Joint submission to Law Admissions Consultative Committee

Review of academic requirements for admission to the legal profession with reference to Civil Procedure

Introduction

As legal scholars engaged in teaching and research on civil procedure, civil justice and dispute resolution in Australia, we are grateful for the opportunity to provide a submission to the current enquiry. Our submission will address items 6.1 and 6.2 of the Committee’s report with reference to civil procedure.

In order to give students an appropriate grounding in the key principles which underpin dispute resolution in Australia, we believe that it is necessary to maintain civil dispute resolution in the academic requirements for admission. This submission briefly canvasses several key issues relating to the value and relevance of civil dispute resolution scholarship and learning in the undergraduate law degree. These include

- The development of key professional graduate attributes
- The need for a well-educated legal profession, with a nuanced understanding of the rule of law and ability to promote its values in practice
- The importance of instilling an understanding of the impact of policy and practice on access to justice
- The impact of civil justice research and scholarship on the functioning and reform of the civil justice system
- The multifaceted perspective that modern civil procedure curricula provide for future legal professionals.

Legal education is not just about technical rules, but also, and vitally, about instilling in lawyers an understanding of the value of process and the contribution that they can make to society’s wellbeing. In light of the importance to legal pedagogy and practice of the matters raised in the current limited review, we believe that it would be appropriate to undertake a more comprehensive review. We would welcome the opportunity to provide further advice to the Committee with respect to the scope and content of the academic requirements for admission.

Access to justice and legal education

We acknowledge the need to ensure that the academic requirements for admission remain relevant and appropriate in Australia’s changing legal landscape. In our view, at the heart of what we teach are the analytical, reasoning and communication skills that are necessary for all recipients of a legal education within this changing landscape. Civil dispute resolution requires students to analyse issues, distil themes and understand the interplay between factual circumstances, and the applicable law and remedies. It is not sufficient that civil procedure be included in practical legal training where the focus is on the mechanics of progressing
litigation. The retention of civil procedure in the academic requirements for admission is required to facilitate a deeper understanding of civil dispute resolution and its underpinning principles and broader policy context.

The courts are the guardians of the rule of law, a central feature that distinguishes successful legal systems like Australia’s from other legal systems. The courts rely on a well-educated legal profession that understands how they operate and furthermore shares the rule of law values and can promote these values in practice. Facilitating a nuanced understanding of the impact of policy and practice on access to justice is a key objective of civil procedure curricula. For example, we consider and analyse the desirability of litigation and potential alternatives, reforms that could streamline the process while maintaining core values such as due process and the costs borne by litigants and society more generally. The processes of dispute resolution are explained and are also questioned and critiqued, thus instilling in future lawyers an understanding of the value of process. Engaging with complex factual and legal matrices within the academic curriculum enables practising lawyers to competently serve the courts and their clients.

The operation of the civil justice system (like the criminal justice system) is mainly within the province of lawyers. Legal practitioners have clear duties to the courts and representing clients is quintessentially lawyers’ work. A legal education must accommodate this important component of legal practice. Changes to the legal landscape in the context of civil procedure reforms are incorporated in the teaching of civil dispute resolution to ensure that students gain a comprehensive understanding of the obligations that apply to lawyers and others. Students attain an understanding of the reality that in diverse areas of practice, policy, government and business, lawyers have a profound impact on access to justice at all levels in society.

Successive inquiries have emphasised the need for legal education to ensure that students learn broadly and deeply about the justice system and, wherever possible, develop skills in communication and problem solving. This necessarily requires students to be able to distil and recount issues in a logical and efficient manner. The recent work of the Productivity Commission has suggested that a systemic review of legal education be undertaken to ensure that legal education and training remains appropriate and equips graduates with necessary skills and education, and that care must be taken to ensure that any changes in one area do not have unintended consequences in another (Access To Justice Volume One at 252). We believe that removing civil dispute resolution from the academic requirements for admission would have significant consequences for students, future lawyers and the system itself.

**Civil procedure is essential**

It is necessary to retain civil dispute resolution as an academic requirement in order to give students an appropriate grounding in the key principles which underpin dispute resolution in Australia. The core of civil procedure is access to justice, due process and the supremacy of the rule of law. The study of civil dispute resolution is necessary to instil an appropriate understanding of substantive rights such as those taught in contracts and torts. Without
understanding how these rights are vindicated, we believe that students would emerge from university without fully comprehending the substantive law they have studied.

