Admission rules

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Uniformity of rules governing the right to practise law: a retrograde step for legal education?

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The Uniform Admission Rules (the Rules) govern the right to practise law in Australia. The Rules largely dictate what constitutes the compulsory core of all law school curriculum in the 26 law schools around Australia. It is argued in this article that the Rules constitute an unwelcome and dangerous attempt by the judiciary to impose their limited and conservative view of legal education on all Australian law schools. They encourage conformity and a very narrow vision of legal education. The Rules are thus not only inadequate to meet the critical, reflective, and scholarly goals of a university education, but at a time when law graduates are finding employment in an ever increasing variety of occupations, they are also inadequate to meet law graduates' future vocational needs.

Furthermore, the content and approach of the Rules has serious implications for the likely social and political values of law graduates. This in turn directly affects the future of the legal profession, and given the power of the legal profession, ultimately the type of society we will live in. Thus, the issue of the Rules goes beyond legal education; it is in fact of vital importance to what kind of future Australian society we will live in.

Impact of the Rules on legal education

The Rules were introduced as a response to the national move towards uniform professional standards advocated by the Hilmer Report.[1] This resulted in the enactment of the *Mutual Recognition Act 1992* (Cth), s.3 of which aims to promote 'freedom of goods and service providers in a national market in Australia'. The implications for the legal profession are that a person admitted to practice in one jurisdiction in Australia must be eligible for admission to practice in any other jurisdiction.

Despite there being little debate and consultation with the legal profession and the community, the Rules were promulgated in April 1992 by the 'Consultative Committee of State and Territorial Law Admitting Authorities' (CCSTLAA).[2] This Committee was drawn up from nominees of each Chief Justice of the States and Territories. The Rules specify that an applicant for admission must have satisfactorily studied, as a minimum, 11 largely traditional 'areas of knowledge': Criminal Law and Procedure, Torts, Contracts, Property (Real and Personal), Equity (including Trusts), Federal and State Constitutional Law, Civil Procedure, Evidence, Company Law and Professional Conduct (including basic trust accounting).[3] These required areas of knowledge are accompanied by a list of topics that must be offered within each subject.

The study of these 11 subjects may be completed during law school or at any other stage prior to admission, such as during an applicant's practical legal training. While it is true that law schools do not have to offer all the 11 subjects in their core curriculum, there is nevertheless strong pressure for law schools to do so. This pressure is particularly

strong for the smaller and newer law schools. As a majority of these schools have been operating accredited LLB programs only in the last two or three years, many have been acutely aware of the Rules in planning their LLB curriculum. Given their strong need to maximise the employability of their graduates, most, if not all, have ensured that their compulsory curriculum includes the requisite areas of knowledge.[4] Eleven compulsory subjects quite clearly detract from the diversity of courses these law schools may offer. While the newer law schools could have added considerable innovation to legal education, to date this has generally not been the case, and the Rules must be regarded as a significant negative factor in this regard.

The larger and more established law schools are more likely not to consider themselves bound to include the 11 subjects as part of their core curriculum. However, even in law schools which do not require all students to complete the 11 subjects, the reality is that 'optional' subjects that are required for admission effectively become 'quasi' compulsory subjects. This is because even students who are not intending to practise law are aware that, should they change their minds at some later stage, they would be required to pass additional courses after obtaining their university education. In order to avoid this, most students prefer to take the necessary 11 subjects during their university education. Thus, a direct result of the Rules is that the 11 subjects have a privileged status in law schools. This sends out a powerful message to students — these are the subject areas that are important and anything else is peripheral. Students thus characterise subjects as 'soft' options in contradistinction to the 'hard' (i.e. 'real' law) compulsories.[5]

The other important aspect of the Rules that has a large impact on the curriculum of law schools is the specified descriptions of the topics that are required to be covered within each subject. On one view, these are not onerous nor difficult to satisfy, and teachers of any of the 11 subjects retain considerable flexibility. There is nothing in the Rules that prevents lecturers from adding whatever other topics or approaches they want, such as feminist, critical, indigenous and multicultural perspectives on the law. However, by specifying a certain minimum content, which consists of black letter rules of law for each subject, the Rules privilege the black letter law above and beyond any other approaches or other considerations. Once again, there is a subtle but powerful form of pressure for law schools to adopt the approach contained in the Rules. That powerful message is that all other approaches to the subject are peripheral to what is really required to become a lawyer.

