

## REDRAFTING ACADEMIC REQUIREMENTS

### REPORT ON SUBMISSIONS

At its June meeting, LACC resolved to circulate the Steering Committee's earlier report to the following bodies, inviting submissions to be made by 30 September 2019 –

The Council of Chief Justices;  
Admitting Authorities, for distribution to relevant professional organisations in each jurisdiction;  
The Australasian Law Academics Association, for distribution to each member of that Association;  
CALD for distribution to each Law School Dean;  
APLEC for distribution to Heads of Courses;  
Law Council of Australia, for distribution to its Directors and constituent members;  
The LSC Admissions Committee.

This was done in the week following that meeting. Each of the recipients thus had more than 3 months in which to respond to the invitation before the time for submissions expired.

#### 1. PRIOR SUBMISSIONS

##### 1.1 NSW LPAB

A letter from the NSW LPAB on 19 June 2019 indicated that –

The consensus of the Board was to indicate to LACC that while the Board is open to improvements or modification to the 'Academic areas of knowledge' prescribed to be covered by law courses in Schedule 1 of the *Legal Profession Uniform Rules 2015*, it does not support a redrafting of the academic requirements at the present time.

The letter was considered at the June meeting of LACC. Acting Justice Emmett indicated to the meeting that he did not consider that the letter indicated that the Board would oppose the Report of the Committee being circulated more widely to gauge the views of other stakeholders to the proposed revised draft of the Academic Requirements.

##### 1.2 NSW LPAB Legal Qualifications Committee

The letter from the NSW LPAB also enclosed a submission from its Legal Qualifications Committee (**LQC**) which was also considered by the June meeting of LACC. While the LQC did not express views about the suitability of the proposed draft for the purposes of lawyers being educated in Australia, it was concerned that if prescribed areas of knowledge were expressed in more general terms than the present list of topics, it might make it more difficult for Boards to determine whether an overseas applicant's qualifications are substantially similar to those of an Australian qualification, particularly in applying rule 11 of the Uniform Admission Rules 2015. This would be "likely to require a greater level of judgment and discretion in making the comparison than is presently required." Further, the suggestion that the description of Property should include an understanding of "principles of indigenous Australian law that form the basis of Aboriginal and Torres Strait Islander claims to land" would mean that it would no longer be possible to conclude that any overseas Property course is substantially equivalent to Australian Property courses.

The meeting noted that the LQC's submission partly arose from a mischaracterisation of the descriptions of the prescribed areas of knowledge as being prescriptive, rather than indicative. It further noted that each Admitting Authority has ample dispensing powers to

ensure that sensible conclusions are drawn about the substantial equivalence of subjects in overseas qualifications. Further, to inhibit the improvement of the description of the prescribed areas of knowledge required of Australian graduates by reference to the possible need to adjust the way in which overseas qualifications are assessed, may put the cart before the horse. The meeting thus concluded that the problem perceived by the LQC should not be a barrier to adopting the revised formulations.

The Steering Committee further notes that –

- (a) in relation to the suggestion that the express mention of principles of indigenous Australian law would mean that no overseas Property course could be substantially equivalent to an Australian Property course, conversely, we do not presently deny credit to an English Property course which includes consideration of either copyhold or the Cornish custom of leases for lives (neither of which exist, or are taught in Australia) on the grounds that they are not substantially equivalent to an Australian Property course;
- (b) in relation to the suggestion that adding a reference to the relationship between Aboriginal and Torres Strait Islander Peoples and the Australian constitutions alters the substance of existing courses in Constitutional Law, one of the authors of the revised description has remarked –

Including the relationship between Indigenous Peoples and the Constitution in constitutional law courses has been best practice for decades now, and I doubt any academic currently teaching the area in a leading Australian law school would dispute that it is a core aspect of the curriculum.

Anyone who thinks that by including this we are changing the substance of what is taught is seriously out of touch with current pedagogical practice.

- (c) any perceived difficulty in assessing overseas academic qualifications against the proposed revised descriptions of the prescribed areas of knowledge would be no greater than the difficulty of applying the imprecise criteria relating to an applicant's "legal skills and experience" which an Admitting Authority in a participating jurisdiction will be required to employ if the proposed Legal Profession Uniform Law Admission Rule 2019 is adopted.

