

# **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 (Summary)**

**(Gary Davis, April 2008)**

## **Background to the Conference and Australian Participation**

The point of departure for this conference was a report that is highly critical of American legal education, the so-called *Carnegie Report*. More formally, it is William M Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond and Lee S Shulman, *Educating Lawyers: Preparation for the Profession of Law* (2007). The Report was produced with the resources and under the auspices of the Carnegie Foundation for the Advancement of Teaching.

The *Carnegie Report*, to quote from what is found at the official Conference website (<http://law.gsu.edu/FutureOfLegalEducationConference/index.php>, accessed 28 April 2008), “calls 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.” The Conference was truly international in content and outlook. It brought together legal educators from a dozen countries (Argentina, Australia, Canada, England, India, Kenya, Nigeria, Russia, Scotland, South Africa, Spain, and the United States) with paper presenters from ten of those countries.

The coincidence of timing as between the Carnegie review of legal education and the current CALD/ALTC (formerly Carrick) Discipline Based Initiative in Law, along with the opportunity to learn from legal education initiatives from around the world, suggested that there would be considerable benefits to the work of the DBI from Australian participation. This notion dovetailed with the Conference organisers’ desire for attendees, especially those from America, to learn from the substantial progress Australian legal education has made to date in the directions favoured by the Carnegie Report. Accordingly, the Conference organisers sponsored the DBI Director (Prof Gary Davis) to contribute and invited CALD to be a co-sponsor of the Conference if it would facilitate the contributions of other leading Australian legal academics.

CALD responded very positively to this invitation, deeming it an appropriate use of a portion of the DBI funding and within the budget parameters and funding conditions. Accordingly, funds were made available to partially defray the travel expenses of three Australian legal academics (Prof Jeff Giddings; Prof Richard Johnstone; Prof Sally Kift) so that they could contribute presentations to the Conference. Although from the perspective of the Conference organisers, the thrust of the contribution of the Australian delegation was enlightenment of the American audience as it considers a re-think of American legal education in light of the *Carnegie Report*, from the perspective of the DBI, the Australian contributors become both further engaged with the work of the DBI and important sources of information, counsel, advice and dissemination to and of its work and to the continued progression of Australian legal education over the course of the coming years.

I now proceed to draw out some of the *key themes and lessons* from the presentations.

## **The Fundamental Theme: Legal Education and Transformation**

Legal education is inevitably a *transformative experience*. Numerous presenters remarked upon the influence legal educators, both individually and as the embodiment of the institution, have on the development of law students. This influence ought to be harnessed to good ends.

### **Professionalism**

These “good ends” were over and over expressed in terms of *professional* (and sometimes moral) *development*. It was a legitimate goal of legal education to produce graduates who understood professional norms, behaviours and ethics, and would be committed to practising them. Indeed, most would have it that it was an *obligation* of legal education to do so. One of the key criticisms made by the *Carnegie Report* of legal education was that it largely ignored the need to inculcate students into the development of a professional identity, that is, it failed to progress a “professional apprenticeship” for law students.

Although “professionalism” was seen to incorporate legal professional ethics, ie the rules of professional conduct for lawyers, it went well beyond those. In part, this was because reliance upon fear and discipline as motivators of professional behaviour was ineffective and misplaced. Rather, one needed to make an individual choice to act professionally, take on a personal commitment to justice and a broader commitment to the justice system.

The concerns that were expressed, possibly most vigorously and passionately by the representatives of the legal profession itself, about absence of professionalism related prominently to general integrity, civility, social consciousness and an outlook disposed towards justice and the welfare of society. As one very senior practice representative said, the legal profession needed more “caring hearts” as opposed to “brilliant minds”. It was in the law schools where the intrinsic values and character of the legal profession could be imprinted upon each successive generation of lawyers.

Therefore, if students are not overtly pushed in the direction of professionalism in the broad sense, then other messages will be received and take root. It was said 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. They will be less likely to be civil in their dealings with others. They will be more likely to adopt the persona of “hired gun” and over-zealous advocate (pejorative labels raised repeatedly during the conference). In the worst cases, they would become cynical, vulnerable to health problems, and prone to destructive behaviour. Studies demonstrating greater problems of depression, mental health and substance abuse among law students and lawyers were referred to as indicative of the harmful outcomes of the failure to integrate professionalism into a lawyer’s identity.

On the contrary, a professionalism disposition, introduced early in legal training, sustained throughout and acted upon at every opportunity, was put forward as an effective antidote to these problems. Choosing to practise (and to learn about) law with an outlook of professionalism created intrinsic satisfaction and personal fulfilment.

That this would be true is something to be expected. It aligns with and reinforces the very essence of being a professional. For professionals, discretion and initiative are integral. Professionalism is a “shelter” from the demands of entrepreneurialism and managerialism – from consumers and bureaucracy. The key commitment of the professional is to the intrinsic value of the work itself. This includes the notion that private interest must sometimes yield to provision of public benefit.

