WELLNESS NETWORK FOR LAW

Submission to the Law Admissions Consultative Committee on the
Review of Academic Requirements for
Admission to the Legal Profession

Prepared on behalf of the Wellness Network for Law by:
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1. Wellness Network for Law

1.1 The Wellness Network for Law (‘the Network’) is a community of legal academics, practitioners and students who are committed to:
- addressing the high levels of psychological distress experienced in law; and
- promoting wellness at law school, in the legal academy, and in the profession.

1.2 The Network seeks to achieve these aims through supporting a deeper understanding of the onset and causes of psychological distress, as well as through the development of strategies for preventing and ameliorating distress, and for fostering wellbeing, within law schools and in the profession.

1.3 The submissions of the Network represent the joint viewpoints of over 100 academics, students, practitioners and others involved in the legal profession.

1.4 The Network has not responded to all the questions raised in the LACC discussion paper, but has limited its submissions to questions that are directly relevant to the aims of the Network.

2. Context of Submissions

2.1 LACC states in its discussion paper at page 4 that ‘the public is entitled to expect a single level of threshold competence across the range of activities for practising lawyers’ and ‘common core knowledge and skills’.
2.2 The Network submits that the public is also entitled to expect that, beyond attaining that threshold competence for core knowledge and skills, practising lawyers are sufficiently mentally healthy to be able to perform legal work skillfully and competently.

2.3 Decisions about the content and delivery of Australian legal education should necessarily have as their anchor point the objective of strengthening the Australian legal profession and the quality of its delivery of legal services to the Australian community. This is a point that is at the heart of the articulation of the Threshold Learning Outcomes for Law,¹ and has been made often since the ALRC’s *Managing Justice Report* of 2000,² particularly by eminent Australian legal academics Professor David Weisbrot and Professor Sally Kift.³

2.4 As upholders of the rule of law, and as providers of transactional as well as dispute resolution advice, lawyers are members of an honorable helping profession. An essential part of the profession’s ability to deliver quality legal services to the community is the mental health and well-being of those working in the profession.⁴ The need for psychologically healthy practitioners is clearly expressed by the requirements in the various pieces of legal profession legislation, including the *Legal Profession Act 2004* (Vic) section 1.2.6 (1)(m), which states that when considering whether an applicant is a fit and proper person for admission to the legal profession, the admitting authority is required to consider whether the person has a material mental impairment.

2.5 Moreover, it is desirable that the legal profession as a whole explores options for ameliorating the high levels of distress experienced by so many lawyers and law students.⁵

2.5 Since 2007 there has been growing awareness in the Australian legal profession that Australian lawyers experience high levels of depression and anxiety.⁶ The 2009 *Courting the Blues* study reported that approximately one third of solicitors surveyed will suffer from clinical

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⁵ See for example, the work of the Tristan Jepson Memorial Foundation which seeks to galvanise the profession as a whole to work together to promote lawyer and law student well-being, <http://www.tjmf.org.au>.
depression at some time in their career.\textsuperscript{7} The Law Institute of Victoria’s Lawyers’ Health and Wellbeing Program Consultation Paper\textsuperscript{8} notes that addressing the problem of lawyer mental health has to occur at a number of levels, including at the individual lawyer level, the intermediate levels of the practice group and firm, and at the jurisdictional level, as a community of professionals.\textsuperscript{9}

2.6 Those responsible for the determination, design and delivery of the academic requirements for admission to practice have an opportunity to take steps to facilitate the improved mental health of the profession at the grass roots level that is law school.

2.7 Research indicates that strength in both the development of knowledge skills and attitudes in the subject areas of Ethics and Professional Responsibility and Alternative Dispute Resolution contributes to the improved mental health and wellbeing of lawyers.\textsuperscript{10} It is for the reasons set out below that the Network submits that:

- Ethics and Professional Responsibility should be retained as a requirement for admission to the legal profession; and
- Alternative Dispute Resolution should be added as a requirement for admission to the legal profession.

