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**FINDING WAYS TO QUICKEN, NOT DEADEN,
THE SPIRIT OF LEGAL EDUCATION:
REFLECTIONS ON APPROACHES TO
DRAFTING REGULATORY STANDARDS**

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FINDING WAYS TO QUICKEN, NOT DEADEN, THE SPIRIT OF LEGAL EDUCATION: REFLECTIONS ON APPROACHES TO DRAFTING REGULATORY STANDARDS

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INTRODUCTION

One of the abiding difficulties in the regulation of legal education is the difficulty of seeing the full landscape of influences – environmental forces and ideological imperatives - shaping legal education, and how particular approaches to regulation impact on those influences. Each player in the regulatory area has their own perception of the influences – and each player sees particular imperatives as more important than others. This paper attempts to sketch some of the influences as seen by law schools against regulatory options.¹ It aims to highlight the impacts and reactions that particular regulatory approaches can cause by examination of two of areas of regulation – content and assessment. Through this it suggests a constructive approach to regulation.

In light of the impact of particular perspectives, it is useful to note at the outset two perspectives that are not often at the forefront of these discussions. The first is the student's. As regulators and law schools raise the standards expected of graduates, there is inevitably a cost to students. Students with the greatest educational advantage, strong family support, and financial backing are the most likely to be able to cope with educational demands² that place increased emphasis on independent home study to reach levels of attainment.³ These more privileged students are also more likely to have the self-confidence and financial safety net to undertake longer periods of study with uncertain outcomes. Students undertaking legal studies can also suffer more or less anxiety depending on how their progress is assessed, whether there are minimum hurdles to enter the profession, and the likelihood of ultimately failing at the end of the process.⁴ So while high standards are important, each ratcheting up of the requirements has costs for students, and should be justified with their interests in mind.

¹ It is itself, of course, limited by my own perspectives. Those are of working in a large commercial law firm and an advisory role inside government departments, education and employment in urban law schools – Macquarie and UNSW, teaching both law students and non-law students, roles in university-level policy formation committees dealing with external and internal regulatory regimes, some exposure to the workings of the Council of Australian Law Deans, a consulting role to the Australian Law School Standards Committee, and a long-term research interest in pedagogy and assessment. That list suggests particular biases and blindspots, which I would readily acknowledge.

² Ryan Naylor and Richard James, 'Systemic Equity Challenges: An Overview of the Role of Australian Universities in Student Equity and Social Inclusion' (2015) 1 *Widening Higher Education Participation: A Global Perspective*.

³ For an overview of law student pressures see eg Alex Steel and Anna Huggins, 'Law Student Lifestyle Pressures' in James Duffy, Rachael Field and Colin James (eds), *Promoting Law Student and Lawyer Well-Being in Australia and Beyond* (Ashgate, 2016); Wendy Larcombe, Sue Finch and Rachel Sore, 'Who's Distressed-Not Only Law Students: Psychological Distress Levels in University Students across Diverse Fields of Study' (2015) 37 *Sydney Law Review* 243; Wendy Larcombe et al, 'Does an Improved Experience of Law School Protect Students against Depression, Anxiety and Stress? An Empirical Study of Wellbeing and the Law School Experience of LLB and JD Students' (2012) 35(2) *Sydney Law Review* 407.

⁴ See eg Anna Huggins, 'Autonomy Supportive Curriculum Design: A Salient Factor in Promoting Law Students' Wellbeing' (2012) 35 *UnsWJLJ* 683; Natalie K Skead and Shane L Rogers, 'Do Law Students Stand Apart from Other University Students in Their Quest for Mental Health: A Comparative Study on Wellbeing and Associated Behaviours in Law and Psychology Students' (2015) 42 *International journal of law and psychiatry* 81.

Similarly, the impact of standards on the shape of legal profession and those it represents is important to bear in mind. High and exacting standards of legal education will hopefully ensure that those appearing before higher courts have a greater grasp of the finer points of the law. But, as a profession, the ultimate aim of lawyers is to be able to represent as wide a range of the population as possible. This means lawyers willing to work for less money, in less salubrious situations, representing people with little social and financial capital. Such people need competent lawyers, but the forms and standards of competence can be very different to the competences expected of an international corporate lawyer or one appearing before the higher courts.⁵

From these perspectives, it might be appropriate to consider what is the bare minimum level of knowledge and competence that is necessary for a lawyer to represent an indigent client on a routine legal matter; and what is the bare minimum level of knowledge and competence needed for a student from a disadvantaged background to be employed as a supervised graduate lawyer in the legal profession. These considerations move the focus from the issue of whether a student graduates with a working knowledge of *all* traditionally important areas of legal practice, to a focus on identifying what knowledge and skills a graduate needs to be able to continue to learn to become a lawyer.⁶

It is a fallacy to imagine that all the skills of a competent lawyer can be taught in three years of academic study, or in a period of articles or practical training. A fully competent lawyer is a lifelong process of continual self education and growing experience. Academic legal education is thus only the first stage in a lawyer's education. It is a vital stage that provides the proto-lawyer with the foundational knowledge and basic skills to be able to move on to learn in practice. Identifying what that first stage involves, and what can best be learnt later is a complex question.

THE CURRENT REGULATORY FRAMEWORK

Legal education in Australia is regulated under a range of State-based regimes. The common core of these are a regulating Act of Parliament that devolves accreditation of law schools to an appointed body representing the courts and the profession, subject to a set of largely similar regulations. Central to these regulations are a list of eleven prescribed areas of legal knowledge (the "Prescribed Areas", commonly known as the Priestley 11). In NSW the legislative scheme is currently contained in the *Legal Profession Uniform Law (NSW)* and the delegated body is the Legal Profession Admission Board ("LPAB")⁷. The specified academic qualifications are contained in r 5 *Legal Profession Uniform Admission Rules 2015 (NSW)* ("Rule 5"). This requires a legal education which:

- (a) includes the equivalent of at least 3 years' full-time study of law,
- (b) is accredited by the Board [LPAB], and
- (c) the Board determines will provide for a student to acquire and demonstrate appropriate understanding and competence in each element of the academic areas of knowledge set out in Schedule 1 [the Prescribed Areas] ...

Rules 7 and 8 permit the LPAB to accredit and review law schools using processes it develops. As part of that development the LPAB and its Victorian equivalent, the Council of Legal Education ("COLE") are trialling an

⁵ Simon Rice, 'A Place for Critical Perspectives in Legal Education' (SSRN Scholarly Paper ID 3029059, Social Science Research Network, 29 August 2017) <<https://papers.ssrn.com/abstract=3029059>>; Productivity Commission, *Access to Justice Arrangements - Productivity Commission Inquiry Report* (3 December 2014) <<https://www.pc.gov.au/inquiries/completed/access-justice/report>>.

⁶ Similar considerations underlie the Law Council's recent initiative *Assuring Professional Competence Committee* <<https://www.lawcouncil.asn.au/resources/law-admissions-consultative-committee/assuring-professional-competence-committee>>.

⁷ Section 19 *Legal Profession Uniform Law Application Act 2014*

elaboration of the rule 5 requirements in a set of Standards developed by the Law Admissions Consultative Committee (the “LACC Standards”).⁸

Unrelated to this set of standards, the Council of Australian Law Deans have developed their own set of Standards (the “CALD Standards”).⁹ A large majority of law schools have voluntarily been through an interim certification process against these standards conducted by the Australian Law Schools Standards Committee. The CALD Standards incorporate the Threshold Learning Outcomes for Law (“Law TLOs”) developed as part of a national standards project.¹⁰

The Prescribed Areas are incorporated implicitly or explicitly in each of the sets of standards. The LACC standard primarily provides an elaboration of Rule 5, but goes beyond it in a number of areas. It additionally incorporates a LACC developed Statement on Statutory Interpretation (“LACC SSI”),¹¹ includes requirements of articulated learning outcomes and breakdowns of how the Prescribed Areas and LACC SSI are taught, strictures on how the law degree is taught and by who, and requirements to adequately assess each Prescribed Area and LACC SSI.

