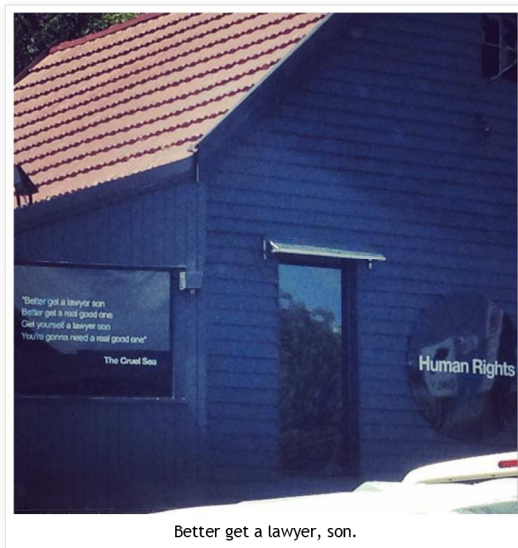


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Tuesday, 9 December 2014

Changing Academic Requirements for Lawyers - Yes Please!



Better get a lawyer, son.

The Law Admissions Consultative Committee ('LACC') has called for submissions in its [review of the academic requirements](#) for admission to legal profession in Australia ('Review'). The Review is the latest in a series of discussions and mini-reviews over the past decade or so about Australian admission requirements. This has occurred largely against the background of calls by the judiciary for more emphasis on statutory interpretation in Australian law schools. The sequence of events: reports, submissions, recommendations etc as to statutory interpretation is

canvassed in the Review.

At the same time, the Australian Productivity Commission has [handed down a report](#) into access to justice ('Report'). Chapter seven of the Report covers legal education and makes recommendations including that the Priestley 11 be reviewed (recommendation 7.1). The Priestley 11 are the core academic requirements for admission to practice in Australia, and must be taught by a law school to become an accredited degree.

The Report and the Review are interesting to read together. While obviously they are addressing different purposes, they contain inconsistencies that perhaps lay bare the conflicted status of the law degree. I might observe that [Margaret Thornton](#) has been exposing this for some decades now.

In this post I will focus on the LACC Review. In particular I respond to some of the questions it poses about the academic requirements. As a starting point though, I will outline the conflicts inherent in the very notion of legal education.

What is *academic* legal education?

Both the LACC Review and the Productivity Commission Report implicitly engage with the idea of a legal education. The Report examines three tiers of education - university, practical legal training ('PLT') and continuing professional development ('CPD'). The Review on the other hand is focused on the law degree, whether undergraduate (LLB) or postgraduate (JD) and the academic requirements. It briefly identifies areas of PLT that build on assumed knowledge, derived from the law degree itself. (For information on PLT, see [PleagleTrainer Blog](#).)

About Me



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In questioning the areas of knowledge contained within the academic requirements (Priestley 11), the Review starts with the premise on which the Priestley 11 were developed:

is the area of such basic potential importance to the great majority of practitioners today that no law graduate should be permitted to practise without it?

Accordingly, the Review is premised on the idea of 'basic potential importance...for practice'. The first observation I make, and one that underpins the discussion below, is that this premise is, with the greatest respect, of limited utility. This is so for two reasons.

The first is the ever-changing role of lawyers and the diversity of practice. A criminal lawyer has no potential importance for practice of equity. A transactional lawyer has no potential importance for practice of evidence. This approach might serve the employment market so that a graduate can be ready for any law job that comes along (so admittedly it would have potential importance). But a graduate whose ambition lies in criminal law need not endure the remaining subject areas. This focus can be considered to represent not service to the profession or society, but an individual utilitarian purpose.

As noted in the Review,

both the range of legal practice and the proportion of lawyers practising primarily in a limited, specialised area of law, rather than in general practice, appear to have increased. For some, these changes challenge both the contemporary relevance of the question underlying the present Academic Requirements and the validity of the choices then made.

Therefore the minimum requirements would always be under review, ostensibly reflecting 'market' conditions without tending to the real question, of *what is the basic level of knowledge that distinguishes the lawyer from any other profession.*

This relates to the second reason for questioning the basis for selection of academic requirements. On what basis can we justify *all* law graduates having a minimum 'spread' of knowledge, when we cannot predict 'potential' utility for that student, nor shifts in the needs of the profession and the public? I suggest that there is a 'coherent core of discipline knowledge' that represents *what it means to be a lawyer*. Knowledge in which the lawyer need not be proficient in practice, but which demonstrates an appreciation of the fabric of the legal system and its components. Knowledge that broadly and perhaps unconsciously informs the practitioner's practice in diverse areas. Knowledge that differentiates a professional from a tradesperson: a legal practitioner from a conveyancer.

Productivity Commission Report

I focus in this post on the Review, the Review is cognisant of the Productivity Commission Report. It is worth making a couple of observations about the Report.

