School of Law, University of Western Sydney
Submission to LACC
Limited review of the academic requirements for admission

Part A: the 10 questions

6.1 Should any or all of the following areas of knowledge be omitted from the Academic Requirements? (please check the applicable boxes)

☐ Civil Procedure
☐ Company Law
☐ Evidence
☐ Ethics and Professional Responsibility

6.2 If so, why?

[Please see our submission below in support of our opposition to the removal of any of these areas of knowledge from the Academic Requirements.]

6.3 Should Statutory Interpretation be included as an Academic Requirement?

☐ X Yes ☐ No

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 ☐ X No

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


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

☐ X Yes ☐ No

6.7 If so, how?


The Academic Requirements should be expressed in a way that (1) avoids a further complicating layer of requirements that could conflict with the present TLOs for the law degree; (2) incorporates the wider aspirations of the TLOs with respect to intellectual skills and values; and (3) allows for as much flexibility in the delivery of programs as is possible within a prescribed curriculum.

How might this be achieved? One approach is a middle ground between the stark subject names of the English Foundations of Legal Knowledge and the overly prescriptive content descriptions found in the Priestley 11. The problem with that latter approach is that it will always risk quickly becoming out-of-date and irrelevant (as some of Priestley 11 content has become).

The Academic Requirements could be drafted in terms similar to the current Priestley 11’s alternative prescriptions (generic formulations) but with further guidance as to the nature of the required treatment of the subject matter rather than as to its content.

There could be a list of prescribed fundamental areas of knowledge indicated simply by subject names, e.g., Criminal law, Property law, etc. with a corresponding statement of guidelines. For many of the prescribed areas of knowledge, the guidelines would be the same, and might be something like the following:

*The area of knowledge must be delivered in a way that ensures an understanding of the aims of the body of law, its general doctrines and principles, and its operation in contemporary contexts. Students must be able to demonstrate a basic ability to employ appropriate intellectual skills and values in the resolution of legal problems relevant to the body of knowledge.*

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?

☐ X Yes ☐ No

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;

Please see 6.7

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?

We think this is unnecessary. Law Schools now map their assessment regimes to learning outcomes devised for each subject, which in turn are mapped to higher-level University graduate attributes. As long as the learning outcomes of the LLB units also correspond with the TLOs for the Law Degree and are consistent with newly drafted areas of knowledge, the required consistency should be achieved.

Part B: Other matters which Board and Committee members may wish to comment upon outside the issues raised in the above questions

Please use the below box to comment on any other matters related to the review of the academic requirements for admission. Issues you may wish to comment upon may include:
Further comments

The comments that follow are premised on the acceptance of a continuation of the current model of Australian legal education (LLB followed by a short period of Practical Legal Training equivalent to 15 weeks of full-time study with a short period of legal internship). We do not wish, however, to be taken as necessarily agreeing with this model. The Law School at the University of Western Sydney has a long history of teaching practical legal skills alongside the teaching of academic skills and knowledge. We believe there is great merit in that approach but recognise that this limited review is not concerned with that issue.

Proposed removal of areas of knowledge

We do not support the removal of any of the proposed areas of knowledge from the Academic Requirements for Admission to the Legal Profession. Each one, in our view, continues to be fundamental threshold knowledge for all entry-level lawyers in the sense that each is “of such basic potential importance to the great majority of practitioners today that no law graduate should be permitted to practise without it”. We comment on each specific area of knowledge below.

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A primary motivation for the proposed removal of any of the existing “Priestley 11” appears to be the perceived need to find room for the inclusion of Statutory Interpretation as a stand-alone area of knowledge. It has been suggested that the statutory interpretation skills of the modern law graduate need to be bolstered. Given that the Academic Requirements for Admission already include statutory interpretation under the umbrella of Legal Process, we submit that this perceived need is adequately addressed by the steps already in train by CALD: the development of a best practice approach to the teaching of statutory interpretation.

However, we see no reason why statutory interpretation might not, in any event, become one of the prescribed academic requirements. The explicit inclusion of it as an academic requirement may give the topic the desired prominence without necessitating the removal of any other area of knowledge. This is so because the academic requirements do not prescribe that each area of knowledge must have a full-semester devoted to it.

The argument for removal of these subjects on the basis of a comparison with the English jurisdiction is not compelling. The PLT component in England, being a 12-month fulltime program, is not comparable with the PLT program in Australia, the coursework component of which is 15 weeks of fulltime study. Within the sequential structure of academic and PLT phases in Australia, PLT courses necessarily assume and build upon relevant knowledge and skills acquired in the LLB. Their aim is to expose students to the practice of law in a protected environment (without the risks of actual law practice). PLT courses enable students to practise their academic skills and knowledge in ways relevant to the legal practitioner. But they presuppose that students have already acquired that knowledge and skills. The removal of these fundamental areas of knowledge from the LLB would necessitate the expansion of PLT courses in a way that is neither desirable nor practical.

If it is suggested that these areas of knowledge are already adequately accounted for in the PLT program, we submit that this view is seriously misguided. It utterly misunderstands both the complexity of each area of law, and the continuing importance of each for the modern practitioner. In our view, lawyers must understand these areas of law at an academic, rather than merely practical level.

Evidence Law

Evidence law is voluminous, complex and, in parts, conceptually difficult. One only has to regard the enormous effort required by a body of experts in the field to produce the seminal Uniform Evidence Acts. Notwithstanding the production of an outstanding statute, the history of its application in the following years has produced a vast volume of judgments and scholarly writings as to its interpretation.