The CALD Standards draw on the approach of the American Bar Association Standards (“ABA Standards”),¹² and provide a combination of minimum and aspirational standards for the law school’s mission and objectives, the curriculum, assessment, staffing, resourcing, governance, research, student and staff wellbeing, and ongoing improvement.¹³

It is significant however to note that the ABA Standards do not at any point refer to the required content of a law degree other than in the most general terms. The knowledge requirement is only described as competence in “knowledge and understanding of substantive and procedural law”.¹⁴

Beyond these law specific requirements are broader Commonwealth government requirements on higher education – most notably via the *Higher Education Standards Framework (Threshold Standards) 2015* administered by the Tertiary Education Quality and Standards Agency; and a complex web of policies and procedures developed within each university.

The following discussion of regulatory options occurs within this environment.

AIMS OF REGULATION

⁸ Law Admissions Consultative Committee, ‘Accreditation Standards for Australian Law Schools’ (2017) <https://www.lawcouncil.asn.au/files/web-pdf/LACC%20docs/238832380_14_LACC_-_Standards_for_Accrediting_Law_Courses-1.pdf>.

⁹ Council of Australian Law Deans (CALD), ‘The CALD Standards for Australian Law Schools’ (2009).

¹⁰ Sally Kift, Mark Israel and Rachael Field, *Bachelor of Laws Learning & Teaching Academic Standards Statement* (2013) <<http://www.olt.gov.au/resources/good-practice?text=threshold%20learning%20outcomes%20law>>.

¹¹ Law Admissions Consultation Committee, ‘Statement on Statutory Interpretation’ (2010) <<https://www.lawcouncil.asn.au/files/web-pdf/LACC%20docs/StatementonStatutoryInterpretation.pdf>>.

¹² *Standards | Section of Legal Education and Admissions to the Bar* <http://www.americanbar.org/groups/legal_education/resources/standards.html>.

¹³ Council of Australian Law Deans, ‘Introduction and Context to the CALD Standards for Australian Law Schools’ <<https://cald.asn.au/wp-content/uploads/2017/11/CALD-Standards-Introductory-Context-Statement-March-2014.pdf>>.

¹⁴ Standard 302

Before examining in detail the contours of regulation and the effect of particular wording, it is important to consider what should be the aims of any regulation of legal education designed to assure competence for professional practice. There are a number of factors to ponder.

OUTCOMES OR PROCESSES OF LEARNING

Regulation that focusses only on achievement of a final outcome, traditionally the passing of an exam, leaves opaque the learning process a student undertakes. This means that all the regulatory authority can be assured of is the knowledge or skill of that student at the moment of the exam, and on the questions asked in the exam. Whether a student had this knowledge or skill a week before the examination, or has retained it a week later is unknown.¹⁵ Whether such high stakes exams are fair indications of student's workplace ability, and whether it is worth the stress caused to students are both debatable.

If an assessment-based assurance of competence is desired, this means that the only alternatives are to move to a graduated series of gateway or hurdle examinations that occur at particular points in the degree and test specific issues, or a portfolio of assessments.¹⁶ This can diminish the artificiality of a single "snapshot" of achievement, but can create logistical difficulties. Practically, the external regulator cannot hope to maintain any close supervision of such assessments, and the varied ways in which students complete their studies in different law schools makes systematisation near impossible.

Further, the more systematised an ongoing assessment regime is, the less law schools will have the opportunity to diversify the way they teach the degree. In an uncertain future, and in a context of disruptive technologies, law schools need to be given more, rather than less, opportunity to innovate.¹⁷ A regulator should therefore be extremely wary of overly constraining the course structures and pedagogies of law schools by standardised gateway assessments.

More fundamentally, this focus on a range of assessments remains a proxy for the real interest of the regulator. That interest is whether the student is learning *permanently* the knowledge and skills required for practice. To assure this requires more than a focus on assessment results, and instead an interest in the whole process of education. This change of focus is to see the student's learning throughout the law degree as a process of apprenticeship¹⁸. Assessments provide some assurance of learning and feedback to students on their progress, but are in reality secondary to the learning that "sticks" with the student beyond each course. To understand that process and to be part of its development requires significant trust between the regulator and those regulated.

CULTURE OR COMPLIANCE

Regulation is often seen in only negative terms: rules that restrict and penalise. But regulatory systems can also be positive, affirming environments that encourage and reward excellence. Such regulatory systems are complex and nuanced, they provide scope for innovation and respect developed expertise and earned

¹⁵ Cf Eugène JFM Custers, 'Long-Term Retention of Basic Science Knowledge: A Review Study' (2010) 15(1) *Advances in Health Sciences Education* 109.

¹⁶ Val Klenowski, Sue Askew and Eileen Carnell, 'Portfolios for Learning, Assessment and Professional Development in Higher Education' (2006) 31(3) *Assessment & Evaluation in Higher Education* 267; Mirjam McMullan et al, 'Portfolios and Assessment of Competence: A Review of the Literature' (2003) 41(3) *Journal of advanced nursing* 283; Vicki C Waye and Margaret Faulkner, 'Embedding E-Portfolios in a Law Program: Lessons from an Australian Law School' (2013) 61(4) *Journal of Legal Education* 560.

¹⁷ Michele R Pistone and Michael B Horn, *Disrupting Law School: How Disruptive Innovation Will Revolutionize the Legal World* (Clayton Christensen Institute for Disruptive Innovation, 2016) <<https://eric.ed.gov/?id=ED568678>>.

¹⁸ See eg WM Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* ["the Carnegie Report"] (2007) 25.

responsibility. Such regulation can develop shared cultures that move beyond penalties for non-compliance.¹⁹ In terms of road safety this can be the difference between a focus on safe driving campaigns to reduce injury; and automatic speeding fines that penalise without context other than a particular speed. Fines and failures may be necessary for extreme behaviours that fall outside the pale, but in a professional regulatory environment that regulates motivated organisations, regulation built on dialogue and mutual respect is far more likely to develop cultures aligned with the aims of the regulator.²⁰

A regulatory system that only sets bright line expectations, with penalties for failure to meet those expectations, is likely to build a negatively strategic approach from those it regulates.²¹ Organisations are likely to aim to find the minimum safest way to be compliant. Regulators who use such bright line measures are likely to develop an environment of adherence to the letter of the standard, rather than its spirit. While regulators may be able to say an organisation is compliant, they will lose the opportunity to encourage the organisation to develop beyond the minimum and in innovative ways, and the chance to have more open conversations about the organisation's real aims and concerns.²²

BUILDING A COMMUNITY OF PRACTICE RATHER THAN IMPOSING ORDER THROUGH HIERARCHY

Allied to the need to build cultures rather than enforce compliance is the need for regulators to avoid being distant removed adjudicators. The common law tradition is for courts to be removed from matters and adjudicate only on matters before them, in order to assure impartiality. That assumes a distinction between the Crown and the populace, it assumes a single moment of decision, and it assumes the court has no ongoing supervisory role. None of this need apply to the regulation of legal education. Instead, those given the task of accrediting legal education providers have an ongoing role and connection to the academy, and multiple opportunities to be informed and to inform themselves of matters.

In such an environment, it is far better to build communities of practice – often described as a group of people who engage in a process of collective learning in a shared domain of human endeavour.²³ While the regulator will make final decisions, seeing the regulator as a member of a professional group of organisations who bring different perspectives to bear on a common goal of education is far more likely to lead to better outcomes. The regulators will be better informed, the regulated organisations will be far more involved and will have ownership of the issues and the necessary benchmarks. Building such regulatory communities also can mean that the regulators need not be 'independent' persons from outside the system. They can in fact be peers. The regulators can then be seen more as team captains rather than as referees.

