Dear Committee,

Review of Academic Requirements

The Law Institute of Victoria (LIV) welcomes the opportunity to provide comment on the Limited Review of Academic Requirements for admission to the Legal Profession.

Our submission is attached.

Please contact me at president@liv.asn.au if you would like to discuss the issues raised in this submission further.

Yours sincerely,

Katie Miller
President
Law Institute of Victoria
Law Admissions Consultative Committee’s Limited Review of the Academic Requirements

LIV SUBMISSIONS

Date: 30 March 2015

Contact:
Andrew Tabone, Paralegal
(03) 9607 9385
ATabone@liv.asn.au
www.liv.asn.au
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INTRODUCTION

The Law Institute of Victoria (LIV) is the peak body for the Victorian legal profession, representing over 19,000 members. The LIV initiates programs to support the needs of the changing legal profession; promotes an active advocacy agenda; responds to issues affecting the profession and broader community; and continues to provide expert services and resources to support our members.

The Law Institute of Victoria (‘LIV’) welcomes the opportunity to comment on the Law Admissions Consultative Committee’s (‘LACC’) limited review of the Academic Requirements for admission to the legal profession in Australia.

The LIV notes that there have been significant changes to the Australian legal profession and legal education landscape since the LACC last called for a review of the Academic Requirements in 1998. The LIV acknowledges the importance of this review and wishes to advise that it has attracted considerable member comment and interest.

This submission reflects the position of the LIV, which has been developed through discussion and feedback with our members. On some issues, individual LIV members have different views to the LIV more broadly. Where possible, individual LIV member comments have been incorporated into this submission and are italicised.

Preliminary Comments

The LIV has considered the Law Council of Australia’s (‘LCA’) submission dated 24 March 2015 and agrees with the LCA and the Council of Australian Law Deans’ view that, given the substantial scope of the review, insufficient time has been provided for relevant stakeholders to adequately respond to the current consultation.

The LIV supports the LCA’s recommendation for a comprehensive and systematic national consultative review of the Academic Requirements for Admission in the context of the broader structure of legal education in Australia. The LIV further supports the LCA assessment that the proposed review should consider both pre and post-admission requirements, including university subjects, practical legal training and continuing professional development (‘CPD’).

Nonetheless, having regard to the above, the LIV would like to draw the LACC’s attention to several issues which our members consider to be of immediate importance, and which are not otherwise considered or substantially addressed by the LCA’s preliminary submission. The LIV therefore provides the submissions herein insofar as they constitute the interim views of its members and welcomes, as suggested above, the opportunity to provide more comprehensive feedback in a future consultation.

For ease of reference, the LIV has adopted the numbering system for the questions set out under item 6 of the review document.
Question 6.1

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

LIV member views differed as to whether the current Academic Requirements require changing. It was generally agreed that, whether or not the Academic Requirements are to be changed, there needs to be an increased focus on practical rather than theoretical skills.

Civil Procedure and Evidence

The LIV is neutral on this suggestion.

LIV member comments generally acknowledged that these requirements are crucial to practice, although there was no consensus as to whether training is more effectively provided as part of a law degree or through practical legal training / supervised workplace training.

LIV members noted that the current Academic Requirements, whilst heavily focused on theoretical learning, are generally effective.

Our members’ views may be summarised as follows:

The current Academic Requirements are effective, but there needs to be more rigour and depth in teaching.

Our members’ views in support of retaining Civil Procedure and Evidence as Academic Requirements may be summarised as follows:

Query whether there is sufficient rigour in practical legal training courses and their assessment processes, when compared to universities, to offer these subjects.

Our members’ views in support of retaining Evidence as an Academic Requirement may be summarised as follows:

The study of Evidence develops core reasoning skills about how a lawyer puts together cases and consideration of what is relevant or not.

Our members’ views in opposition to retaining Civil Procedure as an Academic Requirement may be summarised as follows:

It is heavily rules-based and does not engage with theoretical or philosophical underpinnings that would make it relevant in a university setting.

Company Law

The LIV is neutral on this suggestion.

There were divergent LIV member views as to the retention or exclusion of company law as an Academic Requirement. Comments from members included:
Company/corporate law should be changed into a non-compulsory elective at university as there is no reason why it should take precedence over other substantive areas. Other ‘growth’ substantive areas of law are more suitable as compulsory subjects.

There should be consideration as to the expansion of company/corporate law subjects. Law graduates should be expected to have knowledge of commercial law – which expands beyond company law to also include sale of goods, trade practices.

Financial understanding and business knowledge are skills that are often missing from law school graduates.

