

**Australian Academy of Law /Australasian Law Teachers Association**

**2012 Perth Roundtable**

**Trends in Legal Education for Practice**

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First of all I would like to thank Curtin University and in particular the organising committee, Professor Dale Pinto, her Honour Judge Gillian Braddock, the Honourable Robert Nicholson and Erika Beazley for organising this event and for inviting me to speak on this topic. You have done a tremendous job in organising such a prestigious group of speakers and commentators.

It is also an important and timely initiative to bring together the academy, the Australian Law Teachers Association and the legal profession to discuss these issues as I understand only last week the Legal Practice Board approved Curtin University's Bachelor of Laws (LLB) degree which will commence in semester one 2013.

It is also timely for me on a personal level having just left the School of Law at Murdoch University to go on secondment to the Centre for Human Rights Education at Curtin University, a multidisciplinary centre. It has given me an opportunity to pause and reflect upon my thoughts and experiences in legal education.

I should also like to acknowledge that the Supreme Court Building stands on the traditional lands of the Noongar People. I would like to pay my respects to their elders both past and present. It was a great privilege to be on the Law Reform Commission of WA during the

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<sup>1</sup> Tani and Vines, 'Law students Attitudes to Legal Education: Pointers to Depression in the Legal Academy and the Profession', (2009) 19(1) *Legal Education Review* 3.

time of the reference in relation to Aboriginal Customary Law and I would like to acknowledge and pay respects to their rich culture of laws and traditions as we gather here to discuss the important topic of legal education.

There are quite a few issues I hope to cover in my time. I will begin by discussing the debates in legal education around knowledge acquisition and skills training. I will also talk about mental health and law students and conclude by making some brief comments about new technologies and the development of JD courses.

Not all students pursue a law degree with the same expectations and aims. Perhaps most enrol in law school with the intention of practicing at the completion of their degree. Not all law students aspire to practice law. Others may enrol for the intellectual challenge and out of an interest to know more about the law and its role in society. Some may think a law degree will give them knowledge and skills set which will be of assistance to them in some career or way of life other than legal practice. Then there are those who may enrol “because they were accepted” and are seeking some validation from their family or peers. In fact one study carried out at the University of NSW found that one third of law students said they chose law to please their family.<sup>1</sup>

Intentions may vary whilst students undertake their studies but we know that a large proportion of law students – perhaps as many as 50 per cent will not enter into private practice upon graduation. Many will enter into government employment, politics, accountancy or academia. Others will work as in-house lawyers or community lawyers. Increasingly law students are working in the international sphere for companies or international organisations.

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<sup>1</sup> Tani and Vines, ‘Law students Attitudes to Legal Education: Pointers to Depression in the Legal Academy and the Profession’, (2009) 19(1) *Legal Education Review* 3.

Law schools have a responsibility to each of these classes of student. This is to say that what we are educating our students for may be a range of things, depending on the student.

Legal education does more than develop students understanding of the law it is the genesis for the formation of their professional identity. Education of any professional is a complex process. The challenge for legal education is how to link the interests of legal educators with the needs of the legal profession and with the broader public the students may go out to serve.

Traditionally it has been assumed that legal education is seen as a trade or professional education teaching students to acquire knowledge and a number of technical skills. Law schools have placed their emphasis on teaching of content and developing skills of legal analysis. The focus has been upon meeting the prescribed academic areas of knowledge which are set by the Law Admissions Consultative Committee, known as the “Priestly 11”. These represent the core of compulsory subjects which all law schools agree to teach to law students as a pre-requisite to admission to the legal profession. These requirements have remained more or less unaltered since their introduction in 1987. These academic requirements are complemented by Practical Legal Training requirements which are commonly undertaken after the completion of a law degree.<sup>2</sup>

The segregation of academic from the vocational aspects of law has been the subject of criticism over the last 2 decades. After a review of Australian law schools in 1987 the Pearce Report concluded that skills teaching needed to be integrated with intellectual skills.<sup>3</sup> The

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<sup>2</sup> Both of these standards can be found at [http://www.lawcouncil.asn.au/lacc/documents/admission\\_policies.cfm](http://www.lawcouncil.asn.au/lacc/documents/admission_policies.cfm).

