LAW ADMISSIONS CONSULTATIVE COMMITTEE[1]

SUBMISSION TO PRODUCTIVITY COMMISSION

DRAFT REPORT ON ACCESS TO JUSTICE ARRANGEMENTS

1. INTRODUCTION

The Law Admission Consultative Committee's (**LACC**) task is to forge agreement between Admitting Authorities about matters of national significance relevant to admission to the legal profession. LACC's predecessor drafted the 11 *Academic Requirements for Admission*[2] and, with the Australasian Professional Legal Education Council, LACC developed the national *PLT Competency Standards for Entry-level Lawyers*.[3] Further, it has sought and assisted the development of, the CALD *Standards for Australian Law Schools*[4] and *Standards for PLT Providers and Courses*[5], which provide objective and common means of accrediting, reviewing and re-accrediting institutions and courses which teach the Academic Requirements and PLT Competencies, for admission purposes.

LACC also seeks to investigate and respond to suggestions about how the requirements for admission to the legal profession might be improved.

2. SUMMARY OF SUBMISSIONS

2.1 Contrary to the suggestion in draft Recommendation 7.1, there is no agreed compulsory core of law subjects in a law degree. The Key points suggestion on page 215 that ADR should be made a core subject is thus inapposite. Similarly it seems inconsistent to suggest that there may be no need for core subjects while proposing that ADR should become a core subject.

2.2 LACC has been unable to find any evidence to support the assertion on page 222 of the Draft Report the 11 *Academic Requirements for Admission* (**Academic Requirements**) "limit the flexibility of universities to compete and innovate in offering more tailored degrees".

2.3 There is evidence, however, that the ability of law schools to innovate has not been impeded by the Academic Requirements, where those requirements are administered with a light hand.

2.4 In recent years, the Australian Qualifications Framework seems to have placed more significant limits on the ability of law schools to "compete and innovate in offering more tailored degrees" than the Academic Requirements – particularly in relation to Honours degrees and the development of JD degrees.

2.5 At page 222 the Draft Report suggests, and then relies on, a false dichotomy between knowledge of substantive law and the skills of accessing, understanding and wielding legal

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1 LACC'S Charter is approved by the Council of Chief Justices which also appoints its Chairman. LACC is not, however, a committee of the Council, nor does it act on the Council's behalf. Most of the documents referred to in this submission appear on the LACC's website.

2 http://www1.lawcouncil.asn.au/LACC/images/pdfs/LACCPrescribedAcademicAreasofKnowledge-June2008.pdf

3 http://www1.lawcouncil.asn.au/LACC/images/pdfs/LACCCompetencyStandardsforEntryLevelLawyers-Jan2015.pdf

4 http://www.cald.asn.au/docs/CALD%20-%20standards%20project%20-%20final%20-%20adopted%2017%20November%202009.pdf

5 http://www1.lawcouncil.asn.au/LACC/images/pdfs/VictorianCouncilofLegalEducation-StandardsforPLTProvidersandCourses.pdf

knowledge. The best exemplars of those skills are the courts. Each of the Academic Requirements was selected as one of the areas where those skills are best studied and revealed by examining the work of the courts, albeit in developing an area of substantive legal knowledge.

2.6 The Draft Report presently fails either to acknowledge, or in formulating its Recommendation 7.1 to take account of, the further significant roles of the Academic Requirements as referents for determining the adequacy of the training of overseas lawyers and the additional training they require before becoming eligible for admission in Australia; as constituting the common threshold for sequential PLT training in Australian PLT courses; and as touchstones for accrediting, reviewing and reaccrediting law schools and their courses for admission purposes. Before suggesting that there may be no ongoing need for academic requirements for admission, the Commission needs to explain how each of the above functions could be effectively fulfilled without them.

2.7 The Commission is encouraged to give further consideration to the Australian Law Reform Commission's Report on *Managing Justice*[6], its discussion of the continuing need for a core of academic requirements for admission to the legal profession, and its suggestions of what areas of knowledge should be included in that core.

2.8 The Commission may also find it helpful to consider the material set out in LACC's 2010 Discussion Paper, *Rethinking Academic Requirements for Admission*[7] before finalising its comments in Draft Recommendation 7.1 about the Academic Requirements.

2.9 There is a demonstrable continuing need for certain areas of legal knowledge to form compulsory academic requirements to be acquired before admission to the legal profession. Insofar as the Draft Report and draft Recommendation 7.1 suggest otherwise, they are both misguided and incorrect.