In order to understand the law, students must comprehend process. Civil procedure is concerned with the making of law through precedent. It is essential that students understand how litigation creates law. They will be unable to make an informed evaluation of the law without an understanding of civil procedure. We note that in law schools in the United States of America, civil procedure is taught as a foundational subject at the beginning of a law degree.¹

Underlying the suggestion that civil procedure might be removed from the academic requirements for admission may be the view that law schools are now generalist institutions and that many graduates may not proceed to legal practice. It may be assumed that civil procedure is of no utility to graduates who do not become lawyers. Nevertheless, law schools must equip all graduates to be lawyers irrespective of the path they go on to pursue.

Disputes are commonplace in commerce and government, domestically and internationally. Civil procedure courses in Australia which also encompass the study of alternative dispute resolution enable students to understand how disputes may be resolved through a number of mechanisms both within and outside the formal court system. The skills and knowledge gained by students in the study of civil procedure at university level will serve them well in whatever field of professional life they pursue.

**Removing civil procedure from the curriculum would adversely impact on research into civil processes and justice scholarship**

Removing civil procedure would substantially undermine scholarship in this extremely important area, with significant ramifications for our understanding of dispute resolution. We note that research in civil procedure assists the judiciary and the profession. Law graduates who become policy and research experts in civil justice do so after attaining an understanding of civil processes. Students and academics add to the body of research that informs civil justice reform. An inadequate focus on this area of scholarship into the future would inevitably lead to less research at a time where those engaged in policy reform suggest that more rather than less civil justice research and evaluation is required.

**Evolution in teaching civil procedure**

While our curricula encompass the prescribed areas of knowledge for civil procedure, our approach to teaching civil dispute resolution has evolved dramatically in recent years. Rather than cataloguing the 11 prescribed areas of knowledge for civil procedure or the rules that

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¹ For examples, see:
http://web.law.columbia.edu/admissions/jd/learn/curriculum/1l
http://www.law.stanford.edu/courses/1st-year-program
http://www.law.berkeley.edu/162.htm
http://www.law.harvard.edu/academics/degrees/jd/
http://www.law.yale.edu/academics/jdfirstterm.htm
pertain to the more general guidelines which operate as an alternative, we seek to imbue our students with an understanding of the overarching aims and principles of dispute resolution and how they are reflected in procedural law. We seek to provide students with the skills to navigate the requirements of dispute resolution and avoid a narrow and technical approach. Our curricula have furthermore evolved to accommodate the increasingly important role played by Alternative Dispute Resolution in the civil justice landscape.

The current framing of the prescribed areas of knowledge for civil procedure suggests a narrow and technical approach to teaching, which is not reflected in the breadth of curricula currently offered. We consider that the prescribed areas of knowledge should be updated and modifications made to the nomenclature used in order to reflect the important place occupied by Alternative Dispute Resolution in Australia’s legal landscape. For example, ‘civil dispute resolution’ would be more a suitable subject title than civil procedure. We believe that the task of updating the prescribed areas of knowledge would best be undertaken in the context of a comprehensive review of the academic requirements for admission.

**Further review required**

The current review addresses itself to matters of great importance for legal pedagogy and practice. It would therefore be appropriate to undertake a more comprehensive review of the academic requirements as a whole, adopting a time frame which enables the Committee to receive submissions from a range of stakeholders, including practitioners and educators. We would welcome the opportunity to provide further advice on how the prescribed areas of knowledge may best be modified in order to ensure that graduates complete their academic studies with sufficient grounding in the principles which are necessary to ensure an appropriate understanding of how legal rights are realised in Australia.

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**Professor David Bamford**  
Associate Dean (International), Flinders Law School

**Dr Bernard Cairns**  
University of Tasmania

**Professor Peter Cashman**  
Professor, University of Sydney

**Margaret Castles**  
Senior Lecturer, Director, Clinical Legal Education Program, Adelaide Law School, University of Adelaide

**Gary Cazalet**  
Senior Lecturer, Director of Teaching, Melbourne Law School, University of Melbourne

**Associate Professor Paula Gerber**  
Monash University
Dr Genevieve Grant  
Lecturer, Monash University

Miiko Kumar  
Senior Lecturer, University of Sydney

Associate Professor Michael Legg  
University of New South Wales

Fiona Low  
School of Law and Justice, Edith Cowan University

Sharlene Marimuthu  
University of New England

Nicki Mollard  
Lecturer, Monash University

Anna Olijnyk  
Lecturer, Adelaide Law School, University of Adelaide

Dr Tania Penovic  
Senior Lecturer, Monash University

Dr Olivia Rundle  
Lecturer, University of Tasmania

Professor Tania Sourdin  
Director, Australian Centre for Justice Innovation, Monash University

Professor Peta Spender  
ANU College of Law, Australian National University

Sonya Willis  
Lecturer, University of Sydney

Professor Adrian Zuckerman  
University of Oxford