With the agreement of Acting-Justice Emmett, the submission of the LQC was placed on the LACC website, in case other persons wishing to make submissions were similarly concerned.

### 1.3 **Tasmanian Board of Legal Education**

#### **(a) Civil Dispute Resolution**

On 8 May 2019, the Tasmanian Board asked whether the description of Civil Dispute Resolution might appropriately be revised to expressly "include questions of costs and enforcement of judgements." This suggestion was referred to the authors.

#### **(b) Evaluating**

The Tasmanian Board also noted that, whereas all the proposed redrafts of the various prescribed areas of knowledge refer to "understanding" material subsequently enumerated in the description, the descriptions for both Property and Ethics & Professional Responsibility also referred to "evaluating" certain material.

In the light of the AQF descriptions of the expectations of different Levels of qualification, the Board asked whether "evaluating" should also be included in the

description of other areas of knowledge? The Steering Committee raised the question with the Property authors, but after several email exchanges, they expressed the view that it might be preferable to remove the reference to "evaluating" from the description of Property. The authors of the description for Ethics and Professional Responsibility reached a similar conclusion.

There are, of course, good reasons to support the view that "evaluating" should be included. One of the objects of the Steering Committee, however, has been to try to obtain consistency between descriptions in order to avoid any *expressio unius* arguments about slight differences in expression. With this in mind, the reference to evaluation has been removed from both descriptors. The object is merely to try to achieve apparent consistency of descriptors, not to inhibit the way material is actually dealt with in class.

## 2. **TIMELY SUBMISSIONS**

The following submissions were received before submissions closed on 30 September 2109.

### 2.1 **Joshua Krook**

Mr Krook made a submission entitled "Abolish the Priestley 11". It suggests that the present Academic Requirements are inappropriate and that other studies should be encouraged for those seeking admission to the legal profession. The submission does not, however, bear on the revised drafting of the present Academic Requirements, and is thus not relevant to the present enquiry.

### 2.2 **Law Society of SA**

The Society notes support from its Young Lawyers for the revised descriptions. It agrees that the requirements should be indicative, not prescriptive and supports the focus on flexibility to allow law courses to keep pace with developments in the law, particularly technology.

It also noted that the revised versions emphasise knowledge, but places less emphasis on thinking skills, research skills, ethical values, effective communication skills and problem-solving and alternative dispute resolution skills. While these matters might be better dealt with in PLT or "supervision components of legal education", it wondered whether they could be further incorporated as part of the LLB?

The Steering Committee notes that item 1 of the Discussion Paper points out that each of the skills (except alternative dispute resolution) identified by the Law Society is actually an express component of the TLOs for Law. The TLOs have been adopted by CALD, endorsed by each law school and are included in the outcomes to meet the relevant AQF requirements. They are thus now already part of the teaching obligations of every TEQSA accredited law school. The revised descriptions of the prescribed areas of knowledge are intended to complement, but not repeat or replace, the TLOs that law schools are already bound to observe.

Further, the name of Civil Procedure was recently altered to Civil Dispute Resolution and now expressly includes the area of alternative dispute resolution.

### 2.3 **University of WA Law School**

The law school generally welcomes and supports the revised Academic Requirements. It would also support embedding technology, globalisation, international or transnational perspectives and "indigenous laws, knowledges and perspectives across the core curriculum." The Steering Committee notes, however, that these are matters that would

need to be examined when the scope, rather than the drafting, of the prescribed areas of knowledge is next reviewed.

The law school also made particular drafting suggestions of both a substantive and an editorial nature for a number of subject descriptions. Its comments about Civil Dispute Resolution, Contract, Equity and Trusts, Ethics and Professional Responsibility and Property have been passed on the authors of these descriptions for their review.

#### 2.4 **Lauren Stinson**

Ms Stinson is a final year law student who sets out her experience as a student and supports the breadth of the academic requirements for admission. The submission does not, however, otherwise comment on the revised draft.

#### 2.5 **Legal Education Associate Deans' (LEAD) Network**

LEAD supports the revision, but draws attention to the need to incorporate "indigenous perspectives and cultural competency into the prescribed areas of knowledge" and to recognise the impact of emerging technology. The Steering Committee considers that these matters will necessarily be part of any review of the substance of the prescribed areas of knowledge, but could not be accommodated in the limited present drafting revision.