This is not to insist upon a utopian view of what it means to be a lawyer or denigrate the modern business practice models for law and the need to serve client interests. The “shelter” referred to above may often be a temporary structure or occupied for short times. However, it is a metaphor for law students and legal professionals knowing how to cope with and respond to the pressures and temptations put in front of them.

The clear message emerging from the Conference on this matter is that legal education which fails to address adequately and emphasise the professionalism dimension of the law is fundamentally incomplete and harmful.

### **The Dominance of Content**

The other side of the coin is that legal education puts too much emphasis on knowledge of the law and the capacity to “think like a lawyer”. The *Carnegie Report* refers to this as the “intellectual / cognitive apprenticeship” element of legal education. The law schools do a superb job of this aspect of educating law students, but they achieve this objective at a high price. Students learn to *think* like a lawyer, but not how to *perform* like a lawyer nor *conduct* themselves as a lawyer should.

The missing professionalism element has already been addressed. As to performance, the *Carnegie Report* called this aspect the “practical apprenticeship”, and it was certainly a theme emerging from the Conference that law schools had to pay more attention to skills development. In part, this was linked to professionalism, it being asserted that it was impossible to separate technical skills from the skills of deliberation and judgment. In other part, it was linked to legal knowledge and analysis, it being asserted that students become overwhelmed and disoriented at the disconnection between their expectations of legal education (learning how to understand client problems and generate useful solutions) and the reality (mired in abstractions).

This led to the view that all three facets, or apprenticeships, of legal education deserve to be incorporated into legal education for it to be considered adequate and effective. Knowledge, skill and behaviour were interdependent. No lawyer can exhibit one facet entirely divorced from the influence of and impact upon the others.

If this is true, then to allow content and analysis to dominate is to do a disservice to the law students and, ultimately, to the community to be served by law graduates. Further, the domination of content in curriculum tends to provoke use of content delivery as a key pedagogy. While that may assist in advancing the cognitive apprenticeship, it is distancing from the formative education that is more suitable to the development and enhancement of skills and attitudes, including a disposition towards professionalism. Adequate space in the curriculum must be found to allow the other facets to flourish and, to go to the next step, appropriate adaptations to pedagogy and assessment must be effected.

### **Lessons from Other Professional Disciplines**

It is quite possible for law schools to teach, and for students to learn, how to think like a lawyer, perform like a lawyer and conduct oneself as a lawyer should. We know this because we find successful examples in other disciplines, most notably medicine. Several presenters made reference to this matter, as indeed did the *Carnegie Report*.

It is notable in this regard that the *Carnegie Report* arose out of the Carnegie Foundation’s “Preparation for the Professions Program”. This is a comparative study of professional education in medicine, law, engineering, nursing and the clergy. The Carnegie study of legal education was thus independent of the law schools. Accordingly, it was able to adopt an *objective outsider perspective* on the design and delivery of legal education. Only one author

(Wegner) comes from a legal background, with the others from moral philosophy (Sullivan), psychology (Colby: moral developmental behaviour; Bond: assessment and measurement), and education (Shulman).

Some of the points made by presenters in this regard:

- other professions adopt an *integrative model* of all three apprenticeships to education in the discipline;
- consumers within other disciplines (eg medical patients) expect that the graduate professionals who attend upon them will have had properly supervised practice on others during their education, and one would not expect that a client of legal services would hold any different attitude when dealing with a newly admitted lawyer;
- relevant to this latter point, it is said that it is the gradual assumption by medical students of real *responsibility for patient outcomes* that turns them from students into doctors;
- the educational approaches of other professional disciplines are helped along, if not driven by, accreditation standards that include and emphasise *outcome measures*, rather than focussing predominantly upon content requirements and other input factors;
- other disciplines have shown that most of the attitudes and skills that we expect of professionals are capable of being taught and learned, notwithstanding that they fall outside the conventional categories of what has been taught in the past; the teaching of cultural competence in medical schools was specifically instanced.

In sum, there are existing models of education in professional disciplines that can guide development of legal education in appropriate ways. A number of presentations at the Conference outlined the new approaches that had been implemented at their own law schools and the indicators of success of those initiatives.

### **Experiential Learning Opportunities**

From the planning stage, the Conference organisers proclaimed two overarching themes that they intended to be addressed over the duration of the Conference: (i) if one were establishing a new law school, how would one structure it to be able to implement the recommendations of the *Carnegie Report*? (ii) what would a transition plan look like for an existing law school to transform itself into a “Carnegie” law school? Accordingly, many presentations described, explained and justified initiatives that had been taken or were planned.

A considerable number of presentations, both American and international, promoted clinical legal education as the way to achieve the desired outcomes. Clinical programs may well have this effect, but they are extremely resource intensive. They also raise other issues such as those related to staffing, supervision, integration within the law school milieu, proper role vis-à-vis the practising legal profession and the courts, and therefore they are unlikely to be the universal solution, especially if all law students are to have the opportunity to undertake a fully integrated legal education.