2.10 It may, however, be appropriate to suggest that either or both:

(a) some of the present 11 Academic Requirements could be omitted, after appropriate consideration; and

(b) other academic requirements for admission should be added or substituted, that are more relevant to the present requirements of legal practice.

2.11 If the Commission were to make a recommendation along the lines of item 2.10, it would be unsafe to assume that:

(a) relevant stakeholders will readily agree on required changes to the present Academic Requirements; or

(b) ADR would necessarily be included among any new academic requirements;[8] or

(c) the resulting list of agreed academic requirements would be smaller than the present 11 Academic Requirements; or

(d) any replacement list of academic requirements would continue to be administered by Admitting Authorities with a light hand.

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6 Australian Law Reform Commission, *Managing Justice: A review of the Federal civil justice system* Report No 89, (2000), paragraphs 2.81 -2.82.

7 http://www1.lawcouncil.asn.au/LACC/images/pdfs/Re-thinkingAcademicRequirementsforAdmission.pdf

8 *Infra*, item 5.

2.12 At page 228, the Draft Report incorrectly asserts that, in the current education and training of lawyers "there is no requirement for the study of alternative dispute resolution (ADR)." The first prescribed Element of the compulsory practical area of Civil Litigation Practice at item 5.3 of the national *PLT Competency Standards for Entry-level Lawyers* requires every lawyer to have acquired and demonstrated entry-level competence in assessing the relevant merits of each case and in identifying the relevant dispute-resolution options, having regard to a client's circumstances.

2.13 Every lawyer admitted to the legal profession in Australia since 2003 must thus have both acquired and demonstrated the competence appropriate to an entry-level lawyer in identifying the ADR options available and appropriate to each client.

2.14 It would thus be prudent for the Commission to reconsider its bald but incorrect assertion on page 228 of the Draft Report and the similar implication in draft Recommendation 7.1.

2.15 If the Commission is concerned to see that lawyers develop advanced knowledge and skills about ADR that are beyond those reasonably expected of an entry-level lawyer, it would be more appropriate to direct its attention to the postgraduate and CPD levels of legal education than to pre-admission academic and practical legal training.

2.16 The Commission also needs to understand that many clients refuse to accept legal advice to adopt ADR techniques in preference to litigation. The use of ADR techniques would be greatly enhanced if they were as embedded in *the psyche of clients*, as effectively as they are presently embedded in psyche of their legal advisers.

3. NATURE OF THE 11 ACADEMIC REQUIREMENTS FOR ADMISSION

Although page 222 paragraph 2 of the Draft Report *correctly* states that the 11 Academic Requirements must be included in a law degree if a student seeks admission to the legal profession, Recommendation 7.1 *incorrectly* suggests that the 11 Academic Requirements are "core subjects in law degrees".

3.1 A compulsory core of subjects?

In 1977, the Australian Legal Education Council, under the Chairmanship of Justice Gordon Samuels, sought to forge agreement on a compulsory core of subjects for Australian law degrees. The object was to try to do what the earlier Ormerod Committee succeeded in doing in England.[9]

Despite several years of trying, it proved impossible to obtain agreement among the (then limited) number of law schools about whether there should be a compulsory core and, if so, what areas of knowledge should be included in that core.

There is still no agreement between law schools about those questions and, as systems invariably differentiate as they expand, the likelihood of reaching agreement in 2014 is less than it was in 1980.

Many law schools strive to offer as many optional subjects in a law degree as the market and their teaching resources allow and to keep "compulsory" subjects to a minimum. This practice has existed for many years. Thus the Monash Faculty of Law *1982 Student Handbook* at pages 37 – 38 lists 59 optional subjects offered by that law school.

Others limit the possibility of choice. Some, like the Australian Catholic University, do so as a marketing device, to produce graduates which they consider will be more attractive

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[9] See generally http://www1.lawcouncil.asn.au/LACC/images/pdfs/BackgroundPaperonAdmissions.pdf (LACC Background Paper on Admission Requirements 2010).

to law firms. For similar reasons, it requires all students to take part in a *pro bono* program. The Legal Profession Admission Board course in New South Wales also makes 17 out of the required 21 subjects compulsory, in order to tailor the course as closely as possible to legal practice.. The choice of whether to make any, and if so, what subjects compulsory is entirely a matter for each law school.

