DRAFT: 22 December 2000

A RESOURCE DOCUMENT FOR DEANS

PREPARED BY THE COUNCIL OF AUSTRALIAN LAW DEANS
IN REGARD TO

THE FUNDING OF LAW SCHOOLS

Contents

Abbreviations & synonyms

ALSA	Australian Law Students' Association
CLS	critical legal studies
DETYA	Department of Education, Training & Youth Affairs
EFTSU	Equivalent full time student unit
HECS	Higher Education Contribution Scheme
IT	information technology
LLB	Bachelor of Laws
RFM	Relative Funding Model

Introduction: what this document seeks to do

The funding of law schools is a major, perennial problem for law school deans. It is a common topic of discussion at meetings of the Council of Australian Law Deans. Law deans need, it seems constantly, to be making arguments for better and more equitable allocation of resources to law schools.

This document is a compendium of resources which law deans can use. It is a resource into which they can dig and use those bits which best suit their purpose. It is not a comprehensive report or a continuous narrative. It is not an argument in itself, but a collection of arguments in regard to different aspects of the one issue – the allocation of resources to Law. It is meant for the use of deans, particularly in their dealings with university administrations, but elsewhere as well.

There are two major areas of concern in regard to legal education.

One is in regard to what law students should contribute towards their legal education. Under so-called differential HECS (Higher Education Contribution Scheme), university students who are studying law pay the highest rate of contribution but for a program which is usually funded at the lowest level within the university. In other words, law students pay themselves a significantly higher proportion of the cost of their education than students in many other disciplines. Although this document contains information which law deans can use in regard to the debates and arguments which revolve around this issue, it is not its primary focus.

The other area of concern, which is this document's primary focus, is in regard to the appropriate and equitable allocation of resources to Law within the university. Law deans argue that more resources should be allocated. This document contains discussion of various aspects of that argument. It can be based on the fundamental issue of the value of legal education, and hence the need to fund it appropriately. Other arguments relate to the changing nature of legal education. For example, the increased emphasis on the development of intellectual skills requires more intensive teaching in smaller groups. Another example is the use of clinical education as a way of training more responsive lawyers. Yet another argument relates to the changing nature of a law library and what it needs to contain to be appropriate and effective.

Law deans can use the information and discuss which is provided on these, and other, issues as a basis for their own submissions and other forms of argument in favour of improved legal education.

1 The value of legal education

1.1 A case for Law as a university discipline

Legal education in universities too often suffers from the unhelpful perception that it exists solely because it offers universities high prestige at a low cost. As a result, the decline in the university ideal is sometimes measured in the growing number of law schools – the spread of law as a university discipline is often seen as a pernicious disease, or as a symptom of one.

By the same token, it is also frequently lamented that there are too many law graduates, for whom there are not enough jobs, and (as if this is a simple zero sum game) not enough graduates in immediately useful disciplines like information technology (IT) or biotechnology. The result often is that law schools receive a smaller slice of the public funding pie than other disciplines – either because the perception of a low cost/high prestige calculation by a university turns out to be the reality, or because there is little support in the university community or government for proper funding of law.

It is not common to hear the case the other way – that is, the case FOR law as a university discipline. Assuming the low cost/high prestige formulation to be a bad reason for a university to offer law, what good reasons might there be? If such reasons can be found, they may help to build the case for proper funding of law.

There are two ways of approaching this. The first is to ask: what is the value of a legally educated person? What attributes, dispositions and skills do such people possess that are of immediate value to the wider community? Why, in short, is it in the public interest that universities offer a legal education?

The second is to ask: what is the value of the university law school to the community? Is there an important and distinctive role to be played that goes beyond the teaching, assessment and graduation of law students? Is there any sense in which they are a valuable resource in their own right that justifies the spending of public money on them?

1.2 The value of the legally educated person

It has been suggested that a legal education develops the ability in individuals to engineer consensus around practicable social projects. Lawyers function at the interface between large scale political, social and economic planning on the one hand, and the development and implementation of workable strategy and policy on the other. This function can be, and is, discharged in a variety of settings - government, commerce, civil society, and even universities themselves. Law graduates need not be working in a 'law job' to be capable of making these sorts of contributions, yet it is a skill or attribute that the legally educated person is likely to possess, uniquely, to a high degree.

