COUNCIL OF AUSTRALIAN LAW DEANS

REVIEW OF THE IMPACT OF THE *HIGHER EDUCATION SUPPORT ACT* 2003: FUNDING CLUSTER MECHANISM

SUBMISSION

1. What is CALD?

The Council of Australian Law Deans (CALD) is the peak body of Australian law schools. It represents the 29 law schools that are currently accredited for the purpose of admission of their LLB or JD graduates to legal practice. See http://cald.anu.edu.au/ .

2. Parameters of review acknowledged

CALD acknowledges that the parameters of this review by the Department of Education, Science and Training (DEST)—namely, that the overall level of funding provided under the Commonwealth Grant Scheme (CGS) and the existing arrangements for student contribution amounts are to be assumed—constrain it from reopening the whole question of the funding of the discipline of law. However, it is necessary to say something briefly by way of background.[1]

3. Entrenchment of historical underfunding of law

The discipline of law has been chronically underfunded since the development of the Relative Funding Model in the late 1980s. Estimation of the historical cost of teaching law was based on fundamentally flawed case studies that (a) confused and conflated the teaching of law to law students and the teaching of law to non-law (eg commerce) students, and (b) so far as it did examine law teaching to law students, chose atypical examples. Even more importantly, the parameter of historical cost made no allowance for the steady change in the imperatives of law teaching from the passive imparting of a body of knowledge to students in large groups to the active acquisition of skills in necessarily smaller groups, requiring significantly more favourable student/staff ratios. All Australian law schools have been struggling ever since to maintain quality and to produce competent and ethical lawyers in an environment of significant underfunding. Law schools have either had to rely unduly heavily on part-time or casual teachers or, where they have the capacity, to subsidise their LLB programs from other parts of their operation such as full-fee paying postgraduate programs, consultancies, or endowments.[2]

---

[1] For further detail, though in some respects now outdated, see CALD's 2000 statement on the funding of legal education at http://cald.anu.edu.au/resources.htm .

[2] In law schools with full-fee paying LLB students, there are also subsidies from those students to HECS students, giving rise to obvious equity issues.

4. Current situation: three criticisms

Moving immediately to the current funding situation, the discipline of law has the lowest Commonwealth contribution ($1,528) and the highest student contribution (maximum $8,333). This is open to three major criticisms, whether one focuses on each contribution separately considered or on the imbalance produced by the stark contrast between them.

5. First criticism: the real cost of legal education today

First, so far as the exceedingly small Commonwealth contribution flows from the historical misconception referred to above relating to the perceived cost of law teaching, that underpinning continues to be fundamentally flawed. Indeed, it is now even more out of touch with the imperatives of a quality legal education. Three examples will suffice:

(i) Clinics

It is now widely accepted that legal education should have a clinical or industry placement component, with students having hands-on experience with real clients; yet clinical programs are so expensive that only a handful of law schools have been able to fund them adequately, usually with substantial external support, to which many law schools do not have easy access.

(ii) Skills

It is beyond argument that acquisition of the range of skills needed by a competent and ethical lawyer—including the skills of logical thinking, rigorous analysis, independent research, and creative problem-solving, as well as the skills of effective mediation, negotiation, advocacy and the like—requires learning by doing and is consequently much more resource-intensive than the passive reception of a body of knowledge; yet current student/staff ratios seriously inhibit adequate skills training.

(iii) Internationalisation

With the growing internationalisation of legal practice and legal education, students today are much more involved in international exchange programs and international competitions (mooting, arbitration, client interviewing, witness examination), participation in which is important both to the development of skills of individual students and to Australia's profile on the world stage; yet most law schools cannot fully support these activities, so that the cost burden shifts substantially to the students, giving rise to serious issues of equity and access.