Competitive pressures and student demand also lead law schools to limit the duration of law courses to the extent practicable, within the constraints imposed by the Australian Qualifications Framework. The limiting factor on duration imposed by Admitting Authorities is a requirement that a person seeking admission to the legal profession must have undertaken the equivalent of three years' full-time study at a tertiary level law course. This requirement is quite separate from the 11 Academic Requirements.

3.2 Academic Requirements for Admission

The 11 Academic Requirements (which the Draft Report calls the *Priestley 11*) were developed by the predecessor of LACC as a response to the inability of the Australian Legal Education Council to get law schools to agree on a common core of compulsory areas of study. Had the law schools been able to agree on a common compulsory core, it is likely that their agreed core would have been accepted by all Admitting Authorities as appropriate academic requirements for admission purposes.

At page 222, the Draft Report incorrectly states that one of the Academic Requirements is "Professional Conduct". Some years ago that requirement was changed to "Ethics and Professional Responsibility", with a consequential alteration of the required subject matter.

The 11 Academic Requirements were subsequently adopted by all Australian Admitting Authorities. But they are not, and have never been correctly characterised as a compulsory core of a law degree. Students seeking admission to the legal profession must, however, include those 11 Academic Requirements in their law degrees.

Because law schools resisted the close prescription of any areas of study, each of the Academic Requirements is couched in broad, indicative terms which can in no way be characterised as prescriptive. Further, the prefatory statement in that document[10] makes it clear that the law schools are at liberty to deal with an area of knowledge in the context of whatever subject it might chose to offer. There is thus no barrier to a law school, say, developing a subject which deals with both Civil Procedure (as described in the Academic Requirements) and ADR, to an appropriate level of detail.

The other significant attribute of the 11 Academic Requirements is that they have been consistently administered with a light hand by Admitting Authorities.

3.3 Effect on Flexibility, Innovation and Competitiveness of Law Courses

At page 222 the Draft Report asserts that, while the Academic Requirements for Admission "provide a strong base knowledge of the law, they limit the flexibility of universities to compete and innovate in offering more tailored degrees".

LACC has endeavoured to investigate claims of this sort whenever they are made.

In August 2013, the Attorney-General's International Legal Services Advisory Council (ILSAC) released its report on *Internationalising the Australian Law Curriculum*. Chapter 4 summarises the key themes of its National Symposium on internationalising the Australian law curriculum held in March 2012. At page 68 it states:

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10 Supra note 2.

> There was broad discussion of the continuing validity and effectiveness of the Priestley 11 areas of knowledge. For some, they represent an anachronism and a dead hand stifling innovation in the curriculum. For a majority, they represent a continuing valid framework within which there is scope for innovation and broad development of the curriculum ... [P]rovided the "light-handed" regulatory approach taken in a majority of jurisdictions applies across the Commonwealth, then the requisite integrated approach to internationalisation of the curriculum is feasible. So, too, are a broad range of delivery methods that allow the development in law students of the range of knowledge, skills and attributes required for practice in a globalised legal environment. All participants supported a principled and sensible approach to regulation that did not impede the effective delivery of legal education.
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> It was noted that in those States where a "light-handed" approach to legal education was maintained, the law schools had freedom to develop innovative approaches to the curriculum that ensured that different schools could remain at the forefront of best practice in different aspects of legal education internationally.
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> Significant concerns were raised that overly prescriptive approaches to regulation in some States and judicial intervention in the application of regulation, down to modes of delivery and individual unit content, would significantly impede the maintenance of good practice in legal education to ensure quality outcomes.

LACC subsequently asked ILSAC to reveal which, if any, Admitting Authorities had previously adopted "overly prescriptive approaches to regulation", as hinted at in the final paragraph set out above. Professor Duncan Bentley, on behalf of the Council responded:

> "This kind of approach may no longer apply in any jurisdiction and may have been a perception rather than a reality, but were it to do so, it would stifle innovation and limit the ability to remain at the cutting edge of knowledge and pedagogy. It would also, by virtue of the specificity of the review, tend to limit differentiation".[11]

This recent expert enquiry by the Attorney-General's ILSAC into the effect of the Academic Requirements on the flexibility and innovation necessary to internationalise the law curriculum thus does not support the assertions made by the Commission in its Draft Report. Further, Professor Gillian Triggs, when Dean of the Sydney Law School, told LACC that the 11 Academic Requirements had in no way inhibited that law school in "internationalising" its curriculum in the way subsequently envisaged by the ILSAC Report.