Inspiration for such an approach can be drawn from the ABA Standards review process.²⁴ Under that scheme a standing committee examines an aspect of the Standards each year. An annual agenda is distributed setting out the standards to be considered, a position paper appears in March and submissions are taken. Public hearings

¹⁹ See eg Christine Parker and Vibeke Lehmann Nielsen, 'Corporate Compliance Systems: Could They Make Any Difference?' (2009) 41(1) *Administration & Society* 3.

²⁰ Cf Tamara Hoekstra and Fred Wegman, 'Improving the Effectiveness of Road Safety Campaigns: Current and New Practices' (2011) 34(2) *IATSS Research* 80.

²¹ Peter J May, 'Compliance Motivations: Affirmative and Negative Bases' (2004) 38(1) *Law & Society Review* 41.

²² Michael Howlett, 'Matching Policy Tools and Their Targets: Beyond Nudges and Utility Maximisation in Policy Design' (2018) 46(1) *Policy & Politics* 101.

²³ Penelope Eckert, 'Communities of Practice' (2006) 2(2006) *Encyclopedia of language and linguistics* 683.

²⁴ *Standards Review Committee | Section of Legal Education and Admissions to the Bar* <https://www.americanbar.org/groups/legal_education/committees/standards_review.html>.

are then held and a considered proposal for change then sent to the annual ABA meeting. Membership of the ABA committee, while representatives of the Bar, in fact are largely law professors.²⁵ This process ensures constant review of the standards, adequate scope for all interested persons to contribute, a clear timeframe and an accountable decision-making process.

RELATIONSHIP OF REGULATION TO OTHER AIMS OF LAW SCHOOLS

Currently Rule 5 only sees and regulates Law Schools as providers of training for lawyers. However, Law Schools are much more than this, and the broader scope and mission of law schools can create tension with a professional regulatory regime.

THE RELATIONSHIP OF LAW SCHOOLS TO THE ACADEMIC ACADEMY

There has been a significant historical shift from training provided in the Inns of Court and through articles to the modern law school. Despite the trade-school background, modern law schools in Australia are now fully a part of the university, and its mission. Unlike the US,²⁶ Australian law schools are not semi-independent or fully independent graduate schools, with their own independent sources of funding and control over their own hiring and teaching practices.

By contrast, the majority of law schools in Australia are only schools or disciplines within larger faculties or colleges. Their “Dean” may be the equivalent of a discipline leader, with no authority to hire staff and no independent budget. The staffing levels and teaching approach may be determined by those outside the law school. At other universities, the Dean may still head a Faculty and have an independent budget, but the amount of independence that Dean has to develop curricula, hire staff or arrange the school may be severely limited by central university policies, strategic plans or budgetary restraints. There may be real limits to the extent that a law school can comply with some broader aspects of a professional regulatory framework.

Within law schools, the academics who teach law inhabit a world largely unrecognisable from a few decades ago. Academics are hired on the quality of their research output, not any demonstrated quality of teaching. In some law schools they are required to teach into areas of teaching need, not necessarily an area in which they would see themselves as expert. They know that their career will largely depend on the academic research that they do – and that that research must be published in journals or by publishers that non-lawyer university administrators will consider to be “quality outlets”.²⁷ Such outlets often do not include the various Law Society journals or the Australian Law Journal. Specialist doctrinal area journals – of most value to the profession – are still acceptable outputs, but legal academics are advised to limit the amount they publish in these journals and instead aim for international academic journals. Increasingly, academics require PhDs prior to being eligible to be appointed to ongoing positions, and such study inevitably moves the neophyte academic from practical to theoretical considerations. This is not a negative development, but it does mean that legal academics now bring

²⁵ https://www.americanbar.org/groups/legal_education/committees/standards_review/src_committee_roster.html

²⁶ Cf ABA Standard 201. LAW SCHOOL GOVERNANCE

(a) The dean and the faculty shall have the primary responsibility and authority for planning, implementing, and administering the program of legal education of the law school, including curriculum, methods of instruction and evaluation, admissions policies and procedures, and academic standards.

(b) The dean and the faculty shall recommend the selection, re

²⁷ Andrew Norton, J Sonnemann and I Cherastidham, ‘Taking University Teaching Seriously’ [2013] *Grattan Institute* <https://grattan.edu.au/wp-content/uploads/2013/07/191_Taking-Teaching-Seriously.pdf>.

to their teaching a much broader range of perspectives than a traditional focus on practice skills.²⁸ It means that students are more likely to be taught by those who see law as a larger intellectual endeavour,²⁹ less a forensic skill for achieving client outcomes. These broader perspectives, while not immediately apparently useful for appearing in a Local Court or drafting a sale of business, nonetheless are perspectives that 'stick' with students and generate the broader professional perspectives so critical in a changing legal environment.

While most academics take their teaching very seriously, the time to prepare and develop their courses is constrained by the demands on their time made by the increased emphasis on research. They are often of the belief that any time spent beyond the ethical minimum for teaching preparation will not be advantageous to their career, and other than recent promises by universities in relation to new "teaching focussed" roles,³⁰ history would suggest those beliefs are correct. Annual performance reviews are likely to look for a minimum level of competence in teaching and largely focus on building excellence in research, often measured as an increasing quantum of research output.³¹

THE RELATIONSHIP OF LAW SCHOOLS TO UNIVERSITY ADMINISTRATION

Modern universities are driven by business perspectives. There is a strong emphasis on metrics for success, and those metrics tend to revolve around research grant money, research outputs and numbers of students graduated. In this environment law schools have ceased to be elite parts of the university. While they still are valuable in attracting the best students from high school, they do not teach enough students to make a substantial contribution to the university's finances when compared to larger business and science faculties. The nature of legal research relevant for professional practice does not easily lend itself to attracting larger research grants, and so again law fades into insignificance beside the STEM disciplines.³² Finally, the size of law faculties is such that any research output is also small compared to larger faculties. In short, law schools are increasingly irrelevant to the key 'bottom line' concerns of universities, and as such any attempts by regulators to insist on substantial changes to administration, teaching or student numbers that have any significant cost impact are likely to be ignored by universities, and only cause tension for law schools and their students.

THE BROADER CONTEXT OF THE FUTURE OF THE LEGAL PROFESSION

The legal profession itself is undergoing an existential crisis. A range of authors and inquiries have pointed to the impact of technology and changing regulatory practices on the role of the profession, and their ability to make obsolete much of what is currently core lawyer business.

Some make the point that with much knowledge being freely available online, and with increased ability to automate tasks that were long the province of a lawyer's practice – much of the effort of learning the "knowledge" of law may be unnecessary.³³ If so, the current degree of concentration on content and the Areas may be misplaced. Instead, there are suggestions that what is key to maintaining law as a profession are the less tangible skills and dispositions of a lawyer. These skills begin with the ability to critically read and interpret

²⁸ Richard K Neumann, 'Osler, Langdell, and the Atelier: Three Tales of Creation in Professional Education' (2013) 10 *Legal Communication & Rhetoric* 151.

²⁹ Daphne Barak-Erez, 'Writing Law: Reflections on Judicial Decisions and Academic Scholarship Essay' (2015) 41 *Queen's Law Journal* [i]; Richard A Posner, 'The Deprofessionalization of Legal Teaching and Scholarship' (1993) 91(8) *Michigan Law Review* 1921.

³⁰ Dawn Bennett et al, 'What Is Required to Develop Career Pathways for Teaching Academics?' [2017] *Higher Education* 1.

³¹ See generally, Norton, Sonnemann and Cherastidham, above n 27.

³² Aiden Byrne, *What Is Success?* (10 July 2014) <<http://www.arc.gov.au/news-media/news/what-success>>.