3. Ethics and Professional Responsibility

In response to paragraph 6.1 of the LACC discussion paper the Network makes the following submissions:

3.1 Ethics and Professional Responsibility should be retained as an academic requirement for admission to legal practice.

3.2 Instruction in Ethics and Professional Responsibility is fundamental to the development of lawyers. LACC states at page 4 of its discussion paper that changes to the range and methods of legal practice over the last 40 years challenge the contemporary relevance of the existing academic requirements. One aspect of practice that has not changed is the

\textsuperscript{7} Norm Kelk et al, Courting the Blues: Attitudes Towards Depression in Australian Law Students and Lawyers, (BMRI Monograph 2009-1, Brain & Mind Research Institute: University of Sydney, January 2009)

\textsuperscript{8} Law Institute of Victoria, Lawyers’ Health and Wellbeing Program Consultation Paper, 15 November 2013.

\textsuperscript{9} Ibid, 8-10.

requirement for lawyers’ conduct to be underpinned by professional ethics. Studying Ethics and Professional Responsibility lays a foundation of professional values, upon which a structure of legal knowledge can be built. As the NSW Law Society’s Statement of Ethics states:

We acknowledge the role of our profession in serving our community in the administration of justice. We recognise that the law should protect the rights and freedoms of members of society. We understand that we are responsible to our community to observe high standards of conduct and behaviour when we perform our duties to the courts, our clients and our fellow practitioners.

The Network submits that this foundation is essential to legal practice, because it gives:

- protection to the public; and
- stability to practitioners through the capacity to exercise professional judgment.

For this reason, Ethics and Professional Responsibility should be retained as an academic requirement for admission to practice.

The elements of Ethics and Professional Responsibility contained in the LACC Practical Legal Training Competency Standards for Entry Level Lawyers 2015 are appropriate for a PLT setting, where the time spent with students is relatively short and in the context of students having already studied Ethics at law school. However, it would be impossible to teach Ethics and Professional Responsibility in a meaningful way within this short time frame, as appears to be suggested. For this reason, Ethics and Professional Responsibility should be retained as an important part of the core curriculum of the undergraduate LLB and postgraduate JD programs.

Parker contends that a professional responsibility approach to ethics can be helpful in guiding behaviour, but does not provide guidance around choices about the kind of lawyer one wants to be or the values which may motivate lawyer behaviour. Instead, Parker endorses a critical morality approach in order to assist law students to develop the capacity for professional judgment. The existing time constraints of PLT would prevent exploration of critical morality in a course of Ethics and

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14 Ibid 53.

15 Ibid 54.
Professional Responsibility, whereas this approach is possible in a university setting. Ethics and Professional Responsibility should therefore be retained as a requirement of the law curriculum.

3.3 The Network submits that the capacity for professional judgment is irrefutably linked to well-being for law students and practitioners.\textsuperscript{16} For this reason, Ethics and Professional Responsibility should be embedded and emphasised throughout legal education. In order to emphasise its centrality to competent legal practice it is appropriate for Ethics and Professional Responsibility to be retained as an academic requirement both at university and in PLT.

3.4 Following their study of 7808 US lawyers,\textsuperscript{17} Krieger and Sheldon determined that law teachers impact students early in the formation of professional attributes and identities.\textsuperscript{18} Further, they state that psychological factors such as authenticity (integrity), competence, relating well to others and community values are important sources of ethical and professional behaviour:

These factors also include the strongest predictors of well-being in our subjects, suggesting that one powerful approach to raise the level of professional behaviour among lawyers is to teach law students and lawyers to maximize their own happiness.\textsuperscript{19}

In other words, Krieger and Sheldon’s research enabled them to conclude that professional behaviour in lawyers is increased by improved well-being in lawyers.

3.5 Krieger contends that professionalism and life/career satisfaction are essentially inseparable because professional behaviour fulfils important human needs:

Real professionalism engenders a sense of competence, self-respect and respect for and from others, as well as inbuing one’s work with meaning.\textsuperscript{20}

3.6 Ultimately, the research indicates a circular notion that well-being begets professionalism in the same was that professionalism begets well-being.