LEAD considers there is a disparity in the breadth of proposed descriptions and "would strongly recommend that a more consolidated and higher-level approach be taken to the drafting of the requirements for admission to practice" such as has been proposed for the descriptions of Contract and Property. In the Steering Committee's view, although LEAD considers that the descriptions of Company Law, Criminal Law and Procedure, Equity and Evidence are "too prescriptive", each description has been carefully devised to ensure that examples, where given, cannot be considered to be prescriptive.

LEAD also suggested minor alterations to the descriptions of Evidence and Torts, which have been passed on to the relevant authors.

#### 2.6 **Monash University Faculty of Law**

The Faculty endorses the approach adopted by LACC to the drafting process. In particular, it -

- (a) welcomes the clear articulation that the descriptions are intended indicative rather than prescriptive, that their purpose is 'not to dictate how, or where in the course, or to what depth such teaching should occur' and that they do 'not seek to prescribe how or where the subject matter is taught in a law course; to limit innovation in teaching techniques; or to mandate the proportionate attention to be given to each element of a description';
- (b) welcomes the clear indication of this purpose in the proposed prefatory comments;
- (c) welcomes the thoughtful way in the prescribed areas of knowledge descriptions have been drafted in a way that allows for the descriptions to be responsive to changes in the law without having to revise the description of a prescribed area;
- (d) endorses the description for each of the prescribed areas of knowledge.

## 2.7 **Melbourne Law School**

The law school proposes "a more fulsome recognition of the importance of developing an understanding of law in the context of the impact on Aboriginal and Torres Strait Islander Peoples." It suggests a statement to that effect in the prefatory comments and that the initial paragraph of the description of each area of knowledge should refer to the effect that the area of law has on the "rights and laws of Aboriginal and Torres Strait Islander Peoples."

In the Steering Committee's view, it would exceed the scope of the present review to make what would be significant substantive additions to each existing area of knowledge. The proposed description of Property contains a reference to 'the principles of indigenous Australian law that form the basis of Aboriginal and Torres Strait Islander claims to land' because the decision in *Milirrpum v Nabalco*, and the subsequent history of this area of law, has been commonly taught in Property courses since 1972, but has not previously been formally acknowledged.

The description of Constitutional Law similarly contains a reference to "the relationships between Aboriginal and Torres Strait Islander Peoples and the Australian constitutions". Again, for many years this area has been taught, but has not formally been acknowledged.

Like the recently-revised descriptions of Evidence and Civil Dispute Resolution, established changes in teaching content need to be recognised. On the other hand, innovation of new areas of study should await a more extensive substantive review of the prescribed areas of knowledge.

The law school further draws attention to the choice of language used in para (a) of each new description of an area.

Sometimes para (a) identifies 'social context', sometimes reference is made to 'social, historical and global context', and in relation to other subjects the reference is to the 'constitutional context' alone (as in the case of Administrative Law), or merely 'wider contexts' (in the case of Criminal Law and Procedure). Similarly, some language refers to the 'theoretical foundations' of the subject, other the 'broad theoretical basis' and sometimes the 'broad theoretical and conceptual basis' (or 'bases') of the subject. We query the reasons for the range of different terminology used in each of para (a), and suggest that if possible, consistent language may be useful".

The Steering Committee, in other contexts, has endeavoured to avoid the possibility of comparative *expressio unius est exclusio alterius* arguments about course content arising. It has thus invited the authors to consider whether common and consistent statements would be feasible.

## 2.8 **Business Council of Cooperatives and Mutuals**

The Council submitted that, despite the significance of corporations that operate on mutual principles, law graduates are not presently made aware of the legal principles relevant to their constitution and operation, and their differences from companies. They suggest that the name of the prescribed area of knowledge should be changed from Company Law to Corporations Law, and that these principles should be added to the subject matter and description of the prescribed area.

The suggestion was referred to the authors of the proposed revised description of Company Law for their views.

## 2.9 **Law Firms Australia**

The submission of Law Firms Australia (**LFA**) raises the following four primary issues –

- (a) The revised descriptions are "inappropriate as a basis against which to assess the academic credentials of foreign lawyers."