<sup>3</sup> DE Pearce, E Campbell, & D Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission: A Summary and Volumes I-IV* (Canberra: AGPS, 1987).

Report nominated three aspects of skills teaching that required greater attention: oral expression and legal advocacy; drafting skills; and negotiation and interpersonal skills. Unfortunately the report lacked clarity as to how this could be done.<sup>4</sup>

Similarly in the United States a review of law schools conducted on behalf of the Carnegie Foundation called for “fundamental changes in both the structure and content of legal education in the United States to integrate realistic and real-life lawyering experiences throughout the curriculum, and challenges American law schools to produce lawyers who are not only smart problem-solvers but also responsible professionals committed to service of both clients and the larger society.”<sup>5</sup> Australian academic Professor Gary Davis after attending an international conference to discuss the Carnegie Report noted the importance of teaching professionalism and that “if students receive the message that intellectual capacities are prized beyond all else, then they will rely upon that in their future behaviour as legal practitioners. They will tend to be unconcerned with the impact their behaviour has on others”<sup>6</sup> or more simply put, the legal profession needs more “caring hearts” as opposed to “brilliant minds.”<sup>7</sup>

The recent work of Australian Learning and Teaching Council on developing a set of Threshold Learning Outcomes (TLOs) for the Bachelor of Laws is an important step forward in articulating standards for law schools that integrates “lawyering skills” into the

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<sup>4</sup> William M Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond and Lee S Shulman, *Educating Lawyers: Preparation for the Profession of Law* (2007).

<sup>5</sup> Ibid.

<sup>6</sup> Gary Davis, INTERNATIONAL CONFERENCE ON THE FUTURE OF LEGAL EDUCATION, Georgia State University College of Law, Atlanta, GA, USA (20-23 Feb 2008) Report to Council of Australian Law Deans ( April 2008).

<sup>7</sup> Ibid.

curriculum.<sup>8</sup> The TLOs are to be read with the Priestly 11 in terms of areas of knowledge and they specify what a Bachelor of Laws graduate is expected to ‘know, understand and be able to do as a result of learning.’ The TLOs deal with 6 areas: knowledge; ethics and professional responsibility; thinking skills; research skills; communication and collaboration and self-management. The TLOs were endorsed by the Council of Australian Law Deans in November 2010, and it is anticipated that the new Higher Education Quality and Regulatory Framework (TEQSA) developed by the Federal Government will use the TLOs as part of the standards by which it will evaluate and register the performance of tertiary education institutions in Australia.

Importantly in addition to law graduates demonstrating and understanding of legal knowledge the TLOs articulate that a law school’s curriculum should also address intellectual and practical skills, critical analysis; professional responsibility and reflective practice. The standards are broadly stated which allows for autonomy for schools to develop their curriculums in innovative ways.

More and more law schools are realising the importance of a dynamic curriculum that integrates the teaching of legal doctrine and analysis along with introducing students to units which will help them connect with the law in a more dynamic way that will assist them in developing skills in serving clients and provide a solid ethical grounding. Exploring the role of legal practitioners in society has seen many law schools offer opportunities for clinical legal education, externships with community organisations, internships, international externships and a variety of experiential courses.

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<sup>8</sup> Australian Learning and Teaching Council, *Bachelor of Laws Learning and Teaching Academic Standards Statement* (2010), Authors: Sally Kift, Mark Israel, Rachael Field.

I would like to talk a little more on clinical legal education (CLE) as this has been an area in which I developed and taught for some years at Murdoch University. The CLE program at Murdoch provides law students with the opportunity to obtain practical experience located at the community legal centre, SCALES, which has offices in Rockingham and on the Murdoch campus. The program has been running for almost 15 years and was the first of its kind in Western Australia. As it is in a CLC the clients are from a range of backgrounds that are likely to be divergent from those of the students and include: migrants, refugees, prisoners, Aboriginal people and other minority and disadvantaged groups. At the clinic students work with clients and cases under expert supervision.