Associated with this is the aptitude of lawyers to function effectively and co-operatively in institutions, and to achieve consensus around the workable – the prevalence of lawyers in positions of responsibility in student organisations, as chairs of university committees, is an example of this. By the same token, the legally educated person understands the values of procedure, of playing by the rules and has the ability to use rules and procedures to achieve desirable ends.

1.3 The value of the law school

Some writers have identified and lamented the decline of a professional ideal in the legal profession – the demise of the 'lawyer statesman' and the rise of a more instrumental model of professionalism. Although this is partly ascribed to moves within the academy itself (the crude bean counting of law & economics or the trashing activities of critical legal studies (CLS)), it is also seen as an inevitable function of increased commercial pressures of professional practice. There is now, it seems, widespread concern about the formation and maintenance of professional behaviour.

Law schools have responded to this by placing more emphasis on the interpersonal, empathic and ethical aspects of lawyering – indeed, it may be that law schools are one of the few remaining resources available to the community for the articulation of a vision of proper professional behaviour and a monitoring (eg, through research) of that behaviour.

The legal profession is a significant social institution, or set of institutions. To some extent, law schools determine or influence access to the profession. The most obvious example is in law school admission practices, which may seek to encourage and support applicants from certain groups currently under-represented in the profession. Another is that law schools might work with sympathetic judges or practitioners to assist students from indigenous, non-English speaking or low socio-economic backgrounds to obtain work experience in ways that encourages those students to remain enrolled in third degrees and then to seek and obtain work in the profession.

The academics who work in law schools are increasingly called on to put their expertise to use in the community. This is partly because of university policies (*eg*, promotion or confirmation criteria emphasising community service) and partly because universities are often the only place in which expertise exists, eg where the bar has been decimated because of reductions to legal aid funding.

Also, the 'juridification' of life generally means that there are more and more areas of legal regulation that are not also areas of legal practice, so that expertise does not exist amongst the profession. law schools, in other words, can be resources of expertise in areas that are 'at the limits' of professional knowledge. This is especially important in periods of rapid technological change, such as the present.

2 Providing a legal education of value in a changing environment

2.1 Matching actions to aims

If the value of a legal education is captured in significant part in the previous section, then there are some significant funding implications. They go to the use of the resources that make achievements of the aims at least imaginable.

2.2 Skills, knowledge, values

This section is extracted from the report of the Australian Law Reform Commision [ALRC 89]. Note that the footnotes have not been included.

2.17 For some years, Australian law schools have accepted that their dual mission was to provide (or contribute to, in the case of combined degrees) a broad liberal education, as well as to provide a basic grounding for those entering the profession. As stated in DP 62

> To some extent, law is coming to be seen as a prestigious generalist degree that can prepare students for a variety of occupations. At the same time, law schools recognise their responsibility to provide the training necessary to prepare future legal practitioners, and there is a trend towards increasing the proportion of time and resources devoted to `professional skills training', whether through clinical or classroom based methods.

2.18 In the United States, `live client' clinical programs, usually focussing on community legal centre/poverty law type practice, have been widely used by law schools to supplement classroom instruction on substantive law, and to provide students with an appreciation of the nature of `law as it is actually practised' -- including the social dimension and the ethical dilemmas which may arise. Virtually every accredited American law school operates a substantial clinical practice program, and some have a range of programs which cater for specialist interests (such as environmental law, criminal appeals, civil liberties, children, and so on).

2.19 In Australia, the much lower level of resources available to law schools has meant that only a handful of law schools run clinical programs -- and only the University of Newcastle allows students to undertake a fully integrated clinical degree program rather than simply an elective unit. Both for reasons of resources as well as recognition of the importance of non-adversarial forms of dispute resolution, the emerging trend in Australia has been toward the teaching of generic `professional skills' -- that is, skills which will be needed in any subsequent legal practice, but would be equally valuable in a range of other occupations and professions.

> According to this view, legal education should focus on the development of skills other than advocacy and the analysis of appellate judgments, to include training in fact finding, negotiation and facilitation skills, as well as the discrete skills, functions and ethics associated with decision making.

