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REVIEW OF AUSTRALIAN HIGHER EDUCATION: QUESTIONS FOR DISCUSSION

CALD SUBMISSION

Introduction

The Council of Australian Law Deans (CALD) is the peak body of Australian law schools. It represents the 31 law schools that offer courses of study (typically Bachelor of Laws or Juris Doctor) that are currently accredited for the purpose of rendering graduates eligible for admission to legal practice. See <http://cald.anu.edu.au/>.

A significant function of CALD is working collaboratively across these educational institutions. A key project currently being overseen by CALD and operating with funding support from the Australian Learning and Teaching Council (ALTC) is entitled *Learning and Teaching in the Discipline of Law: Achieving and Sustaining Excellence in a Changed and Changing Environment*. This CALD/ALTC project is closely examining a number of areas associated with ensuring the provision of high quality legal education to and quality outcomes for the diverse range of students who enter upon the study of law. These include graduate attributes; ethics, professionalism and service; standards for Australian law schools; building sustainability for the long term through improved links with relevant professional and regulatory bodies; and exploration of factors that can affect the mental well-being of law students.

This CALD submission proceeds by directing attention to a small select number of the Discussion Questions framed by the Committee in the *Review of Higher Education Discussion Paper* released in June 2008. In summary, CALD's views on these matters are as follows:

ANU College of Law, Australian National University; Faculty of Law, Bond University; School of Law and Business, Charles Darwin University; School of Law, Deakin University; School of Law and Justice, Edith Cowan University; School of Law, Flinders University Adelaide; Griffith Law School, Griffith University; School of Law, James Cook University; School of Law, La Trobe University; Division of Law, Macquarie University; Monash Law School, Monash University; School of Law, Murdoch University; Faculty of Law, Queensland University of Technology; School of Law and Justice, Southern Cross University; The Law School, University of Adelaide; School of Law, University of Canberra; The Melbourne Law School, University of Melbourne; School of Law, University of New England; Faculty of Law, University of New South Wales; Faculty of Business and Law, University of Newcastle; School of Law, University of Notre Dame, Australia; TC Beirne School of Law, University of Queensland; School of Law, University of Southern Queensland; School of Law, University of South Australia; Sydney Law School, University of Sydney; Faculty of Law, University of Tasmania; Faculty of Law, University of Technology, Sydney; Faculty of Law, University of Western Australia; School of Law, University of Western Sydney; Faculty of Law, University of Wollongong; Law School, Victoria University

Section 3.1 Meeting labour market and industry needs

Question 2 Innovation: History and professional accreditation requirements based upon the teaching of content have hindered systemic innovation in legal education. This could be addressed by utilising and adequately *funding an overarching structure*, such as the Australian Academy of Law, as a means of bringing academe and stakeholders (including legal practitioners and the judiciary) together as equal partners in creating a new educational paradigm for legal education leading to professional accreditation.

Section 3.3 The student experience of higher education

Question 13 Learning Outcomes: Legal education can be better developed through measuring learning outcomes that have been derived from Graduate Attributes statements and processes that encompass the full range of qualities that will lead to the production of law graduates who not only know how to *think* like lawyers, but who also know how to *perform* like lawyers and *conduct themselves* as lawyers should.

Section 3.7 Higher education's contribution to Australia's economic, social and cultural capital

Question 26 Knowledge Transfer: Legal education is exceedingly well placed to fulfil knowledge transfer and community engagement functions for higher education, provided adequate funding is in place to underpin the *clinical and other experiential models of learning* that will bring all law students directly into contact with ordinary members of society, especially disadvantaged or socially excluded groups. At the same time, law students will learn and be able to exercise the practical and professional skills that enhance the undeniable valuable contributions well trained lawyers make to a civil society and the economic well being of the nation.

Section 3.8 Resourcing the system

Question 28 Unintended Consequences of Funding Arrangements: Although adequately dealing with the teaching of conventional cognitive legal skills, legal education can struggle in current circumstances to sustain on a sector-wide basis models of learning and assessment that patiently nurture the development of the practical and professional skills that will best prepare graduates to be client-ready at the entry point of their careers. In addition to this *neglect of nurturing an appropriate skill base*, the level of debt resulting from the high differential between public and private contribution to the costs of providing legal education can tend to give law students and graduates the *incentive to focus inwards on material success* rather outwards on making the valuable contributions to the public good and civil society that lawyers are uniquely placed to provide.