LFA endorses the views of the LQC, which were considered by LACC at its June meeting. LACC's conclusions on that submission are set out in item 1.2 above. It concluded that the LQC's submission depended upon a mischaracterisation of the present descriptions of the prescribed areas of knowledge as prescriptive rather than indicative. The Steering Committee understands that the LQC's apparent approach to determining the "substantial equivalence" of an overseas applicant's qualifications may not be applied by other Admitting Authorities; and that, in practice, they have much greater flexibility in determining substantial equivalence than the LQC's submission suggests.

A second concern endorsed by LFA is that mention of aspects of Aboriginal and Torres Strait Islander legal issues in the proposed description of Property might adversely affect foreign practitioners applying for admission in Australia. The reason for this alteration to the description of Property is set out in item 2.7 above. It acknowledges general changes in the teaching of Property in all law schools that have occurred since 1972. Those changes have not, so far, produced adverse effects on determinations about substantial equivalence of overseas common law studies in Property. The Steering Committee can see no reason why the proposed alteration of the description of Property to reflect current teaching practices – as has recently occurred with the descriptions of Evidence and Civil Dispute Resolution – should produce any change in the current practices of Admitting Authorities.

- (b) "The necessity of the proposed prefatory comments is unclear, and their inclusion may give rise to confusion".

The prefatory comments were prepared to reduce, rather than to add to, confusion. Despite the introductory sentence to the existing descriptions of prescribed areas of knowledge and the alternative descriptions offered in relation to each area of knowledge, Admitting Authorities, law schools and others have persistently been confused about –

- (i) the extent to which the various descriptions are prescriptive;
- (ii) whether they therefor prevent law schools from being flexible and innovative in their teaching methods.

Indeed, as noted in item 1.2 and paragraph (a) above, both the submission from the LQC and LFA's submission manifest such confusion.

The Steering Committee notes that several other submissions have enthusiastically endorsed the clarification provided by the proposed prefatory comments. The Committee has considered whether these matters could be clarified "by appropriate, but separate guidance". This suggestion appears to assume a role and beyond LACC's present authority. Further, in the Steering Committee's view, information about the precise nature of the prescribed areas of knowledge should be available to all and should not be supplemented by covert guidelines.

LFA also queries the purpose and effect of the final paragraph of the prefatory comment. It was inserted to acknowledge and complementary roles of the TLOs and prescribed areas of knowledge in preparing a law graduate the threshold of seeking practical legal training for the purpose of applying for admission to the legal profession. It also meets a concern expressed by law schools about whether the TLO's requirement that a graduate "demonstrate an understanding of a coherent body of knowledge" required a separate summative assessment of all the

knowledge and skills acquired by a law student throughout the law course, before the student graduates.

The Steering Committee considers that the proposed prefatory comments should not be altered and should be retained.

- (c) The intended practical effects of updating prescribed areas of knowledge have not been identified, nor their effect on the provision of law programs or the assessment of overseas qualifications identified.

LFA considers that LACC needs to separately identify the descriptions that have been updated or expanded and the reasons for doing so. "It would be beneficial to the profession for LACC to specify where prescribed areas of knowledge have been amended to reflect developments in the law." The task of "identifying the new areas of law in the descriptions is made more difficult by the fact that all prescribed areas have been subject to amendments to cast them in a more generalised form."

The Steering Committee is somewhat bemused by this criticism. It doubts whether an "Executive Summary" (which seems to be what is requested) could identify alterations more accurately or effectively than a careful comparison of the former and proposed descriptions by an informed reader.

Further, in its discussions and negotiations with the 25 people responsible for preparing drafts, it became clear that there are significant and often subtle reasons for their choice of particular phrases. In the Committee's opinion, documenting these reasons would be a most time-consuming and dilatory process which would impose unduly on the generous contributors who have prepared the various drafts. It wonders whether the results of such a complex investigation would produce the sort of information that LFA appears to seek.

As noted in item (a) above, the Steering Committee does not consider that the changes need have any notable effect on the assessment of the qualifications of overseas applicants.

As to the impact on the provision of law programs, the proposed changes have been encouraged and welcomed by law schools. They recognise the developments in teaching practices that have already occurred, and are not seen as leading to significant changes in present practices.

In all the circumstances the Steering Committee doubts whether undertaking an investigation such as that proposed would be either feasible or ultimately helpful to "the profession." In any event, the intentions of the authors will ultimately be subservient to the interpretation adopted by each Admitting Authority.

