

SUBMISSION TO REVIEW OF AUSTRALIAN HIGHER EDUCATION 2008

How Better Funding of Australian Legal Education Will Add Serious Value to Australian Society

Introduction

The Council of Australian Law Deans (CALD) is the peak body for Australia's 31 law schools.¹ CALD has made a formal submission to the Review of Higher Education 2008, based on outstanding work currently being done by its project team under an Australian Learning and Teaching Council (ALTC, formerly Carrick Institute) discipline-based initiative (DBI) grant. This highly promising project has an exciting focus, relatively new for the discipline of law, on:

- the desirable attributes that law graduates should have;
- how ethics, professional responsibility and the ethos of public service are most effectively embedded;
- how, through the articulation of and commitment to a set of standards, the quality of all Australian law schools may be lifted;
- how the well-being of law students, including their mental health, is best secured; and
- what mechanisms, such as the newly-formed Australian Academy of Law, can best sustain these advances into the future.

The present submission, from the current Chair and the Immediate Past Chair of CALD, entirely endorses CALD's formal submission, and views it as a very positive case, based on real developments and innovation in the discipline, for better funding, in order to ensure that the positive aspirations of the discipline can become a reality.

The point of the additional submission from the current Chair and Immediate Past Chair is simply to go 'back to basics', and to explain the significance of lawyers, lawyering and legal education in a broader context, rather than to take for granted that these things are known and understood, even by well-qualified and experienced educationalists.

Outline of this submission

In February 2007, CALD made a submission to the then Department of Education, Science and Technology (DEST) in relation to DEST's review of the funding cluster mechanism under the Higher Education Support Act 2003. In our view, that submission remains as compelling now as it was then, and is worth revisiting. It is available on CALD's website at <http://www.cald.asn.au/>.

In its 2007 submission, CALD explained the reasons for the historical underfunding of the discipline of law. In this submission, we simply take the opportunity to state with extreme brevity:

¹ See <http://www.cald.asn.au/>. The newest and most recent law school to be admitted to membership of CALD is the law school at the University of Southern Queensland. RMIT also has an accredited JD program in its School of Accountancy.

- why lawyers are important to a civil, fair, just, tolerant, well-functioning, innovative, and prosperous society;
- why this has generally not been well understood;
- how this misunderstanding has affected the funding of legal education and why this poses a threat to Australian society; and
- why the current opportunity to revitalise and foster innovation in legal education should be seized with both hands.

Why we need lawyers

Lawyers add value to society at a number of levels. First, lawyers are indispensable in administering the framework of laws that govern our lives and in thereby ensuring the efficacy of our day-to-day personal arrangements and business transactions.² This is well-enough understood to be sometimes taken for granted.

Secondly, and less well understood, lawyers are in a unique position to use their specialised knowledge and skills both to promote understanding of and respect for the rule of law as the underpinning of civil society, and to contribute to the continuous improvement of the law and the operation of the legal system.

On the former point, Australian lawyers have been prominent, nationally and internationally, in educating the community and calling for adherence to the rule of law.³ On the latter point, many law schools today have developed an ethos of law reform and social justice that adds an entirely new dimension to the 'black letter' approach of the past.⁴

Thirdly, lawyers possess to a high degree the generic skills of thorough research, critical analysis, clear communication, and creative problem-solving, that add value in a wide range of occupations beyond mainstream legal practice, and explain in part why so many lawyers gravitate to positions of community leadership and responsibility.⁵

Fourthly, with the increasing internationalisation of legal education and the growing export of Australian legal services, Australian lawyers are becoming pivotal to Australia's export earnings. As the CALD formal submission explains, 16% of Australian legal services are delivered in international commercial transactions. Through the efforts of CALD and others, Australian law degrees are becoming increasingly recognised for the purpose of admission to legal practice in other countries.⁶

Why this has been poorly understood

Stereotypes of lawyers have abounded since the earliest days of 'lawyer jokes'.⁷ There appears to be a combination of reasons for this:

² For an elaboration of this and the subsequent points, see <http://law.anu.edu.au/deansMessage.asp>.

³ See, for example, the CALD statements in relation to the David Hicks Case, and also the recent situation in Pakistan, at <http://www.cald.asn.au/>.

⁴ See Michael Coper, 'Law Reform and Legal Education: Uniting Separate Worlds' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (The Federation Press, 2005) 393.

⁵ These and other points are well elaborated in the comprehensive submission to the Review of the Australian Law Students' Association (ALSA), which we commend to the Review.

⁶ See *Studying Law in Australia*, a publication of CALD, at <http://www.cald.asn.au/slia/>.

⁷ See Marc Galanter, *Lawyer Jokes and Legal Culture* (2005).