³³ Richard Susskind and Daniel Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts* (Oxford University Press, 2015).

the various genres of legal text, to articulate these in succinct oral and written format. But they also extend to the ability to communicate with clients, the ability to draw on frameworks of knowledge in critically analysing new situations, and the ability to deal with uncertainty and change.³⁴ Perhaps even more fundamentally for the notion of law as a 'profession',³⁵ lawyers need to develop the key dispositions of being community minded, being selfless and ethical, and being committed to the key values of fairness and the rule of law, and to avoid retreating into inappropriate role distancing.³⁶

The mechanical skills can be assessed in formal examinations, but the more critical skills and the developing dispositions do not lend themselves easily to point-in-time examination. Instead such dispositions develop through enculturation and immersion in supportive environments. Such cultures are built over time through law schools, individual teachers and student peers. It is relatively easy to set up a facility that teaches student content and technical skills – some consider the internet will soon do this³⁷ – but it is much harder to develop an environment that develops dispositions.

REGULATORY APPROACHES

With this range of pressures on law schools, how should an external regulator approach the setting of standards? I would suggest there are a number of key factors. First the regulator, as a representative of the broader profession, should see itself as a protector of what is best and important about legal education and scholarship in universities. While a range of skills and areas of knowledge are critical for all lawyers to know, the broader intangible qualities of a university education are just as critical. Exposure to legal thinkers and experts, critical perspectives on the status quo, dispositions of intellectual curiousness and open-mindedness, appreciation of the plight of others and the importance of the rule of law are all lifelong perspectives and memories a university law degree provides.

Regulators then should consider how what is required, and what is not required, pushes law schools to emphasise or de-emphasise aspects of legal education. Regulators could consider forms of regulation that can be aspirational or inspirational. This approach to regulation is a part of the ABA Standards, and a part of the CALD Standards. The CALD Standards include for example:

- 1.3.2 The law school's mission encompasses teaching, research and community engagement.
- 1.3.3 The law school's mission encompasses a commitment to the rule of law, and the promotion of the highest standards of ethical conduct, professional responsibility, and community service
- 8.1 The law school fosters the relationship between research and teaching.
- 8.2 The interaction between research and teaching is reflected in the curriculum. This interaction influences teaching, and encourages and prepares students to engage in legal research and the development of the law.

These are standards of intent and purpose. Rather than minimum compliance approaches they encourage a school to take pride in its efforts, allow a regulator to reward best practice, and give the regulator an opportunity, as part of a conversation about the future, to encourage those lagging.

³⁴ Randall Kiser, *Soft Skills for the Effective Lawyer* (Cambridge University Press, 2017).

³⁵ Andrew Abbott, *The System of Professions: An Essay on the Division of Expert Labor* (University of Chicago Press, 2014).

³⁶ John Bliss, 'Divided Selves: Professional Role Distancing Among Law Students and New Lawyers in a Period of Market Crisis' (2017) 42(3) *Law & Social Inquiry* 855; Gerald J Postema, 'Moral Responsibility in Professional Ethics' (1980) 55 *NYUL Rev.* 63.

³⁷ See eg Susskind and Susskind, above n 33 and the already existing online student support services such as <https://www.studiosity.com>.

The CALD Standards also signal to universities and the community what the profession values in law schools beyond producing legal mechanics or plumbers³⁸ and highlight the broader role law schools play in society. Such signals and requirements can be vital supports for law school management in times of internal strategic and financial pressure.

I now turn to how regulation can impact on two aspects of legal education: content and assessment.

CONTENT

THE TYPE OF CONTENT

Although competency-based standards for practitioners will be based on learning outcomes, standards for inputs remain important. Inputs are the required curriculum – the knowledge and skills that must be taught. In order to ensure that students have a common basis of knowledge to draw from when starting their careers, and for the public to understand the nature of a law degree it is thus necessary to describe the core curriculum of a law degree.

How broad or detailed that description is can vary enormously. In the earlier days of standard setting, content was described by doctrinal area – and the Prescribed Areas bears that hallmark.³⁹ More recently, enquiries into the legal profession have urged more broad concepts of knowledge, such as understandings of business principles, computer coding, practice development. These new areas of content, coupled with calls for broader training in emotional and ethical skills have been described by some as the development of the T-shaped lawyer.⁴⁰ The idea is that whereas traditional legal education only concentrated on doctrinal knowledge – the stem of letter I, the modern knowledge and skills requirements will produce a crossbar on top of that stem – creating a letter T. The insight is that the types of knowledge in the crossbar are different to those in the stem, and we thus need to rethink legal education. A recent set of new ‘knowledges’ were proposed by the FLIP report,⁴¹ and in the US a larger set have been proposed.⁴²

Such developments are welcome. However, the time available for students to learn these new areas and skills has not to date increased. Consequently, this means that as the size of the crossbar increases, the size of the stem must decrease. The implications of this must be squarely faced. It is not possible for a regulator to require an increased focus on, for example, skills of statutory interpretation, alternative dispute resolution and business accounting, without expecting a decrease in treatment of other areas such as torts or equity law, or less scope for electives. There can be some change of focus within existing courses - an examination in tort law could for example focus on statutory interpretation – but even then, to the extent that the change is significant and leads to different learning outcomes for students there must be a corresponding decrease in emphasis on other matters – such as dissenting judgments, policy issues etc..

³⁸ William Twining, ‘Pericles and the Plumber (1967)’ 83 *LQR* 396.

³⁹ Law Admissions Consultative Committee, ‘Background Paper on Admission Requirements’ <https://www.lawcouncil.asn.au/files/web-pdf/LACC%20docs/Background_Paper_on_Admission_Requirements-Oct2010.rev2.pdf>.

⁴⁰ *The 21st-Century T-Shaped Lawyer | Law Practice Division* <https://www.americanbar.org/publications/law_practice_magazine/2014/july-august/the-21st-century-t-shaped-lawyer.html>.

⁴¹ *Flip - Law Society of NSW* <<http://www.lawsociety.com.au/ForSolicitors/Education/ThoughtLeadership/flip/index.htm>> (Technology, Practice Skills [including teamwork, collaboration, writing and drafting, presentation, advocacy and negotiation skills], Business Skills [including basic accounting and finance], Project Management, Internationalization and Cross Border Practice of Law, Interdisciplinary Experience [involving interaction with clients and another profession or occupation], and Resilience, Flexibility and Ability to adapt to change).

⁴² *Foundations for Practice: The Whole Lawyer and the Character Quotient | IAALS* <<http://iaals.du.edu/educating-tomorrows-lawyers/publications/foundations-practice-whole-lawyer-and-character-quotient>>.

One truism of the law is that there is more than there used to be. This can only mean that if we wish to ensure that graduates are across all fundamental areas of law and not jettison current areas, the students must cover more content. Universities are currently very focussed on developing flexible, online, streamlined degrees. A discipline that attempts to cram more content into an existing degree is unlikely to find university approval simple. This means that if there is a desire to increase the quantum of content we need to increase the length of the degree. Law is in fact unusual in the more technical professional degrees. Most take more than three years to complete, or require an additional Honours or Masters degree as a de facto requirement. Completing the academic training necessary to become a doctor takes six years at university, and a school teacher often four. Engineering, Pharmacy, Architecture, Physiotherapy, and Advanced Science degrees are often four years in length. It may seem odd that law, with its increasing content remains at three years.

Presumably the limitation to three years is because most students undertake another degree jointly and it is considered too much to ask students to stay at university any longer. But those joint degrees could in fact be already providing some of the lawyer's skill set. Many of the new skills that bodies such as the FLIP committee have identified - such as Technology Skills, Practice Skills, Business Skills, Project Management, and Interdisciplinary Experience – are likely to be a part of the non-law degree, and regulators could relatively easily require evidence⁴³ that a student has acquired them in that degree, or through alternative diploma programs. On the other hand it might well be that *expecting* such skills of all graduates amounts to an overweening sense of control of the nature of members of the profession, and law firms could be left to make their own choices as to which broader skills they wanted in graduates - and how they would look to assure them. The point is that such skills, required or not, may well be best acquired outside of a law degree.