While the Review is concerned with the *academic* requirements, the Report seems to merge academic requirements of knowledge and its manipulation, with skills. On page 253 for example, it cites two submissions that promote the need for graduates to have a set of practice skills. The interviewees state that there is 'a lot that will probably be irrelevant to your day-to-day work'. Indeed I know of few lawyers practising constitutional law. But that is no argument against its inclusion in the academic requirements.

The Report likewise celebrates clinical legal education as a 'focused, practical and intensive method of learning' (page 248). There is a lot of evidence to show that this is the case. I disagree though that this goes to the heart of an *academic* education. It effects contextual training, to be sure.

as [students] work their way through law school and black letter law they will also at the same time have an understanding about ... the real-life practice of law and the need to treat your clients as consumers as opposed to separate clients.

It is somewhat ironic to read this glowing support of clinical legal education in light of the profession's dismantling of the previous system of articles of clerkship.

The emphasis of the Report is on meeting a market for practice-ready lawyers. This may well be central in considering PLT and CPD, and as the Report observes, these areas with

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academic education are together relevant in considering the education of lawyers. But I'm not convinced that this is the purpose of legal education in its *academic* sense. And this is the context for the discussion in the LACC Review.

The LACC Review Questions

Question 1:

Should any or all of the following areas of knowledge be omitted from the Academic Requirements: Civil Procedure; Company Law; Evidence; Ethics and Professional Responsibility?

Question 2:

If so, why?

It is submitted that the discipline areas of evidence and ethics and professional responsibility are essential components of the coherent body of discipline knowledge that represents *what it means to be a lawyer*. As discussed above, this is the criterion I prefer to the utility of a field to potential practice.

Evidence

While the law of evidence is only ever 'needed in practice' by litigation lawyers, the concepts of evidence reveal the essential workings of the justice system. As all lawyers are officers of the court (even if they do not practice in the courts), it goes to the essence of the lawyer that they will understand the management of information that founds the litigation process.

Ethics and Professional Responsibility

While it is noted that ethics is also dealt with in practical legal training, this discipline area also lies at the heart of understanding the profession and its relationship with the judicial arm of government. As with evidence, ethics relates to the nature of the profession itself. It is more than simply a list of rules that govern practice, and encompasses the role of the profession and the practitioner in society. It therefore supports the coherent body of discipline knowledge that distinguishes the lawyer from any other profession. While the principles of ethics are central to all professions, the function of the law as a system is founded upon these principles. Professional responsibility builds on a broader understanding of ethics to encompass duties to the court that differentiate the law from other professions.

This subject area represents also the opportunity to engage students in developing a sense of professional identity, known to be a [crucial aspect of student engagement](#) and in shaping the practitioner. While there are other ways in which to develop professional identity, in light of the role of lawyers in the administration of justice there is a strong argument that this subject is a crucial bridge between the student and the profession in terms of academic knowledge but also in personal and professional development.

It is however submitted that the academic requirement of ethics need not include trust accounting. This is a practical endeavour properly taught in the context of practical legal training.

Civil Procedure

Civil procedure is to be distinguished from evidence in terms of forming an essential aspect of discipline knowledge. Civil procedure arguably represents a more applied aspect of the discipline, not necessary to a global view of 'the law'. While it lies at the centre of management of the courts and the litigation within them, it does not represent the heart of discipline knowledge in the same way as evidence. The practical aspects of civil procedure are addressed in the practical legal training standards.

Company Law

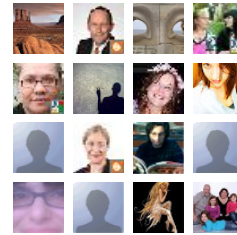
The Productivity Commission reports that 57 per cent of solicitors practice in property and commercial law (p238). This appears to suggest that statistically, knowledge of company law may well be 'needed (or potentially needed) in practice'. Certainly the growth of companies in the economy has been exponential and it would be rare to find a practitioner in private practice who had not encountered one.

It is noted that these statistics are limited to civil law (ie non-criminal law). As discussed above, this goes to the nature of the boundaries of essential and non-essential. Those who do not practise in the commercial sphere are unlikely to 'need' knowledge of company law.

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This illustrates the unhelpful nature of framing the question in terms of likely need.

Company law has become increasingly complex and in doing so, has arguably become a specialist area. In particular, directors' duties now exist outside the realm of company law itself, and into revenue law, environmental law, industrial relations, workplace health and safety etc. It is submitted that these areas can still effectively be studied without an in depth knowledge of the operation of company law itself.

While the company may be ubiquitous, the knowledge associated with company law does not speak to the operation of the legal system as such. If the discipline area of company law were to be stripped back from the complex regulatory framework, perhaps the key conceptual knowledge of company law that embodies what the lawyer must know might be the nature of legal personhood. Traditionally the only compulsory study of the particular forms of legal personhood has been company law (and perhaps the law of trusts). Other law relating to legal personhood such as the law relating to children, guardians, attorneys, elder law and estates are not compulsory. There is therefore no real reason to suggest that company law should be privileged over any other of these areas.