To this must be added the growing cost of maintaining law libraries, never fully understood, as they must be, as the lawyer's equivalent of the scientist's laboratory, and now, despite (indeed, to a large extent, because of) the shift to electronic resources, even more vulnerable to publisher monopolies, with price often determined by the legal profession market, where the cost is simply passed on to clients.

6. The real cost of a poor legal education

The wider point should also be made here that 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, manifesting itself in a range of ways including unnecessary litigation, unproductive legal disputes, poorly drafted legislation and other documents requiring constant interpretation, and

failure to see constructive and cost-minimising solutions to legal problems that are durable and sensitive to client needs. Quality legal education is not a public subsidy for individuals; it is an investment in Australia's future.

7. Second criticism: the truth about law graduates' future earnings

Secondly, so far as the excessively large student contribution flows from a perception that all law graduates go on to amass great wealth, the assumption is as flawed as is the assumption that all professional golfers earn at the level of Tiger Woods. In fact, there is a paucity of good, robust and recent information about the earnings of law graduates throughout their careers, and proper empirical studies need to be done, including longitudinal as well as snapshots. Even in relation to those who go into mainstream legal practice (and again there is a dearth of recent information that tracks the career paths of law graduates), the impression of CALD from historical data is that average earnings (mean and median) are relatively modest. For the many law graduates who do not go into mainstream legal practice, average earnings are likely to be even more modest. In any event, facile assumptions about a law degree being a universal ticket to lifelong prosperity are certainly misplaced.

8. Third criticism: lawyers and the public good

Thirdly, and looking now more globally at both the Commonwealth contribution and the student contribution and the imbalance between them, there is a very important point that is largely missed in the debate about the funding of tertiary education in Australia. 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. There is little recognition or even awareness of the ways in which lawyers can and do add value to the society they serve.

This value comes in at various levels. The sheer professionalism and competence of a sound and ethical lawyer adds value, including economic value, in the ways noted in paragraph 6 above. But it goes beyond this. 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. That is why law schools today are consciously embracing a more critical perspective and a more deliberate ethos of law reform, rather than merely teaching the law as it is. Understanding the law as it is is pivotal to being an effective lawyer, but 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, and 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.

9. The solution

What to do in this situation? The most obvious and compelling solution, namely, that the level of Commonwealth contribution for law be increased as part of an overall increase in CGS funding, is excluded by one of the constraints on this review. Thus, if that constraint is to be accepted, a matter no doubt ultimately to be determined politically, an increased Commonwealth contribution for law must necessarily be at

the expense of the level of Commonwealth contribution to another discipline. CALD would submit that this possibility must be considered, though by definition it will obviously have no support from any other discipline. Indeed, if the overall level of CGS funding is not to be increased, and the arrangements for student contributions are to be undisturbed, it is difficult to see what alternative there is but to change the relativities between disciplines.[3]

10. The current CGS rate for law is inappropriate

It is difficult to see why law should not be funded, so far as the government contribution is concerned, at least at the rate of the humanities ($4,239), if not of behavioural studies and social studies ($6,729), which better reflects the social science and clinical base of law studies, or even, to a degree, of foreign languages ($9,217), given the international travel aspects referred to in paragraph 5 above. An adroit combination or synthesis of these rates would be appropriate. CALD is happy to advise further on the detail.

11. Implications for the level of student contribution of increasing the CGS rate

If the CGS rate were increased, there would then be room for consideration of some reduction in the rate of student contribution, thus achieving a better balance between the private gain and public good aspects of being a lawyer (see paragraph 8 above). On the other hand, to the extent that the sum total of an enhanced Commonwealth contribution and the student contribution exceeded the current total of $9,861 (before the 2007 CGS 7.5% increase), law schools would have an enhanced capacity to provide a quality legal education. Minimalist change to the current system would see an enhanced Commonwealth contribution, and no change in the maximum student contribution amount, leaving law schools free, as now (though only in theory), to set the student contribution at any point up to the maximum.