The clinic provides opportunities for students to develop concrete practical skills such as interviewing, drafting, negotiation and communication. Regarding clinics as only skills training is to narrow the vision of CLE and serves to reinforce the split between theory and practice. The live client experience means students have to take the responsibilities and make the decisions and judgments of a solicitor (albeit with the directed support of their supervisors). The experience generally works like this:

1. Students are asked to meet and interview a client
2. Students then must discuss the problem presented by the client to their supervisor. In discussing the problem there are several challenges: the client presents with concrete specific facts (how specific will depend on the client!) that is not pre-digested or structured for the student as is the case in many law units. Problems require the consideration of different dimensions – legal, practical, personal.

3. Students must deal with those problems in the role of a practitioner, they bear responsibility for the approach for how they will approach the problem, plan a course of action and implement it.
4. A student's performance is subjected to intensive critical review and reflection with supervising staff and other students and used for planning future conduct.

Legal education has often sequestered itself from other disciplines. In a clinical setting the fact that it is real life and focused on the client - non-legal issues are not filtered out – students realise that client work is about responding to a real person's situation however it might present itself. Such real life experiences also mean students have an opportunity to understand that clients present with as many non-legal issues as legal issues and this provides an important opportunity to learn and engage with other disciplines in problem solving.

The benefits of clinical legal education are obvious; the problem is of course funding priorities and sustainability in an environment of shrinking budgets. Law Schools are often proud of their clinical programs but the rhetoric is not matched by substantive involvement in the structures and processes.

Important research on developing best practice standards for clinical legal education in Australia is being developed through a joint project involving Monash University, UNSW, Murdoch University, Griffiths University, ANU and La Trobe.<sup>9</sup> It is funded through a grant from the Australian Learning and Teaching Council. The project has already done some useful mapping of CLR in Australia. The project aims to “develop a set of standards for effective clinical legal education, and to assist in the renewal of University law curricula in

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<sup>9</sup> For a discussion of the project and interim reports see <<http://www.law.monash.edu.au/about-us/legal/altc-project/>>.

Australia. The project will investigate current practices in clinical programs with the aim to explore the different approaches to clinical learning and effective practice.”

### **Mental health and law students**

As educators we need to also be concerned about the health and well-being of law students. Many of us are aware of the research that suggests persons practicing within the legal profession are at risk in terms of their mental health and wellbeing. The work of the Law Society of Western Australia, in particular research and public advocacy of their President Dr Kendall, is to be congratulated on bringing this issue to the attention of the profession in WA. There is also research which clearly suggests that the risk to mental health and wellbeing of legal professionals begin with a person’s experience in Law School. This has implications both for the law school curriculum and for professional development

A research study, “Courting the Blues” from the Brain and Mind Research Institute of the University of Sydney published in 2009, studied 741 final-year law students from the thirteen law schools.<sup>10</sup> The study revealed high levels of psychological distress and risk of depression in the law students, when compared with Australian community norms and other tertiary student groups. The research found that 35% of law students suffer high to very high levels of psychological distress.<sup>11</sup> These levels of psychological distress are more than 20% higher than those found in the general population.<sup>12</sup> The report did not go onto identify what factors either inherent in the student population or in their experiences in law school that contributed to these findings.

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<sup>10</sup> Kelk, N., Luscombe, G., Medlow, S., & Hickie, I. (2009). *Courting the blues: Attitudes towards depression in Australian law students and lawyers*. Brain & Mind Research Institute Monograph 2009-1.

<sup>11</sup> Ibid, p 11.

<sup>12</sup> Ibid, p 12.