2.20 As noted in DP 62, the major 1992 review of legal education in the United States -- the MacCrate report – sought to narrow the gap between what was taught in law schools and the day to day skills (and ethical understandings) required of modern legal practitioners. Perhaps the best known and most quoted part of the MacCrate report was the `Statement of

Skills and Values' (SSV), which seeks to enumerate core skills for lawyers which law schools are meant to address. According to MacCrate, the 10 fundamental lawyering skills are

- problem solving
- legal analysis and reasoning
- legal research
- factual investigation
- communication (oral and written)
- counselling clients
- negotiation
- understanding litigation and alternative dispute resolution processes and consequences
- organisation and management of legal work, and
- recognising and resolving ethical dilemmas.

The `fundamental values of the profession' according to the MacCrate report, are

- the provision of competent representation
- striving to promote justice, fairness and morality
- striving to improve the profession, and

professional self development.

2.21 As the Commission commented in DP 62

> It is notable that where the MacCrate Report focusses on providing law graduates with the high level professional skills and values they will need to operate in a dynamic work environment, and assumes that lawyers will keep abreast of the substantive law as an aspect of professional self development, the equivalent Australian list -- the `Priestley 11' -- focusses entirely on specifying areas of substantive law. [36] In other words, MacCrate would orient legal education around *what lawyers need to be able to do*, while the Australian position is still anchored around outmoded notions of what lawyers *need to know*.

2.23 Following this recommendation, a `joint multi-sectoral committee' was established in 1998, comprised of four academics, one judge, one practitioner and one CLE provider, and a discussion paper released in late 1999. The `Recommendation 49 Committee' settled upon a number of premises for its conclusions and proposals, including

- The study of law necessarily involves a study of human interaction and conflict and of various approaches to responding to these phenomena. The practice of law moves the study of law directly into engagement with human interaction, and through this engagement is itself part of the process of norm or law creation. To ensure that the law and legal system operate to support social development and improvement in human interaction, rather than exacerbating conflict, lawyers must develop high levels of self-awareness and of reflection on their practice at the individual and general levels.
- A comprehensive modern legal education curriculum must focus on the development of this awareness and encourage effective social interaction, knowledge and

information as an essential aspect of the discipline of law, as well as developing technical expertise about application of legal rules and the various ameliorative responses available in the legal system.

- This requires a cross-disciplinary approach to legal education and may include materials and faculty from a range of social sciences such as psychology, sociology, conflict resolution specialists and social work schools. This information is a substantive aspect of legal education that is obtained through a combination of theory, experiential learning and conflict analysis skill, including legal analysis.

2.24 The Recommendation 49 Committee's proposals for discussion mirror the points above, as well as specifying that

- Law students should have the opportunity in substantive courses to practice negotiating the settlement of legal problems and to develop knowledge about theories of analysis of interpersonal conflict. Students should be expected to develop an awareness of contract clauses that provide for dispute resolution as well as to design and critically evaluate processes for resolving conflicts in light of broader public interest concerns and legal rights.
- In order to develop their negotiation, communication and conflict resolution skills, law students should be encouraged, through varying forms of evaluation, to carry out some team projects that develop the ability to reach solutions and resolve interpersonal conflict effectively. There should be an opportunity for reflection on these exercises.
- Civil procedure courses should include information about the various dispute resolution processes and practices available and their utility in resolving various kinds of problems.
- Law schools are urged to consider making mandatory ethics courses which should include negotiation and mediation ethics as well as issues relating to obligations of lawyers regarding human rights and inter-personal relationships.

Increased emphasis on broad professional skills development

2.78 As discussed in DP 62, the traditional law school focus on developing analytical skills through a close reading of cases and statutes in subjects organised around bodies of substantive law is increasingly being supplemented by teaching in areas of dispute resolution, advocacy, fact finding, client interviewing (that is, communications), negotiation and drafting -- all areas which also are replete with difficult ethical dilemmas for practising lawyers. This teaching need not be limited to separate subjects -- some of the best skills teaching occurs in context, within substantive units. For example, the law of contracts provides opportunities for skills development in negotiation and drafting, and for contemplating the ethical considerations involved in negotiations. Teaching

> good corporate lawyering, while not sufficient to ensure good corporate citizenship, can help equip our graduates to be effective not only at best-practice advising, planning and advocacy for corporate interests, but also at doing so reflectively and responsibly.