LACC accepts that, if the Academic Requirements were not generally administered with a light hand, this might inhibit law schools in developing programs which cater to contemporary needs – including ADR. But Admitting Authorities have, in the past, been more likely to challenge law schools' attempts to truncate the overall duration of a law course, or the "volume of learning" requirements (the Australian Qualifications Framework equivalent of what were formerly known as "contact hours") devoted to particular areas of knowledge mentioned in the Academic Requirements, rather than the range or content of particular subjects devised to meet the Academic Requirements.

LACC has been unable to find evidence which would support the Commission's assertion that the Academic Requirements "limit the flexibility of universities to compete and innovate in offering more tailored degrees". As the ILSAC Report has recently reached the opposite conclusion, and as the experience of law schools does not appear to support it, unless the Commission can produce hard supporting evidence, the assertion should be omitted from the final report.

3.4 Reasons for the Academic Requirements

The Academic Requirements have four distinct roles, three of which appear to be overlooked by the Draft Report, and one of which seems to be misconstrued.

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[11] E-mail from Professor D Bentley to Chairman of LACC, Professor S D Clark, 6 August 2013.

(a) *Threshold Knowledge and Skills*

As the Draft Report asserts on page 222, the subjects which law schools devise to include the 11 Academic Requirements "provide a strong base knowledge in the law". On page 230, however, it suggests that the 11 Academic Requirements predate:

> vast improvements in the ease of accessing information. Today, the challenge is not obtaining information, but rather knowing how to analyse it, use it and place it in context. In other words, the art of the professional lies less in an encyclopaedic memory but more in the skill of accessing, understanding and wielding the knowledge.

The inference appears to be that the Academic Requirements require students to develop an "encyclopaedic memory" for substantive principles of law, rather than "the skills of accessing, understanding and wielding the knowledge".

The argument is analogous to the suggestion that, as all school students now have access to an electronic calculator, it is no longer useful to require them to develop arithmetical schools of addition, subtraction, long-division or to learn multiplication tables by rote (heaven forfend!). The argument fundamentally misunderstands both the process and content of the legal education offered by most law schools, and does those law schools great disservice.

The best exemplars of the skills of legal analysis, the elucidation and application of legal principle, and the interpretation of legislation are the courts. The study of their techniques in analysing legal problems and developing and fashioning new principles and doctrine is indisputably the best (if not the only) way of "accessing, understanding and wielding the knowledge". The notion that there is a discernable dichotomy between "substance" and "skills" in this context is simply incorrect.

Each of the Academic Requirements has been chosen because it reflects issues of substantive law commonly encountered by the majority of legal practitioners and are areas where the previously-mentioned roles of the courts are best revealed. The range of areas of knowledge reflects the very diversity of destinations and practice revealed at pages 218 to 221 of the Draft Report. The national *PLT Competency Standards for Entry-level Lawyers* are similarly structured. In both instances, however, the aspiration is to develop threshold competence, appropriate to someone beginning a life in the law, rather than sophisticated or advanced knowledge or expertise.

(b) *Referents for Overseas Trained Lawyers*

The Draft Report takes no account of the significant number of overseas legal practitioners, lawyers and law students who seek to have their qualifications assessed for admission purposes in Australia. In 2013, a total of some 740 such applicants were assessed by Admitting Authorities by applying agreed *Uniform Principles for Assessing the Qualifications of Overseas Applicants for Admission*, developed by LACC.[12]

These principles require that an overseas applicant should have (or acquire) both academic and PLT training which are substantially equivalent to that required of a locally-trained applicant. Both the 11 Academic Requirements and *PLT Competency Standards for Entry-level Lawyers* are national referents for determining what additional training must be undertaken by overseas applicants who wish to prepare for admission to the legal profession in Australia.

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12 http://www1.lawcouncil.asn.au/LACC/images/pdfs/UniformPrinciplesforassessingOverseasQualifications-Feb2014.pdf

(c) *Threshold Preparation for PLT*

The national *PLT Competency Standards for Entry-level Lawyers* assume that all those proceeding to undertake sequential PLT courses have attained threshold and common understanding in each of the areas of knowledge comprised in the 11 Academic Requirements. Given the limited duration of such PLT courses, it is impractical for them either to offer remedial training to some students who are not adequately prepared in some of these common areas of knowledge, or to extend their courses to cater to those who are not appropriately prepared. Further, to do so would increase the costs of the practical legal training stage of legal education unnecessarily.

Abolishing or significantly amending the present Academic Requirements would thus require significant consequential rethinking and reorganisation of the practical training stage of legal education.

These flow-on effects are unavoidable in a system which appears to have inalterably evolved into one of mainly sequential academic and practical legal training.