Other initiatives were described in the various presentations. These included externships or placement programs. They also included simulation-oriented learning, including a Scottish program supported by an extremely sophisticated software program that created and populated a virtual town.

Further, they included a well-established program called “Street Law” that started in the United States but is now operating internationally in some 30 countries. The “Street Law” program describes itself as “preventative legal education” and it utilises the skills of law students to educate average citizens about the law, how it works and how it can be harnessed

to protect and assist. It is a program that can be included within the ordinary law curriculum, with law students being properly instructed but following that, being able to develop and make use of legal knowledge, communication and other skills, and professionalism, and be evaluated and graded as to what they have achieved.

In sum, all of these programs or initiatives might best be brought under the umbrella of *experiential learning* (to be distinguished from observational or passive learning). A major theme arising out of the Conference is that law students ought to, as it were, experience experiential learning during the course of their law studies. There are a variety of ways for this to be incorporated into the standard legal education program. Although some of them could operate only with an injection of significant resources, others would be less susceptible to such constraints.

All would involve the use of formative pedagogies to advance student learning. These would result in students having opportunities to practise things, receive feedback, incorporate feedback into further learning tasks, and pay attention to goals. This approach would reinforce their development as professionals.

### **Inspirational Role Models**

It was emphasised, especially in relation to assisting in the development of a sound professional identity, that law students should be provided with opportunities to encounter and be inspired by appealing examples, eg of those who are known to have upheld the high values of the profession, or of law and the legal system being used as a force for justice. There are a number of ways of accomplishing this, eg via formal meetings in person or via the literature. Ideally, students would be required to report upon such encounters, reflecting upon their own emerging professional identities in light of them.

### **Foundations for Improved Legal Education**

One of the key contributions of the Australian contingent to the Conference, although echoed by others, was the notion that it must be *intended outcomes* that drive the development of legal education. This means understanding what attributes law graduates should have upon completion of their studies, unpacking these into the knowledge, skills and attitudes that combine to make them up, appropriately locating the teaching and learning of these knowledge, skills and attitudes in the law curriculum, and providing opportunities for student performance, evaluation, feedback, practice and assessment. A concomitant of having a curriculum driven by outcomes is that one would expect it to be progressively sequenced – things need to be learned in logical order, and at ever advanced levels.

A curriculum shaped entirely or primarily by content and knowledge acquisition is unlikely to produce the more fully rounded law graduate that seems to now be expected. One presenter said that the days have passed where law firms were content to have new lawyers spend their time researching law in the library while gradually developing practice skills. Rather, they expect graduates to come to them with client-servicing skills, and the content of law and procedure has become so complex and specialised that they expect that it is this knowledge, rather than the practice skills, that will develop over time.

A related theme revolved around legal education developing in harmony with the type of environment in which a particular law school exists. The characteristics of the students, the geographical location of the law school, the university environment of which the law school is a part, are all relevant. For example, one American law school had as its core mission diversifying the legal profession and producing public interest lawyers. It also deliberately sought to admit students who were in tune with those missions. Its curriculum and teaching approaches were determined by these matters. Another law school developed its curriculum

heavily in an interdisciplinary direction to take advantage of the strengths within its university. Another presenter suggested that the teaching approaches had to be tailored to the actualities of the students' learning capacities at the time they entered law school, but too often, legal education forced students to regress in learning style rather than building upon the skills that they already had.

### **Approaches to Inculcating Change**

An important theme revolved around how to implement change. It was suggested that, ideally, change should be "whole-of-course", consultative and continuous (including monitoring, review, and evaluation). However, the "political realities" had to be taken account of. This might mean in some circumstances that one should settle for incremental or piecemeal gains. It also meant that workload implications, both in the development process and in the implementation, had to be kept within manageable bounds.

It was said that change should involve stakeholders. However, it was also necessary that there be a sense of ownership within the law schools and legal academics themselves. Attempts to impose change would be resented, resisted and undermined. One law school experienced considerable success by convening a "conclave" of academics, university officials, practitioners, judges and legislators. This proved to be a "mutual education". The representatives of the law school and university learned of the needs of the profession, the external attendees learned that changes in the existing and traditional approach to legal education were needed to respond to changes in society and legal practice.

### **Role of the Profession**

Those at the Conference who came from the profession were strong in their view that the profession and the law schools had to work together as respectful partners in the process of improving legal education. Involvement of members of the profession in areas that matched their expertise, eg skills and professionalism, were to be strongly encouraged and could be provided in a number of ways, including not only teaching but providing realistic scenarios raising professionalism issues and making themselves available to students in a variety of forums.

In addition, change in legal education was only the beginning of the spectrum. The profession needed to carry forward the educational process afterwards, particularly in regard to furthering graduates' professional identities and values. A compulsory mentoring program of new lawyers, operating in the State of Georgia and funded by a small annual levy (\$10) on the State's practitioners, was raised as an exemplar in this regard.