Critique of subjects listed in the rules

The 11 subjects laid down by the Rules are problematic. The decisions of the members of CCSTLAA were dictated by their own perceptions and values, and by the content of their own legal education. What this Committee saw as 'important' were the traditional subjects taught in their legal education, with an emphasis on the type of matters that are likely to reach the Supreme Court.

The most glaring omission from the list is family law. The family is a central institution in our society, and family law plays a large part in determining the nature of relationships between men and women, between parents and children, and between families and the state. From a practical point of view, more Australians are involved in family law proceedings than any other area of the law.[6] Furthermore, family law involves some of the most important decisions in the law that a court can make, such as decisions about the care of children, and whether a child should undergo invasive or irreversible medical treatment (*Re Marion* (1992) 175 CLR 218). From an academic point of view, family law raises significant contemporary issues, such as feminism, multiculturalism, the rights of gays, lesbians, bisexuals and transsexuals and children's rights. The exclusion of family law from the 11 subjects also has the consequence that it is possible to complete a law degree and not have studied one of the most important issues in society today — that of domestic violence (this would include child abuse).

The omission of family law can perhaps be explained by the common perception of it being 'soft law', involving 'feminine concerns', such as relationships and the caring dimensions of the law. In this regard, it should be noted that there is not a single woman on CCSTLAA; one can only speculate if there was a woman on the Committee whether family law would have been omitted.

Another important oversight from the 11 subjects is a subject based on poverty law, welfare law or employment law. These are areas of the law which are of vital importance to the less powerful members of our society, and make up a significant proportion of the work of many lawyers in community legal centres, the public sector and some private law firms. From an academic viewpoint, the study of these areas of the law also involves critical questions about the role of the legal system in society, and the role of the State. Such a subject allows law students to think about issues of class, whether the supposed principle of 'equality before the law' is simply rhetoric, and the role of the law in the capitalist system. The fact that the Rules include company law and property law, areas of the law associated with the corporate and business side of the law, shows again how dependent the Rules are on the values of the members of CCSTLAA.

A further omission from the Rules is human rights and/or civil liberties. The continuing debate over whether Australia should, like most western countries, have its own domestic Bill of Rights, is a vital issue for future lawyers (this is apart from the question to what extent Australia already has a Bill of Rights). Furthermore, many of the rules of criminal procedure, administrative law and evidence cannot be fully appreciated without an understanding of human rights or civil libertarian perspectives. The omission of a subject based on human rights makes it possible for a student to graduate from law school without ever having considered the law in relation to critical issues such as freedom of speech, the right to vote, freedom of assembly and association, and other basic civil liberties questions.

It is possible to make many arguments in relation to whether these and other areas of the law should be part of the core curriculum. Although the writer's opinions are just as subjective as those of CCSTLAA, the obvious question is should this small elite group be able to dictate to all law schools in Australia the subjects which are 'important'? Do the perceptions and opinions of this elite, who were trained many years ago, match what is happening in legal practice today? Why is there no mention of modern developments in the law, such as the use of computers and environmental law? Furthermore, are subject areas chosen on the basis of what is necessary for legal practice compatible with recent trends which indicate that many law graduates, for a variety of reasons, do not find employment in the private legal profession?

Critique of topics listed in each subject

Leaving aside the question of which subjects should be part of the compulsory core, one can critically examine the list of topics that must be taught in each of the 11 subjects. Time does not permit a detailed examination of each subject area. Rather some common themes will be discussed.

The main overall criticism is that the approach of these topics is black letter law oriented, concentrating on the 'knowledge' of rules, and ignoring broader theoretical concerns. Much has been written on the importance of theory in the study of law. Recent enquiries into legal education[7] have stressed the need for theory to be included in the curriculum, and that legal education cannot be limited to teaching legal principles and rules.