Another study carried out across a range of students at UNSW in 2005 identified attitudinal differences between law students and those in other disciplines including low levels of personal autonomy and a strong element of competitiveness.<sup>13</sup> Research may also indicate that law students' problems may begin in their first year. A pilot study of first year law students at the ANU conducted in 2009-2010 compared students entering law school with those who had finished their first year and made some preliminary findings that those students who were at the end of their first year had higher stress and distress levels.<sup>14</sup> More broadly there have also been studies which have found that law students' experience a loss of altruism and their "commitment to social justice principles and public interest practice diminishes over the course of their studies."<sup>15</sup>

One response to these studies is to assist students to seek help and to develop strategies for coping with stress during law school. Positive initiatives in this respect have been developed by the Australian Law Students Association and by resilience initiatives at a number of other universities.<sup>16</sup> But it also challenges us to think about ways of developing curriculum in law schools that from the first year that addresses these issues. One example proposed is to teach non-adversarial practice in the first year of law.<sup>17</sup>

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<sup>13</sup> Tani, M., & Vines, P, 'Law students' attitudes to education: Pointers to depression in the legal academy and the profession?' (2009) 19 *Legal Education Review* 3.

<sup>14</sup> Hall, K., Townes O'Brien, M. & Tang, S. 'Developing a professional identity in law schools: A view from Australia' (2011) 4(1) *Phoenix Law Review* 19.

<sup>15</sup> Walsh, T, Putting justice back into legal education, (2007) *Legal Education Review* 119, at 120.

<sup>16</sup> See Australian Law Students Association *Handbook on depression in Australian law schools*, <[http://www.alsa.net.au/assets/publications\\_ALSA\\_depression\\_handbook.pdf](http://www.alsa.net.au/assets/publications_ALSA_depression_handbook.pdf)>; Antolak-Saper, Natalia, Lloyd England and Anthony Lester, 'Health and Wellbeing in the First Year: The Law School Experience' (2011) 36(1) *Alternative Law Journal* 47.

<sup>17</sup> Field & Douglas, 'Teaching Non-Adversarial practice in the first year of law: A proposed strategy for Addressing High Levels of Psychological Distress in Law Students, Paper presented to the First Year in Higher Education Conference', QUT, 2011 <[http://www.fyhe.com.au/past\\_papers/papers11/FYHE-2011/content/pdf/14D.pdf](http://www.fyhe.com.au/past_papers/papers11/FYHE-2011/content/pdf/14D.pdf)>.

Apart from the educational benefits of some of the clinical and experiential courses mentioned previously these units may also help inculcate a sense of belonging through involvement, engagement and connectedness with their degree, educators and fellow students.

### **New Technologies**

Over the last two decades, the number of law schools in Australia has increased from 12 to 32. The number of law schools in WA has gone from 1 to 5 with the opening of a law school next year at Curtin University. With the increase in law schools so too should diversity feature in contemporary Australian legal education. Innovation and multiple options are desirable. One of which I will mention briefly is the use of new technologies and the development of the ability to access teaching resources on line. There are numerous advantages to utilising new technologies, they provide flexible and innovative teaching options and can provide access to rural and remote students. The challenges will be how to utilise these technologies in a way where students are supported and included and not isolated in their studies.

### **Funding and the delivery of legal education**

Concomitant with this increase in numbers of law schools has been a decline in government funding which places pressures on law school staff in terms of teaching and research.

Since the early 1980s, the Australian government funding to universities has declined, while student fees have increased. Endeavouring to meet funding problems the response of the higher education sector to increasing costs has been to increase student–staff ratios and reduce face-to-face contact time, for example by reducing the number of tutorials. In

general, students today are being taught in larger classes than 20 years ago. As well as higher student–staff ratios there has been an increased casualisation of academic teaching staff over the last 15 years.

The current funding arrangements has the discipline of law at the very bottom end of Commonwealth contribution (a position which, until recently, it occupied alone) and the student contribution at the highest percentage end.