(d) *Touchstones for Accreditation*

The other significant continuing role of the 11 Academic Requirements is to provide the focus for Admitting Authorities in fulfilling their statutory obligations relating to accrediting law schools and their courses for admission purposes.

In order to limit the intrusive scope of their enquiries and the costs to institutions of managing and responding to reviews, Admitting Authorities now seek to combine their reviews with comparable reviews by other bodies that law schools are now customarily required to undergo from time-to-time: see item 5 below. In addition, Admitting Authorities are primarily concerned to review the way in which law schools teach the 11 Academic Requirements, rather than other elements of a law school's teaching program. Concentrating on these elements limits the scope of reviews for accreditation and reaccreditation purposes, with consequential additional savings to the relevant institutions.

If agreed academic requirements were abolished, both the scope and costs of accreditation and reaccreditation reviews would increase. Further, the task of making relevant comparisons with other law schools would become much more subjective and difficult.

Before the Commission finalises Recommendation 7.1 and its implicit suggestion that there may be no ongoing need for academic requirements for admission, it needs to consider each of the roles set out in paragraphs (a) –(d) above, and suggest how each of these roles could be performed in a cost-effective manner, without such academic requirements for admission.

4. REVIEWING THE ACADEMIC REQUIREMENTS FOR ADMISSION

Following its cursory assertions about the Academic Requirements noted in item 3.3 above, the Draft Report concludes in draft Recommendation 7.1 that it is appropriate to review the "ongoing need for the 'Priestley 11' core subjects in law degrees."

This recommendation is made without any apparent consideration of the recent conclusions of the Attorney-General's International Legal Services Council note in item 3.3 above, or of earlier careful investigations of the need for academic requirements for admission. Two earlier investigations, in particular, need to be considered before the Commission finalises this recommendation.

4.1 Australian Law Reform Commission views

In 2000, the Australian Law Reform Commission published its report on *Managing Justice*.[13] While expressing the view that law schools should pay greater attention to broad, generic professional skills development, the Commission, at paragraph 2.81, emphasised that it did not:

> seek to minimise the need for students to receive a solid grounding in core areas of substantive law, the historical organisation (and divisions) of the common law system, the language and key concepts of core areas of law and the nature of the relationships as between the state, the courts and the individual.

While the ALRC wished to see a move away from solitary preoccupation with the detailed content of numerous bodies of substantive law, it acknowledged the need for an agreed core of substantive legal studies. But its preferred core did not appear to be any smaller than the present Academic Requirements. It affirmed the need for any core to include constitutional law, criminal law, contracts, torts and property. But, at paragraph 2.82, it also canvassed the claims of administrative law and "high-profile areas such as family law, environmental law, taxation and trade practices". It further noted that, in the light of "globalisation" both public international law and private international law could be seen as being within any modern core. Strangely, however, the ALRC appeared to see no need to include ethics and professional responsibility in its proposed core.

If the suggestions of the ALRC were followed, however, there would be 12 areas of knowledge, rather than the present 11, which might have a deleterious effect on law school flexibility and innovation, which the Draft Report seeks to protect. Importantly, however, the ALRC affirmed the ongoing need for agreed and common academic requirements for admission to the legal profession.

In evaluating the ALRC's suggestions about the need for training in broad generic professional skills development, it is important to note that the ALRC Report predated the introduction of the comprehensive and explicit national *PLT Competency Standards for Entry-level Lawyers* which were not endorsed by all Admitting Authorities until 2002. Since that time, all PLT courses have been required to ensure that every person presenting for admission has received practical legal training in, and acquired and demonstrated entry-level competence in, many matters relevant to modern legal practice – including ADR.

4.2 LACC Discussion Paper on Rethinking Academic Requirements for Admission

The Commission might also be assisted by the LACC's 2010 Discussion Paper, *Rethinking Academic Requirements for Admission*.[14] This paper reviews more recent developments in both theory and practice relating to the training of lawyers for legal practice in the United States, England and Scotland.

In addition to examining the ALRC's arguments and recommendations, it explains the background to the present Academic Requirements and lists some 16 criticisms that have been levelled against them in the past 15 years.

The paper also notes, at page 20, that, in 1998, LACC's predecessor asked all the law schools, PLT providers, Admitting Authorities, the Law Council of Australia and each of the Law Council's constituent bodies in all Australian jurisdictions, whether or not the present Academic Requirements should be reviewed and brought up-to-date. Remarkably, not one respondent thought that that a review of the present Academic Requirements was either necessary or desirable.