Without a solid grounding in that body of knowledge, a student could not hope to achieve many of the competency standards devised by the Law Admissions Consultative Committee. The manner in which those competency requirements are drafted demonstrate that the student is expected already to have a comprehensive understanding of the law of evidence.

For example, the competency descriptor for the compulsory Civil Litigation Practice subject is as follows:

“An entry-level lawyer should be able to conduct civil litigation in first instance matters in at least one State or Territory court of general jurisdiction in a timely and cost-effective manner.”

One of the elements of that requirement is “Gathering and presenting evidence”, a performance criterion of which requires the student to have “presented, or observed the presentation of, that
evidence *according to law* and the court’s rules” (emphasis added). How could a student hope to achieve that without a basic understanding of the applicable law (ie Evidence Law)? Indeed, a student could not hope to achieve *any* of the performance criteria for that element without a basic understanding of the laws of evidence.

The same could be said of numerous other competency requirements. Take, for instance, that for *Criminal Law Practice*:

> “An entry level lawyer who practises in criminal law should be able to ... participate in minor contested hearings and assist in preparing cases for trial.”

A basic understanding of the law of evidence is essential for the preparation or conduct of any contested hearing. Again, it must be assumed that the student has acquired this understanding prior to the PLT stage.

In any area of practice where there is the potential for litigation, a lawyer must have an appreciation of evidence law in order to advise clients competently. The rules of evidence, in governing what may be adduced in court, and what can and can’t be proved, will influence a lawyer’s advice whether or not to pursue litigation or another form of dispute resolution.

The law of evidence is one of the features that distinguish the common law system from others around the world. It is part and parcel of the adversarial system of justice. An understanding of its principles and its aims at an academic level is essential to an understanding of the Australian legal system itself.

Evidence law is relevant to every one of the Threshold Learning Outcomes devised for the Bachelor of Laws. Not only is the law of evidence a “fundamental area of legal knowledge” by itself. It is also part of the knowledge required for an understanding of “the Australian legal system, and its underlying principles and concepts”. The law of evidence is also one of “the broader contexts within which [many] legal issues arise”. Its connection with “principles and values of justice” is obvious – it is an essential element of the adversarial system of justice.

Even if it were appropriate to teach the law of evidence in a PLT course, which it is not, the time limitations of a such a PLT course would preclude anything bar the most superficial treatment of its many complex and important principles.

**Ethics and Professional Responsibility**

Ethics and Professional Responsibility is obviously critical threshold knowledge for admission to practice. We refer you to the attached submission by legal ethics academics, which we endorse.

**Company Law**

An academic understanding of the principles of *Company Law* is a pre-requisite to numerous of the competency requirements for the compulsory PLT subject *Commercial and Corporate Practice*. Element 2 concerns the setting up of commercial structures, and the performance criteria (eg selecting a structure that will achieve the client's objectives; informing the client of any of the continuing obligations of the company etc) all presuppose a basic understanding of the nature of various corporate structures and the obligations of their officers.

Once again, we fail to see how this considerable body of knowledge could be acquired within the time constraints of a PLT course.

**Civil Procedure**

Perhaps *Civil Procedure* is the least of these areas of knowledge with a claim to a place in the LLB as a distinct area of academic study. Nevertheless, there are good arguments for its retention.

To understand civil procedure is not simply to understand which form is to be filled out and the time limits for it to be lodged. It is to understand the nature of the processes in an adversarial litigation system in order to know when to adopt one process in preference to another. This is particularly important in the contemporary context with the advent of alternative processes for the resolution of civil disputes. The aims and principles underlying civil litigation are different from those of mediation or arbitration, for example. Lawyers who are not well versed in these methods – their aims and principles – will not serve their clients well.

Other matters of importance to practitioners, such as problems of cost, delays and unequal access to the courts, can only be understood by studying *Civil Procedure* in an academic context. (See the Australian Government Productivity Commission, *Access to Justice Arrangements* Productivity Commission Inquiry Report Overview No 72 (2014)).
ATTACHMENT

Submission by Legal Ethics Academics

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] 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’ 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. 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

1 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
lengthy debate. 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 clear how LETR’s ‘appropriate learning outcomes’ differ in concept from the Australian TLOs relating to Ethics. 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 McCrätze Commission and the American Bar Association Professional Committee - the American Bar Association urged law schools to *increase* their attention to professionalism and ethics. [Emphasis added. The Carnegie report itself reached a similar conclusion.]

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

**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. 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:

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4 ibid
8 Ibid 69.
9 Stuckey and Others, above n 6 chapter 2.
10 LACC Review, 2
(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,
(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


\(^{12}\) in England, Ethics is taught in the equivalent of PLT in a 12 month full time course
supplementary teaching at PLT level is difficult to accommodate ‘in the tight framework of most PLT courses’. 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 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-s 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

¹³ LACC Review, 10
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

unless they make an explicit effort to do so, law schools do not contribute to greater sophistication in the moral judgement of most students.\textsuperscript{16}

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 1\textsuperscript{st} 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’.\textsuperscript{17} \textit{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.\textsuperscript{18}

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.\textsuperscript{19} 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

\textsuperscript{16} Sullivan et al, above n 5, 134.
\textsuperscript{17} Ibid 139.
\textsuperscript{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.’

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.

This submission has been prepared by the following legal ethics academics:

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Professor Adrian Evans, Monash University
Professor Reid Mortensen, University of the Southern Queensland
Dr Justine Rogers, UNSW
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And endorsed by the following legal academics:

Michael Brogan, University of Western Sydney
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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