Question 29: Adequacy of Current Funding Models

The current model of funding legal education is not adequate to produce on the widest possible scale the quality teaching that will allow today's and tomorrow's law graduates, coming from diverse backgrounds and capacities, to attain the qualities and flexibilities needed to meet Australia's economic and social needs in the most optimal fashion. Re-development of curriculum and teaching, learning and assessment methodologies will require both an *increased investment of public resources* and a *re-balancing of the contributions of students relative to the public investment*.

CALD now elaborates its views in respect of each of these five discussion questions posed in the *Discussion Paper*.

Question 2: Are there impediments to the higher education sector being able to innovate in the development of courses and programs? What are these impediments and how could they be removed?

The core academic basis for accreditation of law graduates for admission to practice is contained in so-called Uniform Admission Rules which are founded almost exclusively in knowledge and understanding of 11 areas of law. That is, legal education at its core is largely constructed around the *content* of the law and *cognitive skills*. This in turn creates a perception that legal education is primarily about knowledge transfer and associated gate-keeping forms of assessment. It is therefore perceived as something that can be sustained by relatively inexpensive forms of mass teaching oriented around the conventional lectures-and-tutorials paradigm, supplemented in more recent times by relatively low-level technological support (eg digital recording of lectures, electronic access to basic materials), and a signature assessment in the form of a content-based examination.

However, if one changes the focus of legal education from its current content emphasis to the qualities law graduates need to possess in order to be competent entry-level legal professionals capable of immediate provision of client services and adapting to changing workforce needs, a different picture emerges. Legal education would then be able to nest into the view expressed by DEST in its 2002 *Employability Skills for the Future Report* (at p 25):

More than ever before universities are being relied upon as a vehicle for advancement of both the national economy and wider society. They do this through the creation of new knowledge and by preparing graduates with appropriate skills and attributes. It makes sense then for them to maintain a focus on keeping graduate capabilities in line with the needs of the economy and society.

Although pockets of innovative approaches to curriculum and teaching can occur in individual law schools, these tend to be overwhelmed by the externally-generated emphasis on content as the linchpin of degree accreditation. As long as this remains, systemic innovation will be impeded.

In carrying out its functions, CALD works to develop strategic links with legal education's key stakeholders. These include, but are not limited to, the legal profession and its peak bodies (eg State and Territory Law Societies and Bar Associations; Law Council of Australia); and State and Territory Admitting Authorities and the Law Admissions Consultative Committee. In addition, individual law schools, or in some cases groups of law schools, attempt to develop similar links at the local level, and quite often with individual law firms and other actual or potential employers of their law graduates.

Although there is goodwill and cooperation on all sides, there is little in the way of an overarching structure that brings interested parties together as equal partners in an environment that is adequately resourced to pursue a new and sustainable paradigm for accredited legal education that puts as much focus on outcomes related to professional skills and attitudes as it does on inputs in the form of legal content. In such a structure, the world of legal academe would be in a position to work influentially with stakeholders in a process of root-and-branch examination and reform of the conventional educational model.

Such a well-funded structure is found in other disciplines such as medicine and business, but it is lacking in law. This interferes with innovation being undertaken on a wide-spread basis. Innovation thus tends to be

restricted to ad hoc project-based initiatives that are not easy to sustain and that have limited national impact. Rigidities set in.

The recently established *Australian Academy of Law* would be an excellent vehicle for driving the development of legal education that is more attuned to producing the outcomes needed, in the form of law graduates who are specifically educated and trained to possess qualities that go beyond knowledge of law but include *social and intellectual skills* and *professional attitudes and values*, and who are *evaluated* against such criteria. Like medicine, business and other disciplines, this body requires public resources to be able to initiate change and influence policy. It should be seen as integral to the development of legal education and the sustainability of change, and appropriately resourced for that purpose.

Question 13: How can the quality of learning outcomes in Australian higher education be measured more effectively?

The key is to recognise that it is a flawed view of legal education to over-emphasise what is referred to in the *Carnegie Report*, a recent review of American legal education, as the “intellectual/cognitive apprenticeship.”¹ Although knowledge and understanding of legal content and how to think like a lawyer are fundamental aspects of legal education and legal practice, their teaching cannot come at the expense of educating law students on how to perform like a lawyer and how to conduct themselves as lawyers should. In other words, the cognitive apprenticeship must be joined by a “practical apprenticeship” and by a “professional apprenticeship” to produce a fully-rounded law graduate suitable for employment and for making contributions to a just and civil society. Knowledge, skill and behaviour are interdependent. No lawyer can exhibit one facet entirely divorced from the influence upon and impact from the others. This approach echoes that recommended by the Australian Law Reform Commission in the chapter on legal education contained in its *Managing Justice Report*.²

Much of the work of the CALD/ALTC Project has, accordingly, concentrated upon legal education oriented toward ensuring that law students attain a full range of graduate qualities, including those associated with *professional values and ethics*. The processes and challenges of developing graduate qualities relevant to law and sharing implementation strategies for embedding these within the law curriculum have been at the core of this work. It has been recognised that compliance using university template documentation can occur relatively easily but that the real challenge is about building staff ownership and involvement in genuine curriculum renewal.