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13 *Supra* note 6.

14 *Supra* note 7.

As noted in item 3.3 above, the majority view at the recent ILSAC National Symposium was that the present Academic Requirements:

> represent a continuing valid framework within which there is scope for innovation and broad development of the curriculum.

4.3 Difficulty of obtaining consensus

For the reasons noted in item 3.4 above, LACC considers that it is still essential that certain academic requirements for admission should be agreed upon and adopted by all Admitting Authorities. LACC retains an open mind, however, on whether the present Academic Requirements all continue to be as relevant as they once were; whether some of the present areas of knowledge might appropriately be omitted; and, if so, whether their place should be taken by other areas of knowledge of contemporary relevance to legal practice.

In 2007, LACC was requested by the Chief Justice and the President of the Court of Appeal in Victoria, with the support of the Chief Justices of the High Court and the Supreme Court of New South Wales, to examine the way in which statutory interpretation is now taught in Australian law schools; and whether that area of knowledge should be substituted for an existing, or added as a new, Academic Requirement.

Despite the overwhelming contemporary importance of statutory interpretation to every person now working in a legal capacity (whether or not in legal practice) LACC has been reluctant to propose that it be added to the present Academic Requirements. Instead, it has issued a *Statement on Statutory Interpretation*[15] which sets out a range of relevant knowledge and skills which will be expected of graduating law students, and has indicated to law schools that Admitting Authorities have agreed to take this Statement into account when accrediting, reviewing and reaccrediting law schools.

Nearly all those who responded to the 1998 enquiry by LACC's predecessor about the need to review and bring up-to-date the present Academic Requirements noted that the initial difficulty encountered in reaching agreement on the present Academic Requirements in itself presented a reason for not re-opening them.

As far as LACC can assess, there is still no real enthusiasm among most relevant stakeholders to review the present Academic Requirements, at least while Admitting Authorities continue to administer them with a light hand.

4.4 Conclusions

Insofar as draft Recommendation 7.1 and other passages in the Draft Report suggest that there may not be a continuing need for certain common and agreed academic requirements for admission involving the study of substantive law, the suggestion is misguided and inappropriate. There is definitely a need for some such academic requirements to continue to exist.

Insofar as the Draft Report and draft Recommendation suggest that it may now be appropriate to either or both consider whether:

(a) it might be appropriate to omit some of the present Academic Requirements; and

(b) add or substitute other academic requirements which may now be considered more relevant to contemporary legal practice,

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15 http://www1.lawcouncil.asn.au/LACC/images/pdfs/StatementonStatutoryInterpretation.pdf

the suggestion may well be appropriate. LACC would certainly support and endeavour to assist any such exercise.

The whole history of the Australian Legal Education Council and its unsuccessful attempts to get the relatively few law schools of that time to agree on an Ormerod-like core of compulsory subjects; then the subsequent difficulties in getting law schools to agree on both the areas of knowledge and the way in which they are expressed in the present Academic Requirements, indicate that a general review would be exhausting, aggravating to most, and ultimately inevitably disappointing for many. There is further a chance that a review would be likely to lead to more, rather than less academic requirements, as it is entirely possible that certain stakeholders may have less malleable views than the law schools about what should be required of an applicant for admission to the legal profession.

If the present Academic Requirements are reviewed and other requirements seen to be of greater contemporary relevance put in their place, LACC foresees a clear possibility that, in future, Admitting Authorities may become much more rigorous in assessing a law school's compliance with the revised, contemporary requirements. As noted in item 3.3 above, this may well deleteriously "limit the flexibility of universities to compete and innovate in offering more tailored degrees."[16]

If the Commission wishes to make a recommendation directed at revising the present Academic Requirements, the final report should advert to these possible consequences and acknowledge their existence.

5. MAINTAINING REGULATORY OVERSIGHT WHILE MINIMISING REGULATORY BURDENS

LACC has taken pains to ensure that processes adopted for the accreditation, review and reaccreditation of law schools and their programs for admission purposes adhere to the principle endorsed on page 231 of the Draft Report. Accordingly, it has recommended that all Admitting Authorities should seek to integrate any reviews for reaccreditation purposes with other reviews conducted by other authorities for other purposes, in order to ensure that additional burdens on institutions are avoided.