2.79 The Commission is aware of the resource intensive nature of professional skills training, which generally requires `small group teaching' to be effective. Greater financial support from the profession, alumni and government is needed to make this more achievable. Nevertheless, it is apparent from university handbooks that most (if not all) Australian law

schools already share some commitment to advancing this approach -- but much can and should be done.

2.80 In order to assess progress in this area, law schools should make explicit the nature and extent of their skills development programs (whether as separate units, as modules within substantive units, or in clinical programs), and how they examine these skills.

2.81 In calling for greater attention to be paid to broad, generic professional skills development, the Commission does not seek to minimise the need for students to receive a solid grounding in core areas of substantive law, the historical organisation (and divisions) of the common law system, the language and key concepts of core areas of law, and the nature of the relationships as between the state, the courts and the individual. As stated in DP 62, the Commission

> does not wish to perpetuate a false polarity between substantive knowledge and professional skills. It is obviously important to provide law students with a basic grounding in the major areas of substantive law, especially `building block' areas such as contracts and public law, and to acquaint them with how these areas developed over time -- that is, to provide an appreciation of the common law method. Nor is it possible to teach legal professional skills effectively in a substantive vacuum, or in manner which does not promote intellectual analysis and reflection on law as an art and a social science as well as a technical or professional service.

2.82 What the Commission does wish to see, however, is a move away from a solitary preoccupation with the detailed content of numerous bodies of substantive law, which is essentially the position taken by the `Priestley 11' requirements. For one thing, this approach makes it difficult to agree upon a set of `core' areas of substantive law. There is little doubt that the core must include constitutional law, criminal law, contract, torts, and property law. Some generations ago administrative law was barely recognised and conveyancing was a staple of the profession. Some important and high profile areas -- such as family law, environmental law, taxation and trade practices -- are popular with students, but are rarely compulsory in law schools. Globalisation suggests that public international law and conflicts of law (private international law) could be seen as within the modern `core', but few law schools make these compulsory. In the United Kingdom, a recent joint statement by the Law Society and Bar Association (awaiting the approval of the Lord Chancellor) emphasised the importance of intellectual lawyering skills, and listed only about a half-dozen `core areas of knowledge', including European Community Law.

2.83 Second, a requirement that students must `master' (or least `know') large bodies of substantive law ignores the stark reality that this substance changes dramatically over time -- sometimes in a very short time. Where once it was possible to trace the slow and careful development of the common law, and identify with either the `bold' or `timorous' judges of the English superior courts, Justice Paul Finn has described Australians as `born to statutes'. Justice Michael McHugh has noted that

> [l]egislation is the cornerstone of the modern legal system. For a long period in the history of the Anglo-Australian legal system, the rules of the common law, as modified by the great system of equity jurisprudence, were the basic instruments of public and private law. But throughout this century, successive Parliaments have legislated to control more and more social and economic conduct. As a result, the rules of the common law and equity are constantly being modified by statute law. The growth of legislation appears to have reached

> almost exponential levels. However, the increase has not been so much in the number of Acts passed as in the length of legislation passed.

2.84 Thus, a student who `masters' taxation law or environmental law or social security law, but does not then work in these areas for a time, would find the substance of the law almost unrecognisable a decade later; and a practitioner who relied significantly on what he or she learned in law school would soon, if unwillingly, become acquainted with the law of professional negligence.

2.85 Again, it is important to make clear that, properly conceived and executed, professional skills training should not be a narrow technical or vocational exercise. Rather, it should be fully informed by theory, devoted to the refinement of the high order intellectual skills of students, and calculated to inculcate a sense of ethical propriety, and professional and social responsibility. The Commission agrees with the view of the Lord Chancellor's Advisory Committee on Legal Education and Conduct in the United Kingdom that an undergraduate law degree course `should stand as an independent liberal education in the discipline of law, not tied to any specific vocation', and its warning that a good legal education should not be `highly instrumental' or `anti-intellectual'.

2.86 In mandating requirements for legal education in Australia, surprisingly little regard has been paid to the policies, debates and experiences which are shaping education and training in other learned professions. Professor Stephen Leeder, Dean of Medicine at the University of Sydney, has suggested, for example, that `common and important themes' have emerged in recent times with respect to medical education, with `the beginning of a substantial, Australia-wide discourse on the reform of medical education'.