Through this process, the focus for lecturers will shift from content knowledge and transmission roles to a responsibility for ensuring the achievement of broad and transparent *outcomes consistent with graduate attributes*. Learning activities will be scaffolded to engage students in well-structured and varied tasks. A range of valid and reliable assessment aspects accompanied by explicit criteria will be used for students to demonstrate their knowledge, skills and values. Didactic and other traditional approaches will be supplemented by experiential learning placements, clinical opportunities and simulations, and e-learning. Space will be found for formative education that provides practice and feedback opportunities, a methodology more suited to the development and progressive enhancement of skills and attitudes than the

¹ See William Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond and Lee S Shulman, *Educating Lawyers: Preparation for the Profession of Law* (Carnegie Foundation for the Advancement of Teaching, 2007).

² Australian Law Reform Commission (ALRC), *Managing Justice: A Review of the Federal Civil Justice System, Report No 89* (Australian Government Publishing Service, 2000); see further ALRC, *Review of the Federal Civil Justice System, Discussion Paper No 62* (AGPS, 1999) p 46 (focus on what lawyers “need to be able to do” instead of what they “need to know”).

summative approach characteristic of content delivery. By engaging students in critical thinking, guided group-work processes, building reflection skills and journal writing, using role plays and experiencing ethical decision-making dilemmas, not only will the law curriculum re-invigorated, but deeper learning in the areas of knowledge, skills and values will be promoted.

Question 26: Do you believe that knowledge transfer and community engagement are legitimate and appropriate roles for contemporary higher education institutions? If so, how do you see this additional role for the higher education sector blending with its traditional roles and are there limits to these additional roles?

Looking at this question from the more focused perspective of higher education in law, CALD's view is firmly in favour of this "third stream" function for legal education. Legal education, provided it is adequately funded, and if freed from the rigidity of a content-based paradigm for professional practice accreditation, is extraordinarily well-placed to combine one of its core functions of teaching with community engagement. Arguably, the two ought to be inextricably intertwined.

One reason for this can be understood by noting the very value of properly educated and trained law graduates to the maintenance of the "civil and sustainable society" mentioned at the outset of the *Review of Higher Education Discussion Paper*, and to the cognate factors expanded upon therein. Lawyers add value to society at many levels.

Lawyers are indispensable in administering the framework of laws that govern our lives. Popular culture can make it too easy to buy into the negative stereotypes of lawyers and legal process as unnecessary hindrances to the efficient transaction of business. It is not lawyers *per se* that get in the way of achieving this desirable goal, but *poorly trained* lawyers.

Poorly trained lawyers are not only potentially a disaster for themselves but also for the nation. Poorly trained lawyers will give poor advice, at a considerable economic cost to the nation. This can manifest itself in a range of ways including promotion of unnecessary litigation; unproductive legal disputes; poorly drafted legislation and other documents requiring constant interpretation; the failure of insight into clients' real problems; a lack of capacity to adapt existing legal knowledge to novel or changing environments; the inability to see and frame constructive and cost-minimising solutions to legal problems that are durable and sensitive to client needs; and the weakening of ethical standards.

To the contrary, if their role is correctly understood, lawyers act to ensure the efficacy of our day-to-day personal arrangements and business transactions. Lawyers and legal process provide a necessary safeguard against corruption and malpractice.

Lawyers are also in a unique position to use their specialised knowledge and skills to promote understanding of and respect for the rule of law as the underpinning of civil society. For the same reasons, lawyers are uniquely able to contribute to the ongoing improvement of the law and the legal system. Those with legal skills and a sound understanding of the principles and values that underpin our legal system are indispensable to the promotion and maintenance of civil society. Moreover, they will have a special capacity to perceive and understand the flaws and imperfections in the law and the legal system, and a special ability to use their skills and knowledge to work for improvements. Ensuring that there are means for legal

education to reflect an ethos of law reform would allow an important new dimension to be added to the conventional “black letter” content-oriented approach.³

