

THE ALTC (formerly Carrick Institute) / CALD DISCIPLINE BASED INITIATIVE
IN LAW – “LEARNING AND TEACHING IN THE DISCIPLINE OF LAW:
ACHIEVING AND SUSTAINING EXCELLENCE IN A CHANGED AND
CHANGING ENVIRONMENT”

LEGAL ETHICS AND PROFESSIONAL CONDUCT

This document summarises a report provided to the Council of Australian Law Deans (CALD) in March 2008. The background, so far as it relates to the Discipline Based Initiative in Law, is found in Goal #6 of the revised documentation submitted to and accepted by the Carrick Institute for Learning and Teaching in Higher Education (now Australian Learning and Teaching Council (“ALTC”]). That Goal is to “develop effective means to inculcate in Australian law students the values of professionalism, ethics and service”. The goal dovetails with intense interest from the Law Admissions Consultative Committee (LACC) in the teaching of legal ethics as part of the routine education of Australian law students.

Prescription of Professional Conduct subject matter in legal education

Specifically, there is a “Professional Conduct” area of knowledge included (as a so-called “Priestley Eleven” requirement) within the Uniform Admission Rules that govern whether law courses are accredited such that their graduates are eligible to be admitted to the practice of law in an Australian jurisdiction.

That area of knowledge is currently expressed in the following way:

PROFESSIONAL CONDUCT (including basic Trust Accounting)

Professional and personal conduct in respect of practitioner's duty:

- (a) to the law;
- (b) to the Courts;
- (c) to clients, including a basic knowledge of the principles of trust accounting; and
- (d) to fellow practitioners.

OR

Topics of such breadth and depth as to satisfy the following guidelines.

The topics should include knowledge of the various pertinent rules concerning a practitioner's duty to the law, the Courts, clients and fellow practitioners, and a basic knowledge of the principles of trust accounting.

... [being specification in some detail of what ought to be encompassed by trust accounting principles]

At its meeting of 21 September 2007, LACC resolved to replace the above prescription with the wording that follows, and to recommend that admitting authorities amend their Admission Rules accordingly (which is occurring in the various jurisdictions):

ETHICS AND PROFESSIONAL RESPONSIBILITY

Professional and personal conduct in respect of practitioner's duty:

- (a) to the law;
- (b) to the Courts;

- (c) to clients, including a basic knowledge of the principles relating to the holding of money on trust; and
- (d) to fellow practitioners.

OR

Topics of such breadth and depth as to satisfy the following guidelines.

The topics should include knowledge of the various pertinent rules concerning a practitioner's duty to the law, the Courts, clients and fellow practitioners, and a basic knowledge of the principles relating to the holding of money on trust.

In its *Discussion Paper 73*, the Australian Law Reform Commission put forward proposals to the effect that “specific consideration of the ethical responsibility of lawyers in relation to making and maintaining a claim of client legal privilege” be included in professional conduct subjects, and that admission rules should be adjusted accordingly.¹ These Proposals have matured into Recommendations in the same terms following the release on 13 February 2008 of *Report 107*.²

Drawing attention to ethics and professional conduct in legal education

As part of LACC’s process of consideration of the above change (which initially arose out of concerns expressed by the law schools that the academic environment was not necessarily well-suited to teaching the “ins-and-outs” of trust accounting), CALD was asked by LACC to provide advice on whether greater emphasis ought to be given in academic legal education to the non-trust-accounting aspects of professional conduct, and if so, how should that be accomplished in the textual expression of the relevant Priestley Eleven subject area.

CALD referred this request to its Standing Committee on Legal Practice. That Standing Committee proposed that a “stocktake” on the teaching of legal ethics and professional conduct in Australian law courses should be conducted. In particular, reference was made to the discussion of the teaching of legal ethics in the AUTC’s 2003 *Learning Outcomes Report*,³ with the idea of updating the information found there. What follows is an examination of the current situation as disclosed by a preliminary stocktake of Australian law schools’ teaching of ethics and professional conduct.

An investigation of the current situation

In January 2008, a website canvass was conducted of 30 Australian law schools,⁴ searching for what was immediately apparent with regard to the subjects in which ethics and/or professional conduct and related matter were being taught. In other words, the search determined the most likely subjects containing such content and utilised the official subject descriptions and other information published on the websites. If it appeared available, more detailed information was gleaned from posted or downloadable documents (eg subject outlines). This stocktake, for the moment, is an exercise in (i) law schools sharing information

¹ ALRC, *Client Legal Privilege and Federal Investigatory Bodies*, (DP 73) (2007), 423 [Proposals 9-3 and 9-4].

² ALRC, *Privilege in Perspective: Client Legal Privilege and Federal Investigations* (Report 107) (2008), 529 [Recommendations 9-3 and 9-4].

³ Richard Johnstone and Sumitra Vignaendra, *Learning Outcomes and Curriculum Development in Law* (2003).