From a practical point of view, an education based on rules of black letter law is inadequate. Wesley-Smith argues:

> mere acquisition of legal knowledge in law school is of little value to a practitioner because that knowledge:
>
> (a) can only be a tiny portion of the whole,
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> (b) can be understood only superficially,
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> (c) is easily forgotten or only partially or inaccurately remembered,
>
> (d) is rarely needed in practice in the form in which it is learned,
>
> (e) is likely to be quickly outmoded and thus dangerous to rely on, and
>
> (f) is of little use when new problems arise to be solved. [8]

The mutual recognition legislation adds another very important reason to those listed above. As graduates will be able to practise in any jurisdiction following admission in a particular State or Territory, what is the point of teaching the detailed laws of one particular State or Territory?

From an academic point of view, the black letter law approach of the list of topics means that the Rules ignore all critical perspectives on the law. One of the rationales for training lawyers at a university rather than a technical college is that they will be exposed to critical perspectives of legal institutions and the role of law in our society. Many graduates will become lawyers involved in the reform of the law and legal institutions, and without a critical perspective they will be inadequately equipped for these roles.

The lack of theoretical perspectives in the Rules is also problematic from a number of more specific points of view. First, there is no reference to any areas of the law that are especially important to women, who now make up about half the law student population. For example, there is no mention of issues relating to domestic violence, marital rape and other gendered harms, equal pay, the sole parent pension, abortion, tortuous remedies for people not in paid employment, sexual harassment or pornography. While the inclusion of family law and welfare law may help to remedy this situation, many of these issues could have easily been mentioned in the existing 11 subject areas. These omissions fly in the face of the Australian Law Reform Commission's Recommendation that: 'Law schools should ensure that the curriculum includes content on how each area of the law in substance and operation affects women and reflects their experiences. The curriculum includes the core curriculum and elective curriculum'.[9]

Second, there is no mention of the concerns of indigenous Australians. It is incongruous that a body set up in the 1990s to examine a uniform curriculum in Australia can completely overlook such concerns. Issues relevant to indigenous Australians could easily have been included in the topics listed in property law (native title), criminal law (customary Aboriginal law), constitutional law (autonomy for indigenous Australians), evidence (the rules in *R* v *Anunga* (1976) 11 ALR 412), equity (fiduciary duties owed to indigenous Australians), and just about all the remaining subjects. The complete failure to even acknowledge the existence of Australia's indigenous peoples makes the Rules the *terra nullius* of Australian legal education.

Furthermore, there is a lack of any perspectives in the Rules on issues relevant to modern Australia being a multicultural society. The Australian Law Reform Commission found:

> . . . a general perception that there is widespread cultural insensitivity in the operation and administration of the law. Perceived problems include stereotyping and the failure of the courts and lawyers and other staff to acknowledge the role of culture in a person's behaviour and to deal with it adequately in decision making.[10]

If the Australian legal system is to address seriously the multicultural nature of Australian society, then clearly issues relating to multiculturalism need to be part of the core curriculum at law schools.[11]

An exclusive black letter law approach is also of concern in so far as it concentrates on the 'knowledge' of legal rules and ignores the importance of legal skills. It is conceded that the traditional teaching of legal principles and rules derived from cases and legislation has been largely successful in teaching students skills such as legal research, legal analysis and problem solving, and to a lesser extent oral and written communication. However, it can be argued that this does not go far enough, and skills such as interviewing, communication skills, drafting, advocacy, negotiation and other forms of dispute resolution should be included in the compulsory curriculum. Such skills can provide students with a more sophisticated comprehension of the nature and context of law, as well as an understanding of the essential interrelationship between facts, evidence, the reliability of witnesses, legal principle and costs which must exist before a superior court has the opportunity to hear the case. Writers such as Goldring[12] deny that placing skills into the curriculum will turn an academic program into a trade course; rather it ensures that the subject matter of the academic law program is not artificially abstract and thus distorted. He stresses that the introduction of skills will strongly benefit even those students who never intend to practise law.