Ethics and Professional Responsibility

It is the view of the LIV that Ethics and Professional Responsibility should be retained as an Academic Requirement.

Members noted that, whilst an individual may not eventually practice, they will still need to understand that law is not just a tool of business but is part of the broader underpinnings of the fabric of society.

**Question 6.2**

If so, why?

See above comments under question 6.1.

**Question 6.3**

Should Statutory Interpretation be included as an Academic Requirement?

The LIV supports, in principle, the introduction of statutory interpretation as an Academic Requirement.

The importance of statutory interpretation was acknowledged by the LIV membership. The LIV is of the view that statutory interpretation is an important aspect of modern legal practice.

The LIV notes that the LACC has previously considered the teaching of statutory interpretation at university level in the *Approaches to Interpretation* discussion paper in 2009 and the resulting *Statement on Statutory Interpretation*.

The LIV has previously facilitated discussion regarding graduate statutory interpretation skills at the 2013 Law Graduates of the Future Forum ('the Forum'). At the Forum, there was a general consensus that graduate statutory interpretation skills could be improved.

The LIV has been advised that the approach to teaching statutory interpretation varies between academic institutions. At the Forum it was agreed that there is room for further discussion about initiatives to develop this skill at university or PLT/SWT level. The inclusion of statutory interpretation as an Academic Requirement would ensure that it is taught to a uniform standard at university level.
The LIV has not formed a view on whether practical legal training provides law graduates with the requisite experience and knowledge in statutory interpretation. It was commented by LIV members that statutory interpretation is a skill with its own set of principles and as such, Statutory Interpretation should be its own Academic Requirement.

Statutory interpretation forms part of the ‘problem solving’ competency standard under the Competency Standards for Entry Level Lawyers but is not referred to in the current Academic Requirements. LIV member comments generally favour the introduction of statutory interpretation as an Academic Requirement to ensure that its graduates are given sufficient grounding in the skill at university.

LIV members expressed divergent opinions on how to teach statutory interpretation at the university level. Suggestions from members included that statutory interpretation could be taught through integration with substantive law subjects or as a separate subject. The LIV notes that the Academic Requirements are grouped under headings for convenience and “there is no implication that a topic needs to be taught in a subject covering the area of knowledge in the heading rather than in another suitable subject.”

Should statutory interpretation be included as an Academic Requirement, it is open to the academic institution to deliver a course of study which will provide a student with an appropriate understanding of, and competence in, each element of the areas of knowledge as set out in the Legal Profession (Admission) Rules 2008.

The LIV is of the view that the Statement on Statutory Interpretation produced by the LACC comprehensively articulates the knowledge expected of a law graduate with respect to statutory interpretation skills.

**Question 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?*

**Aboriginal and Torres Strait Islander content in Academic Requirements for Admission to the Legal Profession**

The LIV is committed to the process of reconciliation and recognises the important role that law schools play as potential agents of change and promoting the process of reconciliation.

The LIV strongly supports increasing Aboriginal and Torres Strait Islander content in law degrees.

It is the LIV’s position that Aboriginal and Torres Strait Islander content should be included in the Academic Requirements as it an area of knowledge that no law graduate should be permitted to practice without.

**The necessity and benefits of teaching Aboriginal and Torres Strait islander content**

It is the LIV’s view that all law students should receive tertiary instruction in the history of pre-existing Aboriginal and Torres Strait Islander law and custom and its interaction with Australia’s legal system. These

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teachings should encompass both past and present legal issues facing Aboriginal and Torres Strait Islander peoples, including the injustices suffered under the Australian legal system.

The LIV believes that a deeper knowledge of the legal history and legal issues faced by Aboriginal and Torres Strait Islander peoples is of basic potential importance to the great majority of practitioners today so that no law graduate should be permitted to practise without it.

Legal practitioners have a duty to exercise the degree of care, skill and diligence that is reasonably necessary for the proper performance of their obligations. Legal practitioners cannot exercise this degree of care, skill and diligence when opposing or representing Aboriginal and Torres Strait Islander clients if they do not possess the necessary foundational understanding of the relevant issues in the interaction between Aboriginal and Torres Strait Islander peoples’ laws and customs and the Australian legal system. The LIV and a number of other legal organisations in Victoria are in the process of developing protocols for legal practitioners to assist them in improving their skills at engaging with Aboriginal and Torres Strait Islander clients appropriately, as it is recognised that such skills are necessary for practice.