Question 3:

Should Statutory Interpretation be included as an Academic Requirement?

It is difficult to agree with the suggestion that an abstracted 'statutory interpretation' should become an academic requirement. Indeed, with respect, it is unclear that the LACC [statement on statutory interpretation](#) provides a lot of guidance in how law schools are to meet the reported deficit in the profession's ability to work with statutes. The element in the statement that comes closest to a broader framework of working with statutes is item 3 'deploying interpretive techniques'. This highlights the ability to problematise language and meaning - which goes to the heart of the law.

It would be unusual to find a law degree that does not teach statutory interpretation as the rules of interpretation. This usually will occur in first year. The question is not whether to have an academic requirement as a subject, but rather how these skills are expressly scaffolded through the degree. I refer to this as 'working with statutes' rather than what I consider to be the somewhat restrictive term of 'statutory interpretation'. The latter focuses on rules of interpretation and their application, rather than a broader approach to understanding how to use statutes.

For example, [French CJ in October 2014](#) pointed out (extra curially) that

...A strong emphasis on statutory interpretation in the teaching of formal skills and in working with statutes in subjects which were formally treated largely as case law subjects. There are few legal problems which come before practitioners or courts today which do not have a statutory dimension. That is so whether they present primarily as problems about contracts, tort, property or equity.

This suggests that a more suitable approach to inculcate the skills of working with statutes would be to ensure that traditional 'case law' subjects such as contracts, tort, property and equity are used as the context for learning about statutes and their interpretation. This will require moving beyond the rules of interpretation into a broader '[consideration of the statutory text, context and purpose](#)'. That consideration should define the logical framework of the statute.'

The problem as I see it is not that statutory interpretation (in a rules based sense) is not taught in law schools - it is. The problem lies in the tradition of using case law as a way of teaching and learning the law. Understanding law through an adversarial appellate framework skews our understanding of the essence of the law. There are two elements to this. One is the almost complete omission in academic legal education of [learning about the law as transaction](#). If we were to turn again to 'what a practitioner needs to know', transactional law would trump appellate litigation every time. Transactional law incorporates working with statutes.

The second, related, element is the vision of statute solely through the lens of the court rather than the other way around.

The emphasis on case law in legal education is [known to limit students' full appreciation of](#)

the law. There are a number of reasons to shift away from the case law approach, in addition to the need to engage more fully with statute law. These include the [implications for student wellness](#) and exposing students to appropriate dispute resolution instead of litigation as the norm in the law.

If there is to be an academic requirement of statutory interpretation, it must allow for the skill to be developed in context, throughout the degree. Working with statutes involves a lot more than application of rules of interpretation and academic experience in discovering, comprehending, manipulating and applying the language of this principal source of law is necessary. Indeed this broader approach could perhaps inform the framing of the existing (or revised) academic requirements.

Question 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?

Again, it would be preferable to pose this question as to whether there is a core element of the discipline of law that represents an integral aspect of what it means to be a discipline. The 'potential importance to practitioners today' is too contingent a question.

As observed in the Review, practitioners increasingly specialise in an area of law. On this basis, perhaps it is arguable that the core subjects should make room for a more diverse range of electives. This would allow graduates to emerge with a coherent specialty field, in addition to the core of discipline knowledge.

There is however one area grossly under-represented in the core discipline and that is [welfare law](#) (or [poverty law](#), however it may be described). [Note: I have struggled to name this area of law. Some have suggested 'social justice law' or 'access to justice law' which does encapsulate a broader and field of relevant areas. I wondered though if these names did not quite convey the idea of substantive legal knowledge, as opposed to a conceptual approach to law (though I also support this approach). I was trying to articulate a substantive area, in the same way that we use 'commercial law' for a broad range of otherwise specialist areas, under the one umbrella. Do you have an idea of what this area of law might be called? Please leave a comment.]

As [has been observed](#) (see also [here](#)) the Priestley 11, supplemented often by elective subjects, privileges private law and a market-based view of practice. At the same time, the profession is engaged in [promoting social justice initiatives](#) including pro bono work. Community legal centres are [struggling for survival in the face of funding cuts](#) and the justice system is [increasingly out of reach for the ordinary person](#). This is fuelled by the nature of legal education. Even in a course dedicated to social justice, the Priestley 11 stand as a monument to private law.

Introducing an academic requirement of welfare law (or equivalent) would ensure that each graduate has as a minimum an understanding of the importance of access to justice and a knowledge base that equips them to contribute to this. Residential tenancies, family violence, consumer law, social security law and elder law are all areas that affect broad sections of society. Additionally, these areas tend to be the subject of statute. This would afford an excellent contextual opportunity for working with statutes, learning about statutory interpretation and the importance of context.

To the extent that legal education fails to ensure a minimum standard of knowledge of welfare law in Australian society, the profession fails to engage constructively in addressing the recognised challenge of access to justice. This Review offers an important opportunity to contribute to justice through progressive change.

Posted by [Kate Galloway](#) at [12:04](#)

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