The Council of Australian Law Deans has noted:

“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 their own career but also for altruistic ends. A low government contribution and a high student contribution sends a message, and perhaps is premised on the assumption, 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.”<sup>18</sup>

The Council argues that the traditional assumptions that studies in the arts, social sciences and humanities are primarily ‘classroom-based’ while other disciplines are ‘lab-based’ are no longer accurate, given the growth in fieldwork, innovative teaching methods, language laboratories and the use of interactive technologies in all disciplines.

The Council of Australian Law Deans made a similar point in its submission to a recent review higher education base funding, arguing that the current funding of law is based on a ‘fundamental miscalculation of the real cost of teaching law’. The final report of that review

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<sup>18</sup> CALD, Submission on funding of legal education, 2007 <http://www.cald.asn.au/resources>.

headed by former South Australian Education Minister Jane Lomax-Smith recommended increased funding for other disciplines (such as medicine, accounting and economics) the review stated that the government “should consider” increasing the funding level for law.<sup>19</sup> *The Australian* reported at the end of last month the Minister for Education stated that a formal response to the Base funding review would come in approximately 2 months time but he cautioned that proposals for increased funding in the “current tight fiscal environment” will be difficult to achieve.<sup>20</sup>

### **Introduction of the Juris Doctor**

I will conclude by mentioning briefly the emergence of the Juris Doctor qualification in Australia. There are a growing number of graduate entry courses, offered at both undergraduate and postgraduate levels, being introduced by Australian universities which are designed to allow graduates to enter the legal profession. There are 12 Juris Doctor (JD) courses offered in Australia, double the number accredited in 2006 (and more law schools are proposing to introduce one). The JD course is supposed to be the equivalent of a masters level qualification.

JD courses have emerged in part to respond to a demand to offer a career specific course to graduates who want to gain entry into the legal profession. A postgraduate full fee paying JD has also been seen as a response to the federal government funding policies which have left law schools underfunded.

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<sup>19</sup> Higher Education, *Base Funding Review, Final Report*, October 2011  
<[http://www.deewr.gov.au/HigherEducation/Policy/BaseReview/Documents/HigherEd\\_FundingReviewReport.pdf](http://www.deewr.gov.au/HigherEducation/Policy/BaseReview/Documents/HigherEd_FundingReviewReport.pdf)> at 61.

<sup>20</sup> <<http://www.theaustralian.com.au/higher-education/bfr-response-within-two-months-evans/story-e6frgcjx-1226461822150>>.

By necessity JDs and LLBs share substantial topic content and both curriculums have to be designed around the Priestly 11 to allow admission into legal practice. The challenge for law schools has been how to offer the two degrees and differentiate between the curriculum of the two degrees. It is clearly more cost effective for law schools to place JD students in the same classes as LLB students particularly for core subjects. However this has raised legitimate concerns about academic standards and there is considerable uncertainty about whether many JD courses are in fact undergraduate courses offered to graduates rather than masters level courses.

The development of JD courses seems to have been rather ad hoc. However there are moves to clarify the exact status and academic standards for the JD which will assist potential students and universities as well as other disciplines that offer or are proposing to offer similar professional courses in understanding the nature of the courses.<sup>21</sup>

Thank you for your attention to my talk. I apologise for the brevity of dealing with serious issues such as new technologies and the JD, they each warrant a delivery in their own right.

I look forward to hearing the discussion of the round table at the conclusion of these speeches.

*In the last analysis, the law is what the lawyers are. And the law and the lawyers are what the law schools make them.*

- Felix Frankfurter<sup>22</sup>

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<sup>21</sup> See Cooper, Jackson, Mason & Toohey, Mary The emergence of JD in the Australian Legal Education marketplace and its impact on academic standards', (2011) 21 *Legal Education Review* 23.

<sup>22</sup> Letter from Felix Frankfurter, Professor, Harvard Law School, to Mr. Rosenwald 3 (May13, 1927) (Felix Frankfurter papers, Harvard Law School library), *quoted in* RAND JACK & DANA C. JACK, MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS 156 (1989).