⁴ Not included are the new programs at the University of Southern Queensland or RMIT, as insufficient information about their Professional Conduct teaching could be located on their respective websites; the new program at the University of South Australia was included.

that will help them develop their own programs; and (ii) underpinning suggestions as to what might be included in Australian law school curricula, as legal education develops in the 21st century, in order to achieve the goal of “inculcat[ing] in Australian law students the values of professionalism, ethics and service”.

Information obtained

In analysing the ethics-related content currently found in the curricula of Australian law schools, initial attempts at collation have produced 3 broad categories and a number of sub-categories. It is difficult to avoid some measure of overlapping, but a useful breakdown follows. This categorisation draws on what the law schools themselves have specified is being taught in their “professional conduct” subjects (however titled). It is largely for this reason that overlaps appear.

Also for this reason, some categories listed below probably do not fall into the “professional conduct” basket, but are more a representation of affinities law schools believe exist between professional conduct and other matters. That is, the subject(s) that are utilised by a law school to teach ethics and professional conduct matters are also regarded as suitable vehicles for teaching other matter.

The content of Australian subjects on ethics and professional conduct includes, relevantly, matter on the following topics (numbers of law schools in bold in parentheses):

1. Lawyers and Clients

- a. Practical skills – communication, interviewing, listening, drafting, oral advocacy, teamwork, work independently, appreciating cultural diversity, research/analysis of evidence (**11**)
- b. Representation and advice (**5**)
- c. Lawyer duties to clients (**19**)
- d. Confidentiality/conflict of interest (**8**)
- e. Lawyer fees and costs (**10**)
- f. Trust accounts, use of clients’ money, bookkeeping (**18**)
- g. Legal dispute resolution processes (**8**)
- h. Types of legal work & work structures (**8**)

2. Professional Traditions, Duties and Regulation

- a. History, Nature and Structure of legal profession & institutions (**22**)
- b. Self-regulation of the profession, competition and reform (**10**)
- c. Nature/importance of ethics, ethical responsibilities, rules of conduct and disciplinary processes (**30**)
- d. Roles of lawyers, barristers, prosecutors, judicial, non-lawyers (**12**)
- e. Duties to court (**14**)
- f. Duties to other practitioners (**11**)
- g. Duties of Competence and Care (**2**)
- h. Fiduciary Duties (**11**)
- i. Professions and professionalism in general (**7**)

3. Advocacy and Justice

- a. Social/political/economic context of law (**10**)
- b. Ethics in negotiation and skills (**2**)
- c. Access to justice (**10**)
- d. Poverty and public interest law (**5**)
- e. Adversary system and its fairness, advantages & limitations (**9**)

- f. Acquiring skills of ethical orientation (**12**)
- g. Service (**6**)

Some preliminary analysis of content

Ethics and professional conduct is taught in Australian law schools

Perhaps most immediately apparent, although not startling given the Priestley Eleven requirements, is confirmation of the AUTC *Learning Outcomes* finding about the prevalence in law degree courses of “something in the nature of legal ethics subject matter”. Indeed, on paper, the coverage is universal, as all 30 law schools report that they have subjects in which the “nature/importance of ethics, ethical responsibilities, rules of conduct and disciplinary processes” are included.

Content associated with legal professional identity

Nearly ¾ of law schools (numbering 22) consider professional conduct subject matter in tandem with material on the history, nature and structure of legal institutions and the legal profession. In these law schools, ethics and professional conduct are seen as integral to the understanding of what it means to be a lawyer, of the lawyer’s role in society. One way of characterising such an approach is to say that it promotes the value of professional, or (more narrowly) legal practitioner, identity.

Content associated with practical legal and generic skills

Over 1/3 of law schools (numbering 11) accept an association of practical skills teaching with professional conduct teaching. These law schools may be said to hold to a view that professional conduct “fits” with the teaching of practical skills (or, from the reverse perspective, that the teaching of practical skills is best included in a topic that includes professional conduct). Put another way, a subject on lawyers, and more particularly “lawyering”, is the place to teach both professional skills and professional conduct.

Content associated with a contextual approach

Nearly the same proportion of law schools (numbering 10) teach ethics and professional conduct in subjects that consider law from a contextual (eg social, political, economic) perspective and/or subjects that explicitly address the issue of access to justice. This type of approach is not one where ethics and professional conduct teaching is located in a lawyering context, ie oriented to the *rules* of professional conduct that a lawyer must follow. Rather, these law schools take the view that teaching ethics and professional conduct is necessarily connected to broader community values and objectives.

Content associated with generic professional identity

Related to the preceding matter is the indication that some law schools (numbering 7) include in their professional conduct subjects content on the broader notions of “professionalism” or the nature of a “profession”. In almost all these cases, it is clear that these concepts are meant to go beyond “legal professionalism” and the “legal profession”. This approach provides students with a more global understanding of professional meaning and values, against which the notion of being a legal practitioner may be considered.

Content associated with development of an ethical disposition

There are 12 law schools whose available information indicates that their professional conduct subjects attempt to assist students to acquire skills of ethical orientation. In other words, the subject provides students with tools to allow them to recognise ethical dilemmas when they arise and how to resolve them. One law school refers to this as ensuring a “framework of ethical analysis” is provided to its law students.