Returning to the initial conundrum of more law and no more time, and assuming that both the degree has not been lengthened and the current depth of treatment of content remains, there can only be one solution – less areas of general doctrinal learning are required in the qualifying law degree, and more specialisation is permitted. In this scenario, like medical degrees, students might graduate and enter into supervised practice, but then be required to undertake ongoing part-time study in one of a number of specialised colleges – general suburban practice, commercial practice, criminal practice, family practice, international practice. Students could presumably complete more than one and thereby broaden their practice.

This specialisation approach is already being adopted by law societies who give advanced “specialist” accreditation in particular fields. Law schools have long offered masters degrees. It would not be a significant step to jointly develop specialist qualifications that satisfied both professional advanced accreditation and university level depth of knowledge. Students could graduate with an overview of law (similar to the way business students are taught law), and a smaller set of in-depth knowledge in core areas of legal knowledge, commence supervised practice and then undertake specialist training to practice in particular fields. While the graduate lawyer could work across all fields, only a lawyer with qualifications in the relevant area could finalise advices, issue documentation, or appear in court in that field.

Such an approach would also require a rethink of how the areas of knowledge were described.

THE DEPTH OF TREATMENT – DESCRIBING AREAS

The US ABA Standards do not set out any required areas of doctrinal knowledge. Currently the Australian content requirements are contained in the Prescribed Areas. That content is described in doctrinal blocks in two ways – either as a prescriptive list of topics, or as a more general description. The recent rewriting of the evidence heading has omitted the general description which may indicate a preference for more detailed descriptions of

⁴³ Perhaps through a portfolio.

content. But these descriptions can be illusory. There is nothing in these descriptions that indicates the depth of analysis required, the standpoint to be taken or the range of sources that should be drawn on.

By way of example, the criminal law component of the NSW HSC syllabus contains significantly more areas of law than the Prescribed Areas description – including offences against the sovereign, economic offences (property/white collar/computer), drug offences, driving offences, public order offences, factors affecting criminal behaviour, crime prevention, police powers, sentencing and punishment, young offenders and international crime.⁴⁴ None of these are part of the current statutory requirements in the Prescribed Areas. The HSC syllabus' dot point description of content runs to 313 words, the Prescribed Areas' detailed list to 61. England and Canada merely require law students to learn "criminal law".

If viewed without realisation of the academic level of the students, the HSC syllabus is significantly more exacting. Similarly, students undertaking business law studies in Commerce or Business degrees may appear, on the basis of their course outlines, to cover significantly more ground than a law student in areas such as contract and corporate law. Given the underlying law is the same, they may well study the same materials – business law texts providing a more accessible explanation of the cases and statutes.

Being realistic, the chances that either a business law student or a law student remembers much of the detail of corporations law after cramming for a final exam and then layering on top of that two or three semesters of other areas of knowledge may well be the same – close to nothing. So lists of knowledge are unlikely to be reliable indicators of depth or retention of knowledge.

Despite the fact that each of the Prescribed Areas need not be a separate course, the long practice has been that this is the case. That then has provided the proxy for depth of treatment irrespective of the length of the list of elements in the Area. As a result in many law schools Torts (five listed elements), Contracts (six listed areas), Ethics (four listed areas) have had the same length of study as Civil Dispute Resolution (13 listed areas) and Criminal Law and Procedure (9 listed areas, and uniquely a choice of 5 sub areas for the last two listed areas). There seems to be no reason for this other than the historic individual choices of describing topic areas in 1970's Melbourne law schools⁴⁵.

THE LACC STANDARDS

The LACC standards are more explicit. They suggest each of the Prescribed Areas should by default be allocated 36 teaching hours.⁴⁶ This is a significant decrease in the flexibility offered to law schools and signals that innovation beyond the curriculum approach of the 1970's will need to be justified. It makes it more difficult to incorporate other areas of law or practice skills into the curriculum.

The 36 hours are presumably three hours of instruction over a 12 week semester. But again, this can be illusory. If the teaching format is an interactive seminar, that could be 3 hours of new content each week. If it is a 2 hour lecture and 1 hour tutorial, the tutorial may be merely reinforcing material covered in the lecture. And again, taking students through cases and legislation in class can be done quickly or slowly. A lot depends on the extent to which students are expected to teach themselves outside of class⁴⁷ and on what skills are being taught in

⁴⁴ 'Legal Studies Syllabus' (2009) <https://www.boardofstudies.nsw.edu.au/syllabus_hsc/pdf_doc/legal-studies-syllabus-st6.pdf>.

⁴⁵ Sandford Clark, 'Regulating Admissions - Are We There Yet?' <<http://www.academyoflaw.org.au/resources/Legal%20Education%20Conference%202017%20Final%20Papers/Sandford%20Clark%20-%20Regulating%20Admissions%20-%20Are%20we%20there%20yet.pdf>>.

⁴⁶ 4.4(b)(iv)

⁴⁷ It is also unclear whether these 36 hours would include class preparation time – are study and teaching hours separate concepts (particularly difficult to identify in online interactive approaches to teaching)?

conjunction with the topic. If the aim is to teach statutory interpretation, a whole class could examine one provision in its broader context and with the students having to learn to find their way through to a resolution. If legal principle is the aim, that provision could be passed over in a minute. If the aim is to provide an overview for students, the lecture or notes could summarise a range of cases. If the students are learn to assess multiple judgment decisions, only one case might be covered. As discussed below, there are a range of important skills that need to be learnt alongside the content. But the LACC Standards approach ignores this reality – other than a requirement of teaching the LACC SSI, which is not legislatively required in the Rules.

This assumption that each of the Prescribed Areas require equal treatment is reinforced by the way the LACC Standard interprets Rule 5's requirement that each student "acquire and demonstrate appropriate understanding and competence in each element of the academic areas of knowledge". Further, the LACC standards require the teaching of each element of the prescribed areas to be quantified by a system such as a matrix or lecture outlines.⁴⁸ Civil dispute resolution requires 13 non-negotiable elements to be covered; Ethics and Professional responsibility requires 4. It is implicit in the 36 hour stipulation that nothing beyond the Prescribed Area elements are taught in that time. By default, that would require nine hours of teaching to be devoted to the 'practitioner's duty to fellow practitioners' element in Ethics, but then 2 1/5 hours to 'obligations of parties and practitioners relating to the resolution of disputes' element in Civil Dispute Resolution. This unlikely to be the reality in any law school.

This pedantic approach to regulation, which is seen as a necessary outcome of the wording of Rule 5, has a highly stultifying impact on the ability of law schools to differentiate. The larger the core of compulsory topics, the less the scope to develop distinctly different types of degrees. With this interpretation of the scope of the Prescribed Areas, all law graduates are generalists irrespective of their law school. But they are generalists in increasingly perverse ways, in the sense that the Prescribed Areas do not necessarily represent the core of the work of a generalist lawyer. To the extent that law schools reject this limited view of education and teach beyond the requirements of the Prescribed Areas, law schools develop graduates who have knowledge and skills unknown to the regulators and employers, and where the required knowledge is an ossified concept of legal expertise ill-suited to modern practice, but identified through compliance documentation to satisfy accreditation.