3.7 The area of ‘ethics, values and professionalism’ was rated the most important knowledge area in the Legal Education and Training Review (LETR) online survey conducted in England and Wales.\textsuperscript{21} The LETR

\textsuperscript{16} Field, Duffy and Huggins, above n 4.
\textsuperscript{18} Ibid.
\textsuperscript{19} Ibid.
\textsuperscript{21} LETR, Setting Standards: The Future of Legal Services Education and Training Regulation in England and Wales (June 2013), 133. This review was a joint project of the Solicitors Regulation
report stated that ethics, values and professionalism is ‘an area that bridges the affective/moral domain and ‘habits of mind’, as well as the cognitive dimension’.22

3.8 The LETR report notes that an increased emphasis on ethics and legal values in the legal education and training systems of England and Wales would be consistent with the need to develop a more thoughtful and contextual approach to professional obligations.

3.9 The majority of respondents to the LETR research surveys took the view that ethics and professionalism need to be developed throughout the continuum of education and training.

3.10 For these reasons, Ethics and Professional Responsibility should be retained as an academic requirement for admission to practice and should be retained in legal and PLT curricula.

4. **Alternative Dispute Resolution**

In response to paragraphs 6.4 and 6.5 of the LACC discussion paper the Network makes the following submissions:

4.1 Alternative Dispute Resolution (‘ADR’) should be added as an academic requirement.

4.2 Field and Duffy argue that the majority of Australian law schools are fundamentally failing future practitioners, and the future of the legal profession more broadly, by only offering ADR as an elective subject, thereby highlighting the disconnect between the law school curriculum and 21st century legal practice.23 They contend that the following reasons, and others, exist for including ADR as a compulsory subject in the law school curriculum:

4.2.1 An absence of compulsory ADR does not reflect current legal practice (for example, ‘it has been estimated that the number of commenced civil actions that culminate in adjudication is less than 5%’;24

4.2.2 Participation in ADR processes is mandatory under legislation in many Australian jurisdictions;25

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22 Ibid.
24 Ibid, 10. See also, Michael King et al, *Non-Adversarial Justice* (Federation Press, 2009) 9, 90.
25 Duffy and Field, above n 24, 10-11. See for example, s. 3 of the *Civil Dispute Resolution Act 2011* (Cth). See also Tania Sourdin, ‘Not Teaching ADR in Law Schools? Implications for Law Students,
4.2.3 Lawyers have a duty to advise about ADR;\textsuperscript{26}

4.2.4 Good lawyers are emotionally intelligent and ADR instruction contributes to the development of emotional intelligence;\textsuperscript{27}

4.2.5 Lawyers need to understand about the theory and nature of conflict and this necessarily requires instruction;\textsuperscript{28}

4.2.6 It is impossible to meet the threshold learning outcomes without exposing all students to ADR instruction;\textsuperscript{29}

4.2.7 ADR instruction can help students develop a positive professional identity;\textsuperscript{30}

4.2.8 Teaching ADR supports students’ psychological well-being.\textsuperscript{31}

These are compelling reasons for the inclusion of ADR as an academic requirement.

4.3 The High Court of Australia has recently emphasised the need for practitioner cooperation in the resolution of disputes. In \textit{Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited},\textsuperscript{32} the court emphasised the overriding purpose of the \textit{Civil Procedure Act 2005} (NSW) (‘CPA’) as being the facilitation of the just, quick and cheap resolution of the real issues in the dispute. It noted that the solicitors involved had a responsibility to conduct themselves in a way which would assist the court to facilitate the overriding purposes of the CPA:

[Cooperation] is an example of professional, ethical obligations of legal practitioners supporting the objectives of the proper administration of justice.\textsuperscript{33}

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\textsuperscript{26} For example, Rule 7.2 of the \textit{Australian Solicitor Conduct Rules} (2012) states: ‘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 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’.


\textsuperscript{29} Duffy and Field, above n 24, 14-15.


