¹⁴ http://www1.lawcouncil.asn.au/LACC/images/pdfs/LACCCompetencyStandardsforEntryLevelLawyers-Jan2015.pdf. It is interesting to note a comment about the TLOs for LLB/JD by a practitioner quoted in the ALTC’s Bachelor of Laws Learning and Teaching Academic Standards Statement:

   I think the principle of pointing students in the right direction, and challenging them to recognise, reflect and argue about ethics and justice is an excellent ideal. At work, graduates will have opportunities to test their ethical framework, but it is essential that they have one before they begin!

   - Member of Large Law Firm, response to D3.1 TLO 2, 26 October 2010


¹⁶ Sullivan et al, above n 5, 134.
11. Judges, ie, LACC’s core stakeholders, are constantly lamenting the deficient character of lawyers who appear before them charged with stealing from their clients or otherwise undermining the justice system. As the Carnegie Report recognises, character development is a formation issue, which arises long before PLT. If anything, LACC ought to be recommending early year LLB or JD attention to ethical formation, or integrated progressive ethical development from 1st year law, rather than the common final year ‘capping’ approach that tends to apply now in many law schools. The proposal to entirely abandon Ethics as a required academic discipline is profoundly unwise.

12. To remove Ethics from the academic requirements for admission, rather than increase the focus on it as recommended in the US and implied by the TLOs, would send a powerful negative message to students, academics, the wider profession and the public. As the Carnegie Report notes, ‘for better or worse, law school years constitute a powerful moral apprenticeship, whether or not this is intentional’. What we don’t teach is as important a message as what we do teach:

Even though the three years of law school represent a relatively brief period in the lifelong development of a lawyers, the law school experience, especially in its early phases is pivotal for professional development. In effect, students are apprenticing to the whole law school experience, not just to those elements that are intentionally designed to train and socialize them.

13. To reiterate, what is required is a far better grounding in the principles and methods of ethics within the academic phase of legal education. Omission of ethics from the required academic phase would justify a future Royal Commissioner concluding that professionalism is endangered, much as an earlier Commissioner lamented after the collapse of HIH Insurance. Within a year or so, it is likely lawyers will be collectively criticised by Justice McLellan (sitting as the head of the Royal Commission into Institutional Responses to Child Sexual Abuse), as a result of the questionable ethics of some lawyers who acted for certain witnesses before the Commission. Let us not set ourselves up for more public derision by footnoting all that abuse with the abandonment of ethical formation for future lawyers.

17 Ibid 139.
18 Ibid.

‘Right and wrong are moral concepts, and morality does not exist in a vacuum. I think all those who participate in the direction and management of public companies, as well as their professional advisers, need to identify and examine what they regard as the basic moral underpinning of their system of values. They must then apply those tenets in the decision-making process. The education system, particularly at tertiary level, should take seriously the responsibility it has to inculcate in students a sense of ethical method.

In an ideal world the protagonists would begin the process by asking: is this right? That would be the first question, rather than: how far can the prescriptive dictates be stretched? The end of the process must, of course, be in accord with the prescriptive dictates, but it will have been informed by a consideration of whether it is morally right. In corporate decision making, as elsewhere, we should at least aim for an ideal world.’

20 See, for example Vivien Holmes, ‘Compounding the Abuse: Lawyers for the Catholic Church in the Ellis Case’ 17 (3) Legal Ethics 2014, pp. 433–436
This submission has been prepared by the following legal ethics academics:

Vivien Holmes, ANU
Professor Adrian Evans, Monash University
Professor Reid Mortensen, University of the Southern Queensland
Dr Justine Rogers, UNSW
Professor Jeff Giddings, Griffith University
Francesca Bartlett, University of Queensland

And endorsed by the following legal academics:

Michael Brogan, University of Western Sydney
Dr Liz Curran, ANU
A/Professor Tony Foley, ANU
Dr Linda Haller, University of Melbourne
Dr Trish Mundy, University of Wollongong
Professor Paul Maharg, ANU
Karina Murray, University of Wollongong
Katie Murray, University of Southern Queensland
Professor The Honourable Nahum Mushin, Monash University
Professor Mary Anne Noone, Latrobe University
Professor Christine Parker (Law, Monash)
Mark J Rankin, Senior Lecturer, Flinders Law School.
Professor Simon Rice, ANU
Dr Amanda Whiting, University of Melbourne