12. The underlying rationale for the current arrangements: supply and demand

There is a further line of thinking that underlies the current arrangements, espoused more at the political than the bureaucratic level. This line of thinking does not relate to the cost of legal education, and indeed may even concede that the true cost has been understated. Neither does it relate to the future earnings of lawyers, and likewise may concede that this consideration does not justify the current arrangements either. One might think that these concessions would remove any rational basis for the current arrangements. But there is a more pragmatic consideration. It is simply that the demand for law places is high, and that there is therefore no need to disturb the current arrangements, at least as far as any government contribution is concerned (institutions might of course argue that the market will in these circumstances bear a higher student contribution).

13. Difficulties with the rationale of demand

There are many difficulties with this line of thinking, even assuming that the demand is well-informed. It does not address the need to raise the quality of legal education in the interests of the nation as a whole (paragraphs 5 and 6 above). It does not recognise the ways in which graduates with legal skills can add value to society, even beyond

[3] DEST will of course receive submissions not only from disciplines on an Australia-wide basis, but also from institutions; submissions from institutions may reveal patterns of cross-subsidy that identify disciplines with suggestions of overfunding. However, it may be difficult to disentangle cross-subsidy from the CGS contribution from cross-subsidy from the student contribution. Moreover, these cross-subsidies may be expedient rather than true indications of relative cost.

mainstream legal practice; indeed, to the extent that it is predicated on the assumption that we already have enough, or even too many, lawyers, it proceeds on a narrow view of the real and potential contribution of lawyers and law graduates to Australian society. Its endorsement and legitimation of the gross imbalance between the government and student contributions, almost a complete privatisation of legal education, encourages a mindset amongst law students of the selfish pursuit of personal goals and obscures the contribution of law and lawyers to civil society, the rule of law, and the public good. Even for those for whom the spirit of altruism survives, and as the United States experience vividly demonstrates, their high level of debt on graduation propels many of them, of necessity, away from lower-paid public interest work and into more remunerative private practice. All of this fosters negative stereotypes of lawyers as interested only in personal material gain, and reinforces other negative stereotypes of lawyers as obstructors rather than facilitators. And the argument based on demand has not, regrettably, been a transparent part of the debate, but an opportunistic undercurrent to justify the present arrangements in light of the inadequacy of the arguments based on cost and future earnings.

14. Submission: adjust the relativities, and recognise the clinical component

At the end of the day, if the overall funding of the CGS is not to be increased, CALD submits that there is no alternative but to readjust the disciplinary relativities so as to lift the discipline of law off its astonishingly low floor (see paragraph 9 above). CALD is obviously not in a position to comment at this point on how this might be done vis-à-vis other disciplines, but would be happy to engage in discussion with DEST in relation to any particular proposal that might emerge from the review.

CALD would further submit that the clinical component of legal education be properly recognised. Although only a few law schools have clinical or placement programs that are adequately funded (see paragraph 4 above), nearly all law schools now have a clinical or placement component of some kind. This should be recognised explicitly in any reorganisation of the clusters and funded accordingly.

15. Pipeline arrangements and attrition rates

Finally, CALD would make two specific points arising out of the DEST discussion paper of December 2006. First, if the 75% pipeline arrangements for new places, based on a 25% attrition rate, were to apply to law, we strongly suspect, without having gathered the evidence but based on the experience of individual law schools, that this would significantly overstate the actual attrition rate, for reasons similar to those that apply to medicine, which is recognised as an exception to the general rule.

16. Inequity of the 2007 percentage increase

Secondly, so far as a percentage increase is applied in 2007 to the CGS (7.5%), this further disadvantages law, as it comes off the lowest base and therefore receives an increase in absolute terms that is less than that of any other discipline. CALD submits that DEST should at least devise a fairer system in this respect (eg an equitable share of the total increase, based on true cost), though this would be second-best to readjusting the relativities to reflect true cost throughout rather than marginally.

Council of Australian Law Deans
26 February 2007