RE-IMAGINING THE CONTENT AREAS

The listing of doctrinal areas also has a fundamental cultural impact. At the broadest level, they fail to refer to the broader issues relevant to law and legal practice. There is no theory, no empirical analysis, no critique of law in the elements of the Prescribed Areas. Yet it is not possible to teach law effectively without these elements.⁴⁹

Further, even within their doctrinal terms, the Areas provide no explanation of what is important to know about each listed item. Instead of a mere list it would far better to describe the areas, whether traditionally doctrinal or not, by a broader 'best practice' approach to the content.⁵⁰ That document could sketch the landscape of underlying principles, key controversies and new developments and ask law schools to construct a curriculum that exposed students to those issues, but allowed for alternative and innovative approaches to the area. Remembering that the students will be unlikely to remember much of the detail, finding ways to build conceptual frameworks, reinforce the concepts and learning where to look for answers to issues that arise in

⁴⁸ 4.4 (b)(i)

⁴⁹ See the discussion in Alex Steel, *Good Practice Guide (Bachelor of Laws) Law in Broader Contexts* (2013) Legal Education Associate Deans' Network website <<<http://lawteachnetwork.org/resources.html>>>.

⁵⁰ An example of this approach is in Jeffery Barnes et al, 'CALD Good Practice Guide for Teaching Statutory Interpretation' (Council of Australian Law Deans, 2015) <<http://www.cald.asn.au/assets/lists/Resources/GPGSI-June15.pdf>>.

the area is likely to be far more useful. Seeing those best practice documents as evolving and providing choice of emphasis would ensure law schools remained responsive to legal developments and innovations.

The current listing of each area as a separate doctrinal node reinforces the project of the 19th century text writers who carved off areas of law to build their own expertise.⁵¹ As a thought experiment to highlight the restrictive nature of the Prescribed Areas one could imagine a very different taxonomy of law courses: Running Businesses, Interacting with Governments About Rights, Protecting Financial Interests, Methods of Controlling Public Behaviours, Social Ordering, Ensuring Minimum Living Standards. It would be entirely possible for the Prescribed Areas to be rewritten under headings such as these that would ensure law schools taught all the current topics – but did so without the doctrinal barriers. Those topics could also include non-legal elements.

Rewriting the content areas in non-doctrinal ways would encourage law schools to think of innovative and integrated ways to conceive of the curriculum. It would allow the profession to better articulate what it sees are the integrated skills and knowledge of practice. There is however, one significant caveat. Despite the stultifying effect of the doctrinal areas, many of the areas do have an underlying structure as a result of their historical development. Any law school would need to be careful to allow students to grasp these structures before launching into comparative approaches. One outcome might be that while the required knowledge is expressed in a practice area taxonomy, law schools would still teach the first years in doctrinally focussed ways. But the point of accreditation would be to demonstrate how students holistically understood an area of practice.

PRACTICAL SKILLS

Students when they begin work in a law firm are likely to be confronted in their first days with complex areas of law they have never studied- reviewing a government tender, dealing with an international intellectual property licencing agreement, defending a child pornography charge, précising an intergovernmental water licencing agreement. Their ability to competently complete these tasks depends far less on a detailed knowledge of the Areas and far more on their skills at research and analysis of unknown areas of law. Yet, as the Areas demonstrate, standards of legal education have focussed on naming content rather than describing skills. If a law school chose to teach entirely by taped lectures and assessed by multiple choice/short answer questions a student could graduate and know the Areas without ever needing to read a case, Act or academic article.

LACC and others have been exercised in recent years about a perceived lack of statutory interpretation skills in graduates. While the evidence of this lack is anecdotal, there is no reason to discount the real difficulties students have in mastering a skill which has never been at the core of legal teaching method. By contrast, the use of the case-analysis method in recent decades – where students distil legal principles from extracts of superior court decisions- has implicitly promoted and developed particular legal skills. Students are required to develop the skills of critical legal reading, learn to understand the genre of legal judgments, see repeated examples of legal syllogistic reasoning. The case-analysis approach is ideal for teaching because the principles can be distilled in class from the more extensive narrative that was read before. Statutory analysis is more difficult because the statute can only be interpreted by adding existing facts or imagining alternatives. Rather than distilling, teaching statutes is brewing.⁵²

⁵¹ Michael H Hoeflich, 'The Americanization of British Legal Education in the Nineteenth Century' (1987) 8(3) *The Journal of Legal History* 244.

⁵² Alex Steel et al, 'Critical Legal Reading: The Elements, Strategies and Dispositions Needed to Master This Essential Skill' (2016) 26(1) *Legal Education Review* 9.

Other skills are also learnt implicitly through choices in pedagogy and assessment. The verbal skills of a lawyer - precision, brevity, clarity – are all honed by in-class discussions. The written skills by extended writing assignments, briefs for clients. Ethical and empathic skills can be developed through a culture of learning.⁵³

Other than initial primers in first year and occasional reminders, these core skills are learnt implicitly through the learning process – either through the format of the teaching or the format of the assessment – not the content of either.⁵⁴ Learning to read, reason and to interpret caselaw and statute can be done just as effectively in maritime law and housing law as in contracts or torts, and in fact more effectively if done in contrasting areas of law.

With a rapidly changing society and legal profession this flexibility based on skills is far more important than ever. Consequently, a legal education standard would be far more relevant, and rigorous if it concentrated on assuring that all graduates had the fundamental skills of being a lawyer. The Threshold Learning Outcomes are a first step in that direction. TLO3 for example states:

TLO 3: Thinking skills

Graduates of the Bachelor of Laws will be able to:

- (a) identify and articulate legal issues,
- (b) apply legal reasoning and research to generate appropriate responses to legal issues,
- (c) engage in critical analysis and make a reasoned choice amongst alternatives, and
- (d) think creatively in approaching legal issues and generating appropriate responses.

These capture many of the key thinking skills of lawyers. It however remains at a principled level and cannot inform an accrediting body's decision. The commentary that follows provides more detail. For example:

Identify and articulate legal issues: Law graduates should be able to examine a text and/or a scenario (for example, a set of facts, a legal document, a legal narrative, a statute, a case report, or a law reform report), find the key issues (for example, unresolved disputes, ambiguities, or uncertainties), and articulate those issues clearly as a necessary precursor to analysing and generating appropriate responses to the issues. This skill includes the ability to discriminate between legal and non-legal issues, and between relevant and irrelevant issues. Graduates should know that not every issue is a legal issue, and that not every legal issue warrants a legal response.

This helpfully sketches the types of tasks students should be competent in, but it still fails to make clear exactly what degree of complexity in the issue, or detail in response, would be a competent level for a graduate. Attempting to do this in a regulatory document would be both arduous and a significant brake on law school innovation. Again, seeing regulation as community of practice and developing best practice exemplars is an effective method of describing the required depth and complexity.

DISPOSITIONS

But beyond this relatively narrow set of technical legal skills, future lawyers need to develop a broader range of practice relevant skills – and a range of professional dispositions. Having the *skill* of critical thinking or of an appreciation of ethical issues is only half what a good lawyer needs. The lawyer needs to also have the *disposition* or inclination to want to use those critical thinking skills and to act ethically. How these dispositions

⁵³ See generally, Sullivan et al, above n 18.

⁵⁴ For the cognitive load this causes for students see Kate Galloway et al, 'Working the Nexus: Teaching Students to Think, Read and Problem-Solve Like a Lawyer' (2016) 26(1) *Legal Education Review* 5.

are inculcated and developed are in many ways the great challenge and achievement of quality legal education.⁵⁵ Clearly this is not achieved by lectures and examinations.

Yet it is this set of dispositions that is the hallmark of a profession. That set of shared values and impulses to act that make a lawyer a lawyer.⁵⁶ Such dispositions are developed over time, through acculturation. This can come through seeing perspectives and ways of thinking modelled in classrooms by teachers, by the nature of reflection prompted by assessment tasks, and by association with peers and practicing lawyers. The promotion of such dispositions are not something a regulator can impose on a law school through benchmarks, or assess through a compliance structure, but it can be something encouraged through a process of dialogue and support. This requires regulators to have a deeper understanding of how law is taught and how law schools operate, to be a part of the process rather than outside of it.