Without a foundational understanding of the relevant issues in interaction between Aboriginal and Torres Strait Islander peoples, their laws and customs, and the Australian legal system, the legal profession cannot adequately position itself to properly address the injustices faced by Aboriginal and Torres Strait Islander peoples in that system. For example, the continuing disproportionate representation of Aboriginals and Torres Strait Islanders in the criminal justice system and high rate of incarceration of juveniles and adults for minor offences, such as the failure to pay fines. Aboriginal and Torres Strait Islander culture and legal issues affect the broader legal system in Australia. For example there is constant tension between the desire to preserve Aboriginal culture and cultural practices and property/land use, environmental and heritage protection laws.

In addition to knowledge of Aboriginal and Torres Strait Islander culture and law being crucial for practicing lawyers, a stronger emphasis on the teaching of this content would also place Australian universities at an advantage. Australia’s access to Aboriginal and Torres Strait Islander culture and law places it in a unique situation internationally. If Australian universities embrace the teaching of Aboriginal and Torres Strait Islander culture and law, by doing so they will ensure that Australian law students gain an important understanding of the interaction between different legal jurisdictions. In an increasingly globalised legal market, this flexibility of being aware of and able to operate in different jurisdictions will be invaluable.

**Suggestions for incorporation of Aboriginal and Torres Strait Islander content**

The LIV has undertaken some preliminary research into the Aboriginal and Torres Strait Islander content currently available in Victorian universities. Some universities have very little Aboriginal and Torres Strait Islander content in either their core or elective subjects.

The LIV advocates for Aboriginal and Torres Strait Islander content to be included as an Academic Requirement for law degrees. However, similar to our discussion about statutory interpretation at 6.3, it is not proposed that it should be taught as a separate subject, but instead, it should be incorporated within a number of different subjects and year levels (to be determined by each university). The Academic Requirements should state that the integration of Aboriginal and Torres Strait Islander law content should begin at the first year level and build on this acquired knowledge in a coherent way. Many universities already offer elective subjects focused on Aboriginal and Torres Strait Islander culture and legal issues, however, it is felt that this does not allow the general student population to become aware of these important issues. The preferable option would be to take a mixed approach that incorporates the integration and
embedding Aboriginal and Torres Strait Islander law content and perspectives across the law curriculum as well as in stand-alone electives.³

The incorporation of Aboriginal and Torres Strait Islander content in law degrees could be achieved in a number of different ways. One way would be to have it as a separate Academic Requirement that lists the various types of knowledge that need to be met under this area, but emphasising that this should not be taught in one single subject, but instead should be integrated within the other core Academic Requirements.

An alternative method would instead incorporate this teaching as required elements under the existing Academic Requirements. This could involve amendments to the current Academic Requirements so that they take into account the broader range of intellectual skills and personal attributes currently included in the Threshold Learning Outcomes. Under this approach, for example, the Academic Requirement relating to property law could include a requirement that graduates obtain an understanding of the importance and limitations of native title and the legal fiction of terra nullius. Such content would also be more valuable to students if they were taught the socio-political context and historical importance surrounding cases such as Mabo (No 2).⁴

A final, less effective, way of incorporating Aboriginal and Torres Strait Islander content into law degrees would be to draft an overarching statement, similar to the current Statement on Statutory Interpretation. However, it is noted in the LACC’s Review that it is not clear that this document ‘has had a marked effect on either the structure or the content of the teaching or assessment of statutory interpretation in most law schools’ so this may not be a, effective approach to increasing the teaching of Aboriginal and Torres Strait Islander content.⁵

Aboriginal and Torres Strait Islander content and perspectives

The LIV recommends that the incorporation of Aboriginal and Torres Strait Islander content in law degrees should examine case law that involves Aboriginal and Torres Strait Islander peoples and also include teachings from Aboriginal and Torres Strait Islander perspectives. The LIV further recognises that, when teaching culture, law/lore and history, care needs to be taken to not misrepresent Aboriginality. The LIV strongly advocates for the involvement of Aboriginal and Torres Strait Islander peoples in course development, design and delivery. This ensures that Aboriginal and Torres Strait Islander knowledge and perspectives are incorporated in a culturally appropriate way.