In summary, the lists of topics found under each subject in the Rules are deficient from both a theoretical/critical perspective, and a legal skills perspective. Again, while it is possible for individual lecturers to include such considerations in their courses, the emphasis on 'knowledge' in the Rules sends a powerful message that theoretical/critical perspectives and legal skills are not as important as mastering black letter law. A further consequence is that the 'areas of knowledge' (the traditional law subjects) are kept in their separate 'boxes', despite the many changes in the law which mean the boundaries between them are not natural, inevitable or even logical. Theoretical perspectives and skills cut across all the 11 subjects, and the failure to include them in the Rules exacerbates the tendency towards keeping the subjects artificially distinct. Although the Rules stress that 'there is no magic in these titles',[13] an examination of the subjects taught by most law schools reveals a high level of conformity. Law schools basically retain the same or similar names as the

'areas of knowledge' laid down in the Rules: another indication of how the Rules contribute to the lack of diversity in legal education.

A question of values

It is understandable that members of CCSTLAA should reflect how they themselves were educated in the law. It is not surprising that they see the imparting of rules as the primary method of teaching law. In this way the law is seen as neutral and autonomous, free of its social, political, cultural, gendered, economic and racial context. When all these contexts are taken out of the law, the 'objective' rules that remain can be said to be 'known' by the transmitters of that knowledge (law academics) or by those who decide the law (judges). These people can thus claim a legitimacy as professionals who have something that others in the community do not have. This justifies their professional standing and self-image. However, if one recognises that the law is shaped by social, political, cultural and other values, then clearly there is far less that makes one person's views any more valid than the next person's.

Applying a set of rules, just like applying a mathematical formula, can be as a value-free operation. This is a viewpoint that many conservative lawyers try to convey. However, there is a growing realisation that the supposed neutrality of the law is in fact a myth. The law is a reflection of the values of those who make it. These are predominately privileged white, middle or upper class, Anglo-Saxon and male, as is reflected by the membership of CCSTLAA. It is quite logical that their prescriptions for university legal education reflect their values. It is thus not surprising that subjects such as family law, welfare law and human rights are omitted from the 11, but subjects such as company law and property are included. It is also not surprising that feminist, Aboriginal and multicultural perspectives on the law are omitted from the list of topics in all the 'areas of knowledge'.

Changing the subjects in the compulsory core and including theoretical perspectives would seriously question the supposed neutrality of the law, and bring into clear focus the question of values. The law cannot really be understood without attention to the values of those who make the law. Bringing discussions of values into lectures challenges the traditional perceptions of legal academics as conveyers of knowledge.

The values of future lawyers will be derived to a large extent from the way in which they are trained during their university days, which in turn depends on the values of their lecturers. To a large extent, present day legal education still remains conservatively oriented. The Rules continue to give preference to certain types of subjects and a black letter approach. The inculcation of these conservative values allows the process of legal education to play a central role in what Duncan Kennedy terms 'training for hierarchy'; he criticises law schools as being 'ideological training for willing service in the hierarchies of the corporate welfare state'.[14]

The concept of hierarchy is a crucial one. The Rules are a product of legal hierarchy. They are made by representatives of Chief Justices of the Supreme Courts, the top of the hierarchy within the Supreme Courts. They naturally focus on the role of the higher courts, being hierarchically superior to lower courts, other types of decision-making bodies, and alternative methods of dispute resolution. CCSTLAA is predominantly white, middle/upper class, Anglo-Saxon and male, the type of 'benchmark' person at the peak of society's hierarchy. Their values are derived from hierarchical notions of the law, and by the hierarchical way they were educated. The transmission of 'knowledge' is a methodology which places the lecturer/student relationship in a hierarchy. The Rules further privilege corporate law practice over practice that deals with poorer sections of society, another hierarchical aspect of the Rules. The Rules also privilege men over women. White over black. Anglos over 'others'. Heterosexuals over homosexuals. The list goes on.

Conclusion

Only by a transformation in the values and perceptions of legal educators can the historical, political, legal and psychological forces which created this hierarchy in the legal profession be changed. Hierarchy and justice are opposite concepts. A continuation of hierarchy means justice can never truly be found. Women, Aboriginals, people from a non-English speaking background, the disabled, cannot find justice in a hierarchical society.