- (d) Because of the consultative processes required by section 426 of the Legal Profession Uniform Law for any proposed changes to the Legal Profession Uniform Admission Rules 2015, "the issues raised by LACC should be considered collaboratively with the Admissions Committee of the Legal Services Council."

The Steering Committee understands that all persons and institutions identified in section 426(3) were invited to respond to the LACC proposals over a period exceeding 90 days. Further, two members of the LSC Admissions Committee are also members of LACC; and the various persons and institutions responsible for nominating members for appointment to the LSC Admissions Committee were also invited to make submissions.

The Steering Committee also understands that there are understandable sensitivities on the part of non-participating jurisdictions about ensuring that their interests are not overshadowed by the concerns of participating jurisdictions. It

further notes that, in the past, LACC has actively sought to assist the LSC and its Admissions Committee, particularly in relation to the development of possible amendments to the Legal Profession Uniform Admission Rules 2015.

In the Steering Committee's view, to undertake additional collaborative consultation with the Admissions Committee at this stage, in addition to the widespread, inclusive and lengthy consultation process which has so far been followed, would postpone matters unnecessarily. It suggests, however, that LACC stand ready to respond to any particular queries that the Admissions Committee or any Admitting Authorities may, in future, have about the proposed descriptions.

#### 2.10 **Law Society of NSW**

The Law Society's Elder Law, Succession and Capacity Committee suggested that Succession Law should be considered for inclusion in the prescribed areas of legal knowledge.

Its Legal Technology Committee further suggested that, if CALD arranges for the TLOs to be reviewed, TLO 2 might usefully include a domain of "wellbeing" or "mental health" for lawyers. Further, TLO 4 might be altered to require graduates to demonstrate -

- (a) an ability to use legal research technology; and
- (b) an understanding of the limitations and biases of using research technology.

The Steering Committee concluded that the suggestion about Succession would be better considered when the substance of the prescribed areas of knowledge is next reviewed.

#### 2.11 **Queensland Law Society**

The Law Society "congratulates" LACC "on the redrafting of the fundamental areas of legal knowledge as academic requirements for admission. The new construction of the descriptions are clear, informative and coherent."

The Society considers, however, that "further areas of academic knowledge are now required to better equip entry-level lawyers with knowledge and skills vital to modern legal practice, notably:

- Statutory interpretation
- The law of succession of estates
- Land transactions
- Legal synthesis across practice areas
- Other knowledge beyond black letter law".

The latter category includes 13 nominated additional qualities which are not presently reflected in either the prescribed areas of knowledge or the TLOs for law. The Steering committee notes that many of these qualities were also identified by the NSW Law Society's Flip Commission Report in 2017, and that several are now taught in the 10 elements of the College of Law's Legal Business Skills Series, which it offers as part of its CLE program.

The Society "appreciate[s] that many of the issues identified are a broadening of the role of pre-admission knowledge and training. However, given the growing disruption [of] traditional modes of legal practice we are witnessing and the future impact of technological change, it is now imperative that there is a comprehensive and fundamental



revision of the basis of admission to the profession to equip entry-level lawyers with knowledge and skills vital to today's and tomorrow's practice."

The Steering Committee notes that these were the objects of LACC's Assuring Professional Competence development program, which failed to attract financial support either from government or the legal profession to allow it to be implemented. It is, however, beyond the scope of the present review to consider where or how these matters should be located in the continuum of legal education.

#### 2.12 **Law Institute of Victoria**

The LIV generally supports the revised draft. It notes, however, that both the revised descriptions and the TLOs for law fail to include critical areas of technology and project management or family violence training. "Family violence knowledge and skills competencies may be incorporated within" areas "such as Criminal Law or Ethics and Professional Responsibility."

The LIV agrees that future prescriptions will need to be expressed in ways that allow for variations to be made in line with a rapidly changing environment and "fully supports the LACC's objective in redrafting" the prescribed areas of knowledge. It considers, however, that there should be a more thorough review and consideration of the education and learning framework for legal practitioners, including Practical Legal Training, Supervised Legal Training and Continuing Professional Development."

As noted in item 2.11, these are the objects of LACC's yet-to-be-implemented Assuring Professional Competence development program.