- in part it is generic to the professions, where material wealth for those at the top has focused attention on the privileged monopolistic nature of professional practice rather than on the other defining characteristic of a profession, namely, the ethic of public service;
- in part it has been encouraged by notorious examples, even if few in number, of abuses and bad apples, to which all human occupations are subject;
- in part it has been based on a perception of legal process as an unnecessary hindrance to the efficient transaction of business rather than as a necessary safeguard against corruption and malpractice; and
- in part it has proceeded upon a misunderstanding that legal research, and therefore legal education, is simply a matter of being familiar with a set of rules, and upon a failure to appreciate the creativity in ascertaining, analysing, synthesising and critiquing legal rules, let alone the intellectual dimension of understanding legal rules in their political, social, economic, philosophical, psychological and cultural context.

Whatever the reason or combination of reasons, it is imperative that anyone with a serious interest in higher education, including those concerned with the current review, should understand and be receptive to the positive message about lawyers and how they add value to society, and be especially careful not to internalise the negative stereotypes, from which have flowed some very poor decisions in the past that continue to have an adverse effect on capacity building in Australian law schools and on the resources invested in legal education, as outlined below.

The historical underfunding of Australian legal education

It is well known in legal circles, though less well known outside them, that, for at least two decades—ironically coinciding with the rapid growth of Australian law schools and the (consequently largely unrealised) potential for innovation in legal education—Australian legal education has been funded on the basis of two fundamentally flawed assumptions.

Passive knowledge: the first assumption was that the transmission of legal knowledge could be effectively achieved by chalk and talk in large classes; this assumption largely explains the current low government contribution to the cost of legal education.

High earnings: the second assumption was that law graduates, as a class, go on to have amongst the highest earnings in the community; this assumption largely explains the current high student contribution, through HECS, to the cost of legal education.

These matters are elaborated in CALD's 2007 submission to DEST, noted earlier. As to the first assumption, it is sufficient to say that it has been completely superseded by recognition of the need to focus on *skills training* rather than on mere knowledge of the rules, utilising small group exercises, clinical experience, and more intensive feedback and assessment, thus requiring a much better student-staff ratio.

As to the second assumption, it is sufficient to say that such empirical studies as there are, coupled with recognition of the diversity of careers entered into by law graduates, suggest that *law graduates do not stand out as high earners* in any way that justifies being asked to make the highest contribution of any discipline to their own education.

Perpetuation of the negative stereotypes: moreover, the relatively high contribution required of law students, and thus the overall level of debt, sends out all the wrong messages about law and legal practice as the selfish pursuit of material reward rather than as a public good and an opportunity for public service.

The misunderstanding and misuse of high demand: a further obstacle to changing the status quo has been the view that current funding arrangements have not suppressed demand for law places, and the associated view that there is no need to stimulate more demand. In our view, this misses the point. The level of funding is fundamentally about the quality of education that can be imparted. The current level of funding, irrespective of the balance between the government and student contributions, and notwithstanding creative self-help by many law schools through fee-paying postgraduate programs, sponsorships, and consultancies, is inadequate to ensure that quality.⁸

The downside of underfunding

CALD's 2007 submission to DEST explained not only the flawed assumptions behind the current funding of Australian legal education, but also the economic cost to the nation of poor lawyering, including the promotion of unnecessary litigation, the failure of insight into clients' real problems, an inability to frame constructive solutions, the lowering of ethical standards, and an inability to adapt existing legal knowledge to new situations.

Constructive and socially responsible and responsive lawyering requires education and training that connects with, motivates and inspires individual students, a situation which under current arrangements cannot be assumed or guaranteed. We need to produce lawyers who are great because of their legal education, not in spite of it.

With the ALTC project well underway, Australian legal education is poised to make giant leaps forward. However, to make these giant leaps possible, it is necessary to recognise the new imperatives of legal education and to fund the initiatives occurring within the discipline accordingly. This is not just a matter of recognising or dwelling on the mistaken approaches of the past; it is a matter of facilitating the needs of the future.

What can be done?

The point of this submission, which resonates and should be read with the more detailed submissions from the Law Council of Australia and the Australian Law Students' Association, is not merely to call for better funding for legal education. It is to make a plea for better understanding of the role lawyers play, how they add value to society, and how poor lawyering is a real social cost.

Once that is understood, and once it is also understood how the quality of the education that lawyers receive is directly a function of the resources that can be deployed to shift from undifferentiated mass education to tailored skills training, clinical experience, and deep embedding of ethical values, then the case for better funding is compelling.

⁸ The ALSA submission (n5 above) catalogues in detail the real impact of the current level of funding.

Enhanced funding would ensure that all the good research and other fieldwork currently going on in the area of legal education,⁹ including CALD's own project to better identify desirable graduate attributes and to better adapt educational programs and methods to the achievement of those attributes, would more likely bear fruit.

Professor Bill Ford
Dean of Law, University of Western Australia
Chair, Council of Australian Law Deans

Professor Michael Coper
Dean of Law, Australian National University
Immediate Past Chair, Council of Australian Law Deans

4 August 2008

⁹ Including impressive work overseas, particularly in the US: see especially William M Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (The Carnegie Foundation for the Advancement of Teaching, 2007); Roy Stuckey et al, *Best Practices for Legal Education: A Vision and Road Map* (Clinical Legal Education Association, 2007).