It is also important to consider the range of skills and dispositions that a future lawyer would require – and can effectively be taught in law school. There are two elements to this consideration. The first is to consider whether a skill or a disposition is something specific to lawyers or something more generally needed in professional life. Understanding how a client’s industry works, having the disposition to be curious about this and the foundational general knowledge and confidence to be able teach oneself about the industry, are key skills for a commercial lawyer. Yet they are skills just as easily learnt outside law school and are not easily assessed. Legal academics may know the law well, but may be no expert on the mining or IT industries. It would therefore seem that while students should graduate with a willingness to learn about client industries, this is something a law school is not well placed to ‘teach’. Similar considerations might well apply to aspects of accounting, business development, entrepreneurship. As mentioned above, these could well be part of the student’s non-law degree.

Other skills might be best learnt in practice. Empathy with clients, juggling multiple matters, courtroom etiquette, etc. are unlikely to be learnt well in a classroom. The CALD Standards require law schools to make efforts to develop experiential opportunities,⁵⁷ and in the US the ABA Standards now mandate a clinical component.⁵⁸ While some Australian law schools have access to clinics and many offer internships, few have all students compulsorily take part.⁵⁹ Absent a major reduction in student numbers or an increase in funding law schools this is not likely to change. Regulators therefore are unable to impose the authentic development of such skills or dispositions on law schools. Realistically, this is part of the education burden the profession must accept.

But secondly, there are other skills and dispositions law schools are best placed to teach. Legal critical reading and thinking are context specific skills, as are ethical and self-management dispositions. There are some skills and dispositions it is necessary to introduce in law school rather than elsewhere. Law school provides a safe environment where students can make mistakes, and where they can explore their own strengths and weaknesses with no or less negative consequence. Developing an ethical framework of what they are comfortable doing as a lawyer, and how they should negotiate interactions with their supervising partners is something that nearly impossible to do in the workforce, where a split-second ethical decision cannot be undone and where there is little time to reflect. Taking time to read and re-read judgments and statutes to build

⁵⁵ Sullivan et al, above n 18.

⁵⁶ Cf Susskind and Susskind, above n 33.

⁵⁷ Council of Australian Law Deans (CALD), above n 9 2.2.4.

⁵⁸ *Standards | Section of Legal Education and Admissions to the Bar*, above n 12 Standard 303 (a)(3).

⁵⁹ Kingsford Legal Centre, UNSW Law, *Clinical Legal Education Guide* (12th ed, 2017) <http://www.klc.unsw.edu.au/sites/klc.unsw.edu.au/files/2676%20CLE%20guide_WEB.pdf>.

interpretive ability is not something easily done in practice when there is much more extreme time pressure. Other dispositions could include comfort with complexity and open-mindedness.

From a regulator's perspective, identifying the skills and dispositions that are best first encountered in a law degree is an important task. Once those skills and dispositions are identified, law schools can consider how best to highlight the development of those skills and dispositions in the curriculum. The non-technical skills and the dispositions will not be 'assessable', but their emphasis in pedagogy and the curriculum will begin the lifelong development of them by lawyers. Given the squeeze on content discussed above, it may well be that these skills and dispositions are seen to be more important than learning content. This may then lead to a rethink of where the emphasis should lie in legal education.

ASSESSMENT

THE LACC STANDARDS APPROACH

LACC Standard 4.6 requires law schools to set assessment that can verify that every single student has both understanding and competence in every prescribed area of knowledge. This is to be verified by students achieving a pass grade in each subject teaching the prescribed areas. This is deeply problematic. Given the LACC Standard's concentration on the elements of the Areas, it suggests there is a requirement that the student be knowledgeable and competent in each element of the Area.

Minimum competence is a binary concept. It sets a minimum standard, but any skill above that is irrelevant. One is either able to undertake the task or not. A child can either tie their shoelaces or they cannot. How well they do the task is not a question of competence. Similarly knowledge can also be seen as binary. One cannot know the alphabet unless all 26 letters can be recited – 23 does not suffice.

But university assessment is rarely binary in this way. Instead the emphasis is on a scale of achievement. Further, these scales are applied to multiple assessments within a course. Thus a pass mark is an amalgam of a number of assessments, and numerous tasks/skills within those assessments. An overall pass grade is a statement that overall the student succeeded more at assigned tasks than failed. It is not a claim that the student was knowledgeable and competent on every aspect of the curriculum.

Assessment has always been thus. All experienced markers know that person achieving a pass grade has got just enough right to get through, but the grade is also a clear warning that the student nearly got so much wrong that they would have been forced to repeat. More realistically a student with a pass mark in a law course can be said to have barely enough awareness of the legal issues to be able to stumble on to the next course. And, with respect, this may be in fact a significant achievement. Students may barely pass some courses but excel in others and may grow in ability as they move through the degree. Pass levels, and the way assessment items are marked and compiled are also subject to complex university assessment rules. These may impact on how a student's results are calculated in ways opaque to external regulators.

All this is deeply problematic for the LACC approach to assuring knowledge. Does knowledge and competence of the element of the Prescribed Area of Contract expressed as "Formation, including capacity, formalities, privity and consideration" include a student who demonstrated an understanding of capacity and the parole evidence rule, but was fundamentally mistaken about consideration and performance? And what records need a law school keep to verify it either way? Currently a law school might be able to exhume an assessment where students analysed a problem scenario, and an overall mark for each student, but without keeping and analysing each student's answer it would be impossible to know if each aspect of contract formation was correctly identified.

Law has traditionally assessed skills of element analysis, issue spotting and reasoned argument alongside demonstration of knowledge of law via long complex problem scenario questions. If interpreted literally, the LACC standard may drive law schools to move to assessment similar to the knowledge requirement of learner driver tests. That is, a bank of multiple choice questions that students must continue to take until they get a high percentage correct. The granularity of that learning assurance is also problematic for student learning and plagiarism. In order to assure knowledge of each doctrinal element specific questions will need to be set. This will lead to both predictability and overassessment. Students will 'learn to the test' rather than more broadly, and if the questions are not constantly refreshed there is an increased likelihood of plagiarism.

It is also unclear what 'competence' means in the context of the Prescribed Areas. Competence is a concept closely tied to skills, not knowledge.⁶⁰ Yet the Areas are not expressed as skills. It is therefore not clear how a student can be said to be competent in "possession, seisin and title". After all these are prescribed areas of *knowledge*, not competence. Competence instead would be in areas such as identifying elements of a document of title, completing a conveyance, etc..

One solution to this conundrum is to recast the requirements of Rule 5 and the LACC Standards to move beyond a fixation on content to one on skills. Thus there could remain a requirement that the curriculum contain coverage of specified content areas, but the regulatory requirements could instead be that:

students demonstrate an understanding of the primary structure and operation of the area of law, with an awareness of its relationship to other areas of law and an ability to apply the area of law to factual situations.

Best practice documents could then provide approved methods of teaching and assessing that competence, leaving law schools to adopt or develop their own approaches. The real focus of the Standards would be on assuring that students have the necessary skills to research and reason their way to legal solutions using those areas of law.

EXTERNAL EXAMINATIONS?

In the United States a national approach to assuring graduate competence has led to the Uniform Bar Exam⁶¹ which assesses student knowledge across a range of doctrinal and procedural areas. There are many flaws with this approach,⁶² not least the cost of a national regime in addition to existing assessment in law schools.