### 3. **PROPOSED ALTERATIONS ARISING FROM CONSULTATIONS**

Several changes to the previous version have been proposed by authors in response to suggestions made in submissions published on the LACC website. They have each been included in the **attached** draft.

#### 3.1 **A common first paragraph**

As a result of the submission by Melbourne Law School, the authors have endeavoured to assure greater consistency in the way paragraph (a) of each description is phrased. For all descriptions other than Administrative Law and Constitutional Law, that paragraph now reads "the broad theoretical and conceptual bases of [subject name] and its historical and social context, where relevant."

#### 3.2 **Civil Dispute Resolution**

In response to the suggestions of the Tasmanian Legal Admission Board, the authors do not recommend a specific reference to the costs of litigation. Similarly, they do not endorse several additions suggested by the UWA law school. They consider that "the risk of adding more specific points is that the list may appear to specifically exclude others, which is not our intention."

They do recommend the inclusion of "strategies" in paragraph (d) as suggested by the UWA law school; and they also recommend the addition of "civil" to paragraph (f) in response to a suggestion made by a meeting of the Civil Justice Scholars earlier in 2019.

It did not agree with the suggestion that reference to the role of parties in litigation should be deleted, as this is thought to be foundational knowledge.

### 3.3 **Contract**

The authors carefully considered the suggestions of the UWA law school, but decided not to recommend any change to the existing draft.

### 3.4 **Company Law**

In response to the suggestions of the Business Council of Cooperatives and Mutuals, the authors recommend that the title of this area of knowledge be changed to Corporations Law. Many law schools already employ this title, which also mirrors the title of the relevant legislation. While the authors carefully considered the other suggestions of the Council, they do not recommend any other changes to the description.

### 3.5 **Equity and Trusts**

In response to the submission by the UWA law school, the authors recommend that paragraph (e) be altered to read "the equitable doctrines relating to unconscionability". They did not, however, agree with the suggestion to delete reference to equitable assurances and assignments in paragraph (h). They "wish to preserve the category here as there is a distinct body of case law, and statutory provisions, that deal specifically with this question" which should be considered in Equity, as they are unlikely to be considered in Property.

### 3.6 **Evidence**

In response to suggestions made by the LEAD Network, the authors considered the suggestions for alterations to the draft paragraphs (b), (c) and (f) and about the use of the term "tendency (disposition)." They have, however, recommended that no alterations be made to these paragraphs.

### 3.7 **Ethics and Professional Responsibility**

In response to matters raised by the Tasmanian Legal Admissions Board the authors recommended that "evaluating" be omitted from the description.

In response to suggestions from the University of WA law school, to reduce the risk of ambiguity, the authors recommend that paragraph (d) be amended to read "the contextual difficulties in resolving ethical tensions that arise for practising lawyers in seeking to discharge their professional obligations."

The authors also carefully considered the law school's other suggestions relating to the "fit and proper person" test and the reference to theory in paragraph (a), but decided against recommending any further alteration to the description.

### 3.8 **Property**

As noted in item 1.3(b), in response to a query by the Tasmanian Legal Admission Board the authors recommend that "evaluating" be omitted from the description. The authors also carefully considered the suggestions made by the UWA law school, but decided not to recommend any changes to the proposed draft.

### 3.9 **Torts**

In response to the LEAD Network's submission, the authors have recommended that paragraph (e) of the description should be altered to read "common law and statutory methods for allocating liability (for example, vicarious and concurrent liability)."

4. **RECOMMENDATIONS**

The Steering Committee recommends that –

- (a) LACC adopt the attached draft of the Prescribed Areas of Knowledge and recommend them to all Admitting Authorities;
- (b) the date on which existing descriptions of the Prescribed Areas of Knowledge should cease to operate, and the revised descriptions should take effect, be fixed as 1 January 2021;
- (c) the documents on the LACC website relating to Model Admission Rules, Uniform Principles for Assessing the Qualifications of Overseas Applicants for Admission and Prescribed Areas of Knowledge be altered to include the revised Prescribed Areas of Knowledge; and to indicate when the existing descriptions will be replaced by the revised descriptions;
- (d) this report be published on the LACC website to indicate to those making submissions that their submissions have been considered and, where appropriate, acted upon.

**8 October 2019**