\textsuperscript{32} [2013] HCA 46 (6 November 2013).

\textsuperscript{33} Ibid [67].
4.4 The National Alternative Dispute Resolution Advisory Council (‘NADRAC’) supports the mandatory inclusion of ADR in the law curriculum.\textsuperscript{34}

In its 2009 report,\textsuperscript{35} NADRAC stated:

NADRAC is of the view that more professional development is needed. NADRAC believes that better training at universities is required and that ADR must be elevated from a mere adjunct to civil procedure or litigation subjects to being taught as a full course. An ADR course should be a compulsory core subject that is a prerequisite for admission.\textsuperscript{36}

Duffy and Field note that, in late 2011, the Attorney-General assigned NADRAC the task of promoting a dispute resolution culture in Australia\textsuperscript{37} and in doing so highlighted the importance of promoting ADR education for law students and the legal profession.

4.5 If a dispute resolution culture is to be achieved in Australia, this must necessarily commence at a grass-roots level in Australian law schools, where it is appropriate for ADR to be a compulsory subject for law students. For this reason, and the reasons articulated above, ADR should be included as an academic requirement for admission to practice.

5. Review Process

5.1 The Network has reviewed the other submissions made to LACC as at 6 March 2015 and endorses the comments within the CALD submission (at paragraph 3) that:

[T]his may be an appropriate time for a systematic review of the Academic Requirements. The process that has been adopted for this Limited Review, however, and some of the proposals that are implicit in the questions asked and the background paper mean that this is not the appropriate mechanism by which serious changes to the Academic Requirements should be contemplated.

5.2 We submit that one of the issues that needs to be considered more fully in such a review is the appropriate balance between legal knowledge, and professional skills and attitudes.

5.3 The Network takes the view that there is at present a disconnect between the academic requirements for practice and the knowledge and skills required for effective practice as an Australian Legal Practitioner.

\textsuperscript{34} Duffy and Field, above n 24, 17.
\textsuperscript{35} NADRAC, The Resolve to Resolve: Embracing ADR to Improve Access to Justice in the Federal Jurisdiction (September 2009), 62.
\textsuperscript{36} Ibid.
\textsuperscript{37} Duffy and Field, above n 24, 18.
5.4 As reflected in the Threshold Learning Outcomes for law, today’s law graduates need a combination of knowledge, skills and attitudes. This is reinforced by the recommendations of a 2014 Productivity Commission Report, which suggested reviewing the need for the Priestley 11 core subjects in light of advancements in information and communication technologies, which have meant that the ‘art of the professional’ lies in accessing, analysing and contextualising information, rather than memorising it. \(^{38}\)

5.5 As Professor David Weisbrot has said:

> [There is] a powerful disconnect that has emerged between the focus of teaching and learning in most law schools in Australia – that is, the mastery of a large number of bodies of doctrinal law – and the generic professional skills and attributes which law graduates require to succeed in the increasingly dynamic work environment in which they find themselves. Although appellate case exegesis (in one field of doctrinal law after another) is one important skill for lawyers, it is by no means the only professional skill which law students and young lawyers need to acquire, nor is it arguably even the most important. \(^{39}\)

5.6 The Network submits that a comprehensive review of Australian legal education that includes a focus on developing an appropriate balance in instruction on legal knowledge, skills and attitudes is warranted at this time.

6. **Conclusion**

As stated above, those responsible for the determination, design and delivery of the academic requirements for admission to practice have an opportunity to take steps to facilitate the improved mental health of the profession, commencing at the grass roots level that is law school.

Knowledge, skills and attitudes in the areas of Ethics and Professional Responsibility and Alternative Dispute Resolution contribute to the improved mental health and well-being of lawyers.

Beyond the inclusion of these subjects in the academic requirements for admission to the legal profession, the Wellness Network for Law endorses the view that we have come to an appropriate time for a systematic review of the academic requirements for admission to the legal profession. Any such review should address the wider, ongoing debate about the appropriate focus on content and skills in legal curricula.

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\(^{39}\) Weisbrot, above n 3, 48.