While it has freed law schools up to develop their own curriculum, the ABA's requirement of particular pass rates for law school accreditation⁶³ creates a dubiously indirect measure of teaching quality. There is no clear reason the link between law school teaching and pass rates would be any greater than the link between economic privilege and pass rates. This is particularly relevant because of the large private coaching industry that has developed around passing the Bar Exams. In Australia we are already seeing the corrosive effect such

⁶⁰ Nadine J Kaslow et al, 'Guiding Principles and Recommendations for the Assessment of Competence.' (2007) 38(5) *Professional Psychology: Research and Practice* 441; Cath Sylvester, 'Measuring Competence in Legal Education: A View from the Bridge' (2015) 49(2) *The Law Teacher* 242; Deborah Merritt, *Validity, Competence, and the Bar Exam* Faculty Perspectives - Association of American Law Schools | The Association of American Law Schools <<https://www.aals.org/about/publications/newsletters/aals-news-spring-2017/faculty-perspectives/>>; 'LETR | Legal Education and Training Review' (2013) <<http://letr.org.uk/the-report/index.html>> Ch 4.

⁶¹ *Uniform Bar Examination - NCBE* <<http://www.ncbex.org/exams/ube/>>.

⁶² See eg Andrea Curcio, 'A Better Bar: Why and How the Existing Bar Exam Should Change' (2002) 81(1) *Nebraska Law Review* 364; Deborah Merritt, above n 60.

⁶³ Standard 316.

coaching industries have had on high school matriculation examinations,⁶⁴ and increasingly these coaches are shadowing university teaching. An external Australian practice admission examination is likely to fall into a similar pattern. From a student's perspective there will be pressures to pay for such coaching, with the financial strain that may cause – particularly impacting on less well-off students and on the subsequent diversity of the legal profession; and particularly because such coaching will not be able to be a part of the HECS deferred payment system.

Such national, large scale examinations also rely heavily on multiple choice and closed book examinations. Both of these methods of assessment are perverse in that they do not replicate practice environments and reward a 'cramming' approach to study⁶⁵ over longer term understanding. As discussed above, such examinations only assess a point in time, and are not clear measures of prior learning. Consequently, success in such examinations is a poor indicator of fitness to practice.

FORMS OF ASSESSMENT

Assessment is a broad, complex, and at times controversial field. There is also a wide range of forms of assessment. Each form of assessment tests different types of knowledge, skill and competence. Assessing a person's ability to make submissions to a court is not appropriately done through a multiple-choice exam, assessing a person's ability to research is not done through a closed book exam. It is important therefore to consider what learning outcome is required before making a choice of assessment.

Assessment tasks on the same area of knowledge can be set with different levels of complexity. Tasks can be set with more or less scaffolding – assistance with understanding the task.⁶⁶ Again, the way in which answers are marked can be more or less demanding. Use of marking rubrics may have effect of privileging one aspect of the answer over the other, and skewing the grading.⁶⁷

Consequently, a regulator mandating (or a law school describing) a form of assessment may, alone, fail to assure that those passing it reach the level of knowledge or skill expected. This then presents difficulties for an accrediting authority if it is asked to judge whether a law school's assessment confirms that a student "attain[s] an appropriate understanding and competence in that area", as the LACC Standard 4.6 requires. An regulator that required law schools to have all assessment items certified would collapse under the weight of its own procedures and the revolt of law schools. On the other hand the setting of prescribed forms of assessment would crush innovation in teaching and assessment.

A middle path may be possible. Using the community of practice model, accrediting bodies could produce, in consultation with law schools, sample forms of assessment that would be expected by the mid-point of a law degree. Creating standards over levels of complexity in assessment tasks and the appropriateness of forms of assessment for assessing particular skills is however not sufficient. What is also required is an appreciation of how those assessments are graded. Connected to these samples could be marking guides or rubrics to explain what was required or assessed. Ideally a sample answer could also be provided.

⁶⁴ John Stewart, *Students Paying Thousands for Tutoring in Struggle for Competitive Grades* (28 September 2017) ABC News <<http://www.abc.net.au/news/2017-09-28/high-school-students-paying-thousands-for-tutoring/8994644>>.

⁶⁵ Elizabeth Olson, 'Bar Exam, the Standard to Become a Lawyer, Comes Under Fire' *The New York Times*, 19 March 2015 <<https://www.nytimes.com/2015/03/20/business/dealbook/bar-exam-the-standard-to-become-a-lawyer-comes-under-fire.html>>.

⁶⁶ Susanne P Lajoie, 'Extending the Scaffolding Metaphor' (2005) 33(5) *Instructional Science* 541.

⁶⁷ Heidi Goodrich Andrade, 'Teaching With Rubrics: The Good, the Bad, and the Ugly' (2005) 53(1) *College Teaching* 27; W James Popham, 'What's Wrong--and What's Right--with Rubrics' (1997) 55(2) *Educational Leadership* 72; Phillip Dawson, 'Assessment Rubrics: Towards Clearer and More Replicable Design, Research and Practice' (2015) 42(3) *Assessment & Evaluation in Higher Education* 347.

These samples could demonstrate the level of complexity required, and illustrate how students who passed those exams would have achieved competence in the relevant skills. The samples could easily be drawn from past law assessments. Law schools wishing to innovate could easily do so either by demonstrating in an accreditation review how the skills/knowledge were assessed, or even better have a sample assessment certified as a new best practice example. A set of exemplar assessments is also vital because with 40 odd law schools there will be no other reliable benchmarking process. Individual assessors or individual accrediting bodies who visit law schools may diverge or be inconsistent in their understanding of the minimum requirements and will need exemplar benchmarks.

MARKING ASSESSMENT

However, from a regulator's perspective it is really the worst possible answers that could be marked as a pass that are critical.

Again, this is not likely to be possible to assess in the abstract and some calibrating mechanism would be required. Complex written tasks that have degrees to which an answer is correct – essays and problem questions being the prime examples - might be most efficiently calibrated by having law schools moderate each other's papers, with an accrediting body member being involved in part of that process.

This need not be a complex process. As all the accrediting body is concerned about is consistency over the pass grade, once that level has been agreed on in one institution it would be relatively simple to circulate a small number of student answers that fell above and below the pass grade between law schools.⁶⁸ Law schools already double mark assessments that fail, so internally the process already exists. In fact this form of calibration is likely to be a part of the national tertiary education landscape in due course.⁶⁹ It would for the first time create a national benchmark for competence and knowledge.

The existence of such a process could mean that accrediting bodies would not need to examine each law schools assessment regime in detail, nor make qualitative decisions about individual assessments. Law schools, as competitive players in the market could be trusted to self-police quality. All the accrediting body need do would be to periodically review the criteria and parameters via inspection of sample assessments.

CONCLUSION

What emerges from the discussion is thus a complex regulatory environment where law schools are subject to much broader forces than are recognised in current accreditation standards, and an emerging set of new aspects of the 'competent' lawyer that range far beyond lists of content. Examining the current approaches to prescribed content and the use of assessment to assure learning has demonstrated that these are inadequate to allow regulators to understand what is learnt by law students, nor sufficiently flexible for law schools to develop and enhance legal education.

Throughout the paper I have argued that effective and sustainable regulation is best achieved through a partnership between law schools and regulators via a community of practice and based on the development of best practice exemplars and documents. For those issues where the parties currently have divergent views, this

⁶⁸ Non-written forms of assessment would be more complex to involve in this process, but if a regulator thought it important there would be methods. Presentations could be recorded, assessments that are expert appraisals of conduct could be assessed against the requirements of detailed rubrics.

⁶⁹ See eg the following reports: *Peer Review of Assessment Networks: Sector-Wide Options for Calibrating and Assuring Achievement Standards within and across Disciplines and Other Networks* <<http://www.olt.gov.au/resource-peer-review-assessment-networks>>; *Assuring Learning and Teaching Standards through Inter-Institutional Peer Review and Moderation* <<http://www.olt.gov.au/resource-assuring-learning-teaching-standards-inter-institutional-peer-review>>.

means a longer process, requiring patience and humility on all sides. But any process that helps to better connect and integrate the academy and the profession will strengthen both and ensure both will be better placed to thrive in disruptive futures. As mentioned at the beginning of the paper, the needs of students and the broader community lawyers serve should also act as balances to overly prescriptive regulatory tendencies.