Changing the Rules so as to reflect a more appropriate core curriculum for university legal education would be a step in the right direction. One obvious reform is to alter the membership of the present CCSTLAA, which would broaden the spectrum of people deciding the core curriculum. At least some representatives of legal academia should be involved, as well as a more expansive base of those said to represent the legal profession, such as representatives of community legal centres, legal aid commissions, and other public interest professionals. The inclusion of some lay people could also be considered, and there should be a reasonable proportion of women, people of a non-Anglo-Saxon background, and at least one indigenous Australian. Such a broader-based committee would surely come up with a very different prescription for what is necessary for legal education.

Given the inbuilt conservatism of the legal profession, any reform of the Rules is bound to meet much resistance. The Rules represent a continuation of traditional Australian hierarchical society, and therefore the battle to change them is an important issue for those who share the writer's desire for a more just Australian society.

References

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5. See Thornton, M., 'Portia Lost in the Groves of Academe Wondering What to do About Legal Education', (1991) 9 *Law in Context* 9 at 12.
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7. See Pearce D., Campbell, E. and Harding, D., *Australian Law Schools — A Discipline Assessment for the Commonwealth Tertiary Education Commission*, AGPS, Canberra, Vol. 1, 1987, p.ixxv; and the Arthurs Report, 'Law and Learning; Report to the Social Sciences and Humanities Research Council of Canada', Social Sciences and Humanities Research Council, Ottawa, 1983.

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Also, in the High Court decision *Bushell v Repatriation Commission* (1992) 109 ALR 30 at 43, Brennan J made the following observations about the role of the AAT:

> Proceedings before the AAT may sometimes appear to be adversarial when the Commission chooses to appear to defend its decision or test a claimant's case but in substance the review is inquisitorial. Each of the Commission, the board [Veterans Review Board] and the AAT is an administrative decision maker, under a duty to arrive at the correct or preferable decision in the case according to the material before it. If the material is inadequate, the Commission, the board or the AAT may request or itself compel the production of further material.

On the other hand there are the views of Deane J in the Federal Court in *Sullivan v Department of Transport* (1978) 1 ALD 383 at 402-3. Deane J acknowledged that there are circumstances in which the AAT needs to raise matters that a party does not wish to raise. However, he felt that parties should generally be left to present their cases as they saw fit. Undue interference with the way an unrepresented party conducts a case might lead to a failure to extend to the party an adequate opportunity to present the case.[13]

Another concern that is sometimes raised is that an investigative approach detracts from the perceived impartiality of the Tribunal.[14] Thus, the legal objections to an investigative approach are founded on the principles of procedural fairness. The requirements of procedural fairness of course depend on the circumstances, including the nature of the inquiry, the subject matter and the rules under which the decision maker is acting.[15] The hearing rule generally requires that a party 'is entitled to know the case sought to be made out against him and to be given an opportunity of replying to it'.[16] The rule thus does not automatically require that proceedings take the traditional adversarial form of the courtroom. If as Brennan J sees it, the role of the AAT is in substance inquisitorial, then it is logical that the tribunal should take the lead in identifying and pursuing issues, rather than leaving this to the parties.[17]

CSAT's approach does not mean that the parties are denied a chance to provide evidence, to ask questions and otherwise argue their point of view as allowed by s.59 of the *CAMA Act*. It rather means that the Tribunal generally takes the lead in identifying issues and asking questions, and then the parties are given this opportunity. Often, parties are satisfied with the Tribunal's questioning and have little they wish to add. The above concerns of Deane J frankly assume a quite unrealistic capacity of the average person to present and argue a case to a passive recipient in a forum in which that person will appear probably only once in a lifetime. Many appellants to CSAT would be daunted by being expected to do so.

Nor should an investigative approach, thoughtfully implemented, give rise to a reasonable apprehension of bias. A tribunal can avoid this apprehension by being even handed in its questioning and explaining why it is or is not probing particular issues.

In the circumstances of CSAT, it would seem to the writer that the factors discussed in **Rationale for an investigative approach** (above) are more than sufficient to justify a predominantly investigative approach.

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4. *Re Saverio Barbaro and Minister for Immigration and Ethnic Affairs* (1980) 3 ALD 1 at 5.
5. In *Re K* [1965] AC 201 at 219.
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