Ideally, universities should provide opportunities for students to hear from Aboriginal and Torres Strait Islander peoples themselves. Opportunities for students to undertake ‘on country’ experiences should be encouraged and facilitated.⁶ There is a growing body of literature on appropriate ways of teaching Aboriginal and Torres Strait Islander content in law degrees which could be drawn upon when drafting this content.⁷

The LIV notes that Tarwirri, the Indigenous Law Students and Lawyers Association of Victoria, is in the process of establishing lunchtime seminars for law students at universities across Victoria and are hosting a one day law conference for university law students on Aboriginal and Torres Strait Islander legal issues. These initiatives have been strongly supported by the various Law Student Societies, demonstrating that

³ See, e.g. [http://www.indigenousculturalcompetency.edu.au/](http://www.indigenousculturalcompetency.edu.au/)
⁴ [Mabo and Others v Queensland (No.2) (1992) 175 CLR 1.](http://www.indigenousculturalcompetency.edu.au/)
⁵ Law Admissions Consultative Committee, Review of Academic Requirements for Admission to the Legal Profession, 9.
⁷ See, e.g. Dr Christine Asmar, [Indigenous Teaching at Australian Universities (2012)](http://indigenousteaching.com/). This website has a booklet you can download: [Indigenous students and Indigenous curriculum](http://indigenousteaching.com/) as well as a list of useful resources in this area.
there is a demand amongst the student body to be educated on Aboriginal and Torres Strait Islander legal and cultural topics.

**Question 6.5**

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

See above comments under question 6.4.

**Question 6.6**

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

Due to the limited consultation period, the LIV has been unable to form a position on this question.

**Question 6.7**

If so, how?

See above comments under question 6.6.

**Question 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?

The LIV supports, in principle, the incorporation of the threshold learning outcomes (‘TLOs’) to the existing Academic Requirements to the extent that the TLOs provide an emphasis on developing practical skills during university.

The LIV notes that difficulties may arise from incorporating the TLOs in the Academic Requirements. It is noted that “the TLOs are expressed in broad terms of capability” \(^8\) and as such would be complex to assess when approving a course of study pursuant to rule 2.04 of the *Legal Profession (Admission) Rules 2008*. However, the LIV is of the view that there should be a greater emphasis on practical skills development throughout university to ensure that graduates are equipped with the necessary skills to allow them to succeed in practice.

Comments provided by LIV members may be summarised as follows:

> There needs to be consideration of moving the focus away from content to the balance of addressing skills requirements as outlined in the TLOs.

> Practical legal training subjects offered at university are extremely useful in assisting with developing the skills required to enter the legal profession as a solicitor. However, there were not a large

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\(^8\) ‘Learning and Teaching Academic Standards Statement for the Bachelor of Laws (TLOs)’ \(^9\).
number of these subjects offered and recently there has been a trend to discontinue offering them. This lack of practical training does not provide junior lawyers with a basic level of training to undertake common tasks required of them, such as drafting letters to clients, preparing court documents and drafting memoranda of advice.

**Law Graduates of the Future Survey**

The Law Graduates of the Future Survey (‘the Survey’) was undertaken in 2011 as an initiative of the LIV to gauge the preparedness of law graduates for the practice of law.

The Survey found that law graduates self-assessed their skills higher to that assessed by employers for most of factors of the TLOs. The Survey identified a skill gap which could be addressed through incorporation of the TLOs within the Academic Requirements.

The LIV prepared two surveys, one for employers, the second for first and second year law graduates. Participants were selected from the LIV’s membership base – 1,300 employers and 1,000 law graduates were invited to undertake the survey to indicate the extent to which they felt that the education undertaken at university and during Practical Legal Training prepared graduates for their careers in the law.

The Survey made the following findings:

TLO 2: Ethics and professionalism ratings differed significantly (p ≤ 0.05) between Graduates and Employers for the *ability to exercise professional judgment* factor with Employers rating Graduates lower.

TLO 3: Thinking Skills ratings differed significantly between Graduates and Employers for all four factors with Employers rating Graduates lower on all counts. These factors are a graduate’s ability to:

1. identify and articulate legal issues,
2. apply legal reasoning and research to generate appropriate responses to legal issues,
3. engage in critical analysis and make reasoned choice amongst alternatives,
4. think creatively in approaching legal issues and generate appropriate responses.

TLO 4: Research Skills ratings differed significantly between Graduates and Employers for the ‘intellectual and practical skills needed to identify relevant factual, legal and policy issues’ and ‘intellectual and practical skills needed to evaluate and synthesise relevant factual, legal and policy issues’ factors.

The LIV notes that the Survey was undertaken in 2011 one year after the adoption of the TLOs and as such the gap between graduate and employer assessment may have narrowed over time.

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9 P refers to the probability of getting a result more extreme than a specific. A significant p value (indicated by ‘p<=0.05’) indicates that for those questions where that the differences between the mean is determined by the variable in the test. A p value of greater than 0.05 is statistically significant.
**Question 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,

Due to the limited consultation period, the LIV has been unable to form a position on this question.

**Question 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?

The LIV does not have a position on this question.