On the other hand, the Draft Report at page 231 appears to misunderstand the relationship between admission to the legal profession and the obtaining and maintenance of a practising certificate. The so-called "consolidated model of administering admission and practising certificates" does not imply identity of processes. While it is possible for one body to house both the function of processing applications for admission in order to make recommendations to the Supreme Court, and the function of granting practising certificates, these functions are, and must continue to be, separate. The task of determining whether a person has the qualifications necessary to be admitted to the legal profession is entirely different from the task of determining whether that person should subsequently be permitted to continue practising law.

In both instances, it is necessary to determine whether a person is a "fit and proper person" for the respective purpose of being admitted to the legal profession and of continuing to practise law. But while some of the relevant indicia may be similar, others are fundamentally different and must be considered at different times in a person's career. Thus, when a person is seeking admission, it may be relevant to enquire whether the person has the relevant academic and PLT qualifications and whether the person has been disciplined by an academic institution for, say, plagiarism or cheating. In determining whether a person should be disciplined as a practitioner or refused a practising certificate, it will be more relevant to enquire about that person's behaviour in

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16 Draft Report page 222.

practice subsequent to admission. This may include whether the person has, for example, misapplied trust moneys or failed to meet the CPD requirements in the preceding year.

The suggestion that these very different processes, that occur a different stages in a person's career, could be conflated is thus misguided.

The material on page 231 also appears to assume that many lawyers who do not engage in legal practice, seek and obtain practising certificates. Bearing in mind the cost of a practising certificate and of compulsory professional indemnity insurance, this proposition is inherently unlikely.

It is, however, true that many law graduates proceed to undertake PLT and seek admission to the legal profession, but do not thereafter seek to practise law. Since the 1970s, many such lawyers have continued to work as lawyers in government and business, but do not seek or hold practising certificates. There is also a high "churn" rate among new practitioners who give up legal practice soon after they have been admitted and seek employment in a legal capacity in other organisations. It is unlikely that many of these people would thereafter continue to hold practising certificates.

The suggestion that there is a need to consider what legal tasks can appropriately be performed by legal graduates without practising certificates fails to recognise the large numbers of lawyers who are already employed in legal capacities on legal tasks in business or government and who do not require practising certificates. This has happened for many years. Indeed, Admitting Authorities have recently had to grapple with the problem of stale qualifications because of law graduates seeking admission to the legal profession many years after they have obtained legal academic and PLT qualifications, who are now employed as lawyers in senior government positions.

Further, many law firms also employ qualified lawyers who have not been admitted to the legal profession on legal tasks which do not require them to hold practising certificates. These include foreign lawyers, recent graduates who have not completed practical legal training and so-called para-legal staff. These same tasks can already be performed by lawyers who are admitted to the legal profession in Australia, but who do not hold practising certificates.

While regulatory requirements and professional indemnity insurers require that a principal or partner, who necessarily holds a practising certificate, must sign off on any external legal advice given by a firm, there is no requirement that much of the preparatory or background legal work done in earlier stages of a matter must be done by someone who is either admitted to the legal profession, or who holds a practising certificate.

In view of this, the material appearing in the paragraph on page 231 headed *"Ensuring that a professional's skills match the tasks they are allowed to do"* appears to be inappropriate.

Indeed, in LACC's view, the Commission's concern is perhaps misplaced. The fact that graduate lawyers can find employment as lawyers in business and government without holding a practising certificate raises the question whether they need to be *admitted to the legal profession*, rather than whether they require a practising certificate.

The fact that many lawyers seek to be admitted, but then do not seek to obtain a practising certificate, places an onerous and unnecessary burden on both Admitting Authorities and on the Courts, which must in some jurisdictions schedule significant amounts of Court time to conduct numerous Admission ceremonies. The Commission might profitably direct attention to finding ways of diverting graduates who do not intend to practise law from applying for admission to the legal profession in the first place, rather than inviting consideration of what legal work may be done without a practising certificate – matters which are already well understood and acted upon.

6. THE THREE STAGES OF LEGAL EDUCATION

The Commission incorrectly identifies "obtaining a practising certificate" as a third stage of legal education at pages 230 and 231 of the Draft Report. A person who has satisfied the academic and practical legal training requirements for admission to the legal profession is not required to undertake any further type of training in order to obtain a practising certificate – although some further training may be required in some jurisdictions for people wishing to practise in the manner of a barrister.