More generally, lawyers can possess to a very high degree the generic skills of research, analysis, criticism, communication, and problem-solving, that add value in a wide range of occupations beyond mainstream legal practice. It is not surprising that so many lawyers gravitate to leadership positions in the community and in their chosen endeavours, including, for example, business and politics.⁴

There is an important qualification to all of this. This qualification arises especially in light of the developments over the past two decades. These developments have diversified the pool of potential and actual law students and have dramatically increased access to legal education. The qualification is to recognise that the qualities required in law graduates in order to provide this value no longer can be expected simply percolate to the top through a culture of legal education that primarily drills on knowledge of law. Whatever may have “naturally” been produced in the past with the existence of a relatively small number of law schools drawing primarily elite students from the upper reaches of those matriculating from high school, those days are long gone. Rather today, in order to produce a more fully rounded law graduate, legal education must be oriented specifically to develop and nurture the desired qualities, alongside such knowledge acquisition as is deemed fundamental in these modern times. Once again, these are qualities rooted in professional skills and attitudes.

This implies developing legal education in such a way as to systematically give law students the opportunity, for example, to reach a deeper understanding of the complexities of ethical decision-making; to attain effective communication and negotiation skills that will promote non-litigious dispute resolution; to obtain authentic experiences in supporting people from various socio-economic backgrounds; to make a significant contribution as a professional during and on completion of their studies; to promote development of beneficial legal and public policy; and so forth.

A setting that encourages such outcomes is the *legal clinic*. The clinical model of legal education, invariably rooted in a public interest / legal aid context, truly does expose students to form of learning that is practical, hands-on, reflective and transformative. While it is an expensive model to operate (and therefore possibly unsuitable as a universal educational device), its features ought to be able to be replicated in other settings that integrate learning with “work” (in the broadest sense). These include legal practice and public sector placements, pro bono centre placements, opportunities for students to teach others (especially the disadvantaged) about the legal system, about access to justice, and about legal rights and legal responsibilities.

Viewed generally, the above are encapsulated by the label of *experiential learning opportunities*. That in itself is a broader concept (especially when discussed in contradistinction to “passive” or “observational” learning), which can include simulations (both in physical and virtual environments). As relevant to the community engagement role, the systemic development of legal education to include and require the provision of experiential learning opportunities to law students opens the door to higher education regularly fulfilling an important third stream function. While supplementing other legal aid services and building commitment for the future towards the social good and economic well-being, it will directly support disadvantaged groups, social justice causes and equity concerns. Knowledge and understanding of law, its

³ 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.

⁴ These and other points are well elaborated in the comprehensive submission to the Review of the Australian Law Students' Association (ALSA), which CALD commends to the Review.

role and its limits, will be transferred by law students to individuals and groups in the community who are not usually privileged with access of this nature. Not to be lost sight of is the benefit of more legal academics being in a position to be trained also to have a first-hand understanding of law's impact, and to bring that added perspective to bear upon their teaching, research and societal contributions.

Question 28: What incentives or unintended consequences are there in the current arrangements for higher education funding?

CALD's primary perspective, of course, is with the funding of legal education. The current arrangement has the law discipline at the very bottom end of Commonwealth contribution (a position which, until recently, it occupied alone) and the student contribution (as is noted in the *Review of Higher Education Discussion Paper*, p 65) at the highest percentage end.

This arrangement, coupled with the historical emphasis on knowledge acquisition and cognitive development (exacerbated by the professional academic accreditation criteria), has tended to entrench a signature pedagogy of inexpensive "chalk-and-talk" (supplemented in more recent times by low-level technological support) content delivery. The same factors have also tended to entrench unimaginative signature summative assessment forms (examination and problem assignment). Although individual law schools do, from time to time, make important inroads, lack of resources and the content emphasis work together to make the sustaining of these inroads a constant battle, often dependent upon individual rather than institutional commitments, with a history of backsliding and vacillation.

In addition, a low government contribution and a high student contribution sends a message. This message is that becoming a lawyer is all about having a successful and materially rewarding personal career, and not at all about making a contribution to the public good. There is little recognition or even awareness of the ways in which lawyers can and do add value to the society they serve (see above).

Understanding the law as it is will be pivotal to being an effective lawyer. However, the broader professional responsibilities of lawyers and lawyering go beyond this. The funding imbalance sends out a strong message that being a lawyer is about looking inward rather than outward. It dampens the aspirations of law schools to harness the natural idealism of many beginning law students and to educate them not only for selfish but also for altruistic ends. There is, in addition, reliable evidence from American research studies (now being further explored in Australia by the Brain and Mind Research Centre at Sydney University in cooperation with the CALD/ALTC Project and a substantial number of individual law schools) that it also *heightens student anxiety*, stress and problems of mental well-being, and that this tends to extend into the professional legal practice sector at higher levels than found in the general population, producing ill effects (of a health, social and economic nature) for individuals and society at large.