The third stage of legal education is more commonly known as Continuing Professional Development (**CPD**). All jurisdictions make it mandatory for those wishing to renew a practising certificate to affirm that they have undertaken a certain amount of CPD in the previous 12 months. Such CPD programs are also generally open to lawyers who do not hold practising certificates, except where they are offered 'in-house" by law firms to their own employees. In some such cases, in-house CPD programs are open to lawyers employed by a law firm's clients as corporate counsel. Indeed, some firms conduct CPD programs expressly for corporate counsel employed by their clients.

There are presently no national mechanisms relating to CPD which compare with the academic and practical legal training stages of legal education for:

(a) determining the appropriate knowledge or competencies to be developed by CPD (apart from some loose requirements to include elements relating to Ethics in one's program);

(b) accrediting CPD providers and programs: or

(c) monitoring, reviewing or reaccrediting CPD providers and courses.

This stands in stark contrast to the requirements and standards for pre-admission academic and practical legal training, outlined in item 1 above.

The Commission might profitably encourage the development of comparable requirements and standards for CPD – particularly as this is an area where a more detailed and sophisticated understanding of ADR could easily be required and promoted.

7. INCORPORATING ADR INTO LEGAL EDUCATION

Draft Recommendation 7.1 implies that existing arrangements do not provide training in "the full range of dispute resolution options" or develop "the ability to match the most appropriate resolution to dispute type and characteristics." At page 228 it baldly asserts:

> [s]pecifically, there is no requirement for the study of alternative dispute resolution (ADR) and in some cases lawyers are not fully informed about the range of dispute resolution options available.

The Commission is apparently unaware of the requirement of item 5.3 of the national *PLT Competency Standards for Entry-level Lawyers*, which every applicant for admission since 2003 is required to acquire and to demonstrate before becoming eligible for admission to the legal profession.

The first prescribed Element of the compulsory practice area of Civil Litigation Practice is the element of:

> "Assessing the merits of a case and identifying dispute resolution options."

One of the corresponding performance criteria for this Element, which each student must satisfy is that:

"the lawyer has competently identified means of resolving the case having regard to the client's circumstances."

The first footnote to this item explains that "means of resolving the case" includes:

- negotiation
- mediation
- arbitration
- litigation
- expert appraisal.

Accordingly, the statement on page 228 quoted above appears to be manifestly incorrect in relation to any lawyer who has been admitted to the legal profession in Australia since 2003.

Further, as noted in item 3.2 above, it is open to any law school to include ADR in its program; and that such matters may well now be included in subjects which also satisfy the Academic Requirement relating to Civil Procedure.

At page 228, the Draft Report also draws attention to the former National Alternative Dispute Resolution Advisory Council (**NADRAC**) view that:

"law schools should increase the amount of compulsory ADR teaching contained in law degrees".

LACC considered whether NADRAC's view required any adjustment to the Academic Requirements at the time its report was released. LACC concluded no such action was necessary or desirable because:

(a) all persons seeking admission are required to acquire and demonstrate the competency spelled out above relation to ADR, to a level appropriate to an entry-level lawyer; and

(b) in view of this, and the fact that the competitive pressures on law schools require them to adapt to the changing requirements of legal practice, it would be inappropriate to "limit the flexibility of universities to compete and innovate in offering more tailored degrees" [17] by adding a further Academic Requirement relating to ADR.

LACC emphasises that the combined role of the academic and practical legal training stages of legal education is to develop knowledge and competencies that are appropriate for an entry-level lawyer. It is not the role of either of these stages to create the expertise that may develop in the course of experience in practice, business or government, with the assistance of either post-graduate qualifications or life-long CPD.

In LACC's view, the implication in draft Recommendation 7.1 that insufficient or inappropriate training in ADR is not presently offered at either the academic or practical legal training stages of legal education is not supported by the facts and is simply incorrect.

If the Commission's real concern is to ensure that ADR is "embedded...into the legal psyche"[18] beyond the level appropriate to an entry-level lawyer, it should concentrate its

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17 Draft Report page 222.

18 Draft Report page 228.

attention, not on the academic and practical legal training stages of legal education, but on the post-graduate and CPD stages of legal education , and their respective capacities to offer more sophisticated and detailed instruction to develop advanced knowledge and skills relating to ADR.

Further, the Commission also needs to understand that many clients refuse to accept legal advice to adopt ADR techniques in preference to litigation. The enduring problem may well be how to embed the use of ADR into the psyche of *clients*. It seems likely that the use of ADR techniques would be greatly enhanced if they were embedded in the psyche of clients, as effectively as they are presently embedded in psyche of their legal advisers.

Any practical suggestions that the Commission may have on how to achieve this objective would doubtless be most helpful.

29 April 2014