Question 29: To what extent are the current funding models adequate to secure the future of Australia's higher education sector? If there are better models, what are they?

It will be obvious from the above that CALD's view is that the current funding model for law is not adequate to produce on the widest possible scale the quality teaching that will allow today's and tomorrow's law graduates, coming from diverse backgrounds and capacities, to attain the qualities and flexibilities needed to meet Australia's economic and social needs in the most optimal fashion. Re-development of curriculum and teaching, learning and assessment methodologies will require both an increased investment of public resources and a re-balancing of the contributions of students relative to the public investment. The re-balancing will recognise not only the private benefits law graduates can gain from their education, but the large public benefits referred to above that arise when well-trained lawyers emerge from the law school

system. To take up one example, currently more than 16% of Australian legal services are delivered in *international* commercial transactions. This is an area of rapid growth in legal practice with enormously important implications and potential for Australian exports. Our lawyers must be trained for this important aspect of Australian legal services. It is now well recognised and acknowledged by the legal profession, and by legal educators, that our lawyers must be adequately trained for this important aspect of the provision and export of Australian legal services. Law schools need to be able (and adequately resourced), to respond appropriately at both the undergraduate and graduate levels to these particular emerging demands.

Resource constraints have a qualitative impact upon the capacity to deliver quality teaching in law. The new approaches discussed above require that those teaching in law schools find the time to re-focus on the new, fully rounded paradigm for legal education, and to themselves be trained to teach and assess beyond the cognitive domain. They will need time for critical review and up-dating; for more closely engaging with external stakeholders and their involvement in course design, delivery and evaluation; for intensifying opportunities for timely and useful feedback that make full and appropriate use of both formative and summative means; for expanding experiential learning opportunities; etc.

More specifically on the matter of the need for mandatory experiential learning, including clinical education and placements, the point must be made that, unlike other professions (eg in the health field) which have historically developed an infrastructure and have secured public funding for coordination of placements and clinics, legal education, as a discipline, has not been provided with similar sustained infrastructure and support. Systematic evaluation and updating of experiential placements for all law students; updating academics' skills to be able to teach, supervise and assess in this domain; revising the curriculum to scaffold towards placements; establishing administrative support to liaise and coordinate; provision of professional development for practitioners in connection with the mentoring responsibilities of experiential learning; etc, are resource-intensive and can only be accomplished with targeted resources and ongoing support.

Advances in technology also need to be better harnessed on a systemic basis and move beyond their current low levels that consist primarily of alternative delivery of content via an on-demand and on-line environment. There is work, for example, that has been done in Scotland, in developing a sophisticated software program ("**SIMPLE**" – **SIM**ulated **P**rofessional **L**earning **E**nvironment) that provides students with a virtual environment in which realistic simulations can operate that allow them to utilise their legal knowledge and learn, practise and improve their practical and professional skills. This can occur in a "safe" setting, with no dangers to the rights and interests of real people or society. This is, as may be expected, expensive, but it is just the type of investment in legal education that can pay high dividends in Australia's economic and social interests.

In summary on resources, there is a danger to be avoided at this crucial juncture. It is that a continuation of low levels of public investment in legal education will cause over-worked academics, even those with great enthusiasm, simply to focus on the (comparatively) easy-to-meet demands that emphasise knowledge acquisition, cognitive development and a gate-keeping function.

Conclusion

This submission should be read with those from the Law Council of Australia and the Australian Law Students' Association. Its purpose is to direct attention to the positive outcomes that will arise from a better understanding of what lawyers are for, how they add value to society, and how poor lawyering is a real social cost. Enhanced public investment in Australian legal education will further Australia's economic and

societal future as well as preparing the vast bulk of Australia's law graduates for the dynamic market for legal services that exists today and that will continue to grow.

The quality of the education that lawyers receive is directly a function of the resources that can be brought to bear on that education. It is imperative to shift from passive mass education to tailored skills training, clinical and other experiential learning, and deep embedding of ethical values. In this context, the case for a greater level of investment is compelling.

Much good work is currently going on in the area of legal education, including the CALD/ALTC Project described in this submission. Better funding for the discipline would encourage and foster this work, and greatly enhance its prospects of success.