2.87 Leeder notes that surveys of medical practitioners indicate that they generally were happy with the way their own degree program gave them an `excellent grounding in the basic sciences', but they also believed that there were important matters which were missing from their education.

> [They] identified communication skills most frequently, skills of critical appraisal of information and research including statistics, and inadequacies in the education methods used to teach [them]. Other strong themes were a perceived lack of integration of basic science with clinical practice, a lack of explicit teaching in regard to the method of problem-solving, no training for coping with the practicalities of practice management, and not enough on ethics and philosophy.

2.88 In DP 62, and later in this chapter, the Commission notes that the particular ability of judges to engage in self directed learning must be recognised in the design of judicial education programs. The very high quality of Australian law students, however, is a factor which receives too little consideration in the design of many legal education programs (both LLB and PLT). Despite the enormous growth in the number of law schools and the number of places available to law students, the almost insatiable demand for entry into law school has created a highly competitive environment in which virtually all law schools can select from within the top 10 per cent of the annual cohort of applicants, and the leading law schools select from within the top 1-2 per cent.

2.89 Accompanied by a commitment to facilitating `lifelong learning' for professionals, Australian law schools might consider adoption of an underlying philosophy which holds that

> [i]n a changing environment, the best preparation that a law school can give its graduates is one which promotes intellectual breadth, agility and curiosity; strong analytical and

communication skills; and a (moral/ethical) sense of the role and purpose of lawyers in society.

2.3 Libraries

A POSITION STATEMENT BY THE

COMMITTEE OF AUSTRALIAN LAW DEANS

Summary

1 A basic statement for Australian law schools libraries

1.1 Over the last 25 years, all Australian law schools have complained of serious deficiencies in their library collections, which are minuscule in comparison to Canadian and USA law schools' library holdings.

1.2 Library collections are more central and vital to legal academic and professional activities than is the case in virtually any other discipline.

2 The importance of law libraries in legal research, scholarship and education

2.1 The Pearce Committee noted that "without [ready access to legal library materials, staff and students] cannot undertake their work", a point reiterated in the subsequent 1994 report by two non-lawyers (McInnis and Marginson, Australian Law Schools after the 1987 Pearce Report).

2.2 That is, unlike most other disciplines, the law library is the research laboratory for law teachers and students, rather than a mere adjunct to research.

2.2 Two crucial developments have particularly exacerbated the position, viz:

- the increasing tendency for leading texts to be transformed into loose-leaf format (and therefore transferred onto the library "serials" budget); and
- increased development of commercially provided electronic reference services, such as CD roms.

Each provides improved access to recent developments in the law, but at a significantly higher cost, since they are aimed primarily at the professional/business market, where practitioners can more readily pass the costs on to clients.

3 Growth of university law schools, and development of different approaches to legal education and research

3.1 Over the past 30 years, there has been a significant increase in the number of full-time law teachers who need access to a broad range of legal materials in a number of different jurisdictions in order to conduct their teaching and research activities.

3.2 Every law teacher and virtually every legal researcher needs access to both a basic legal collection and to specialist materials. While the latter are perhaps analogous to the specialised equipment needed by experimental scientists, the former is much more analogous to the provision of basic laboratory space and basic equipment/materials. Lack of the former therefore deprives legal researchers of their basic necessities.

3.3 There has also been a marked change in law teaching methods, with students generally involved in more active learning (such as self-directed and problem-based learning), which again increases the demands on the law library.

3.4 The lack of adequate teaching and research resources has resulted in some very good teaching staff going overseas (particularly to the USA) where resources are better.

4 The relative disadvantage of law schools in attracting university and other research funding

4.1 The development of legal research and much postgraduate teaching is severely hampered by the lack of a world class legal research library collection.

4.2 Law is also disadvantaged in obtaining large research grants because of the nature of legal research and scholarship, which unlike many other disciplines is primarily library based, with comparatively low costs for travel, book purchases and research assistance.

4.3 Legal education will stagnate while law libraries continue to be underfunded.

5 Law libraries are a community resource

5.1 Effective functioning of the legal system requires community access to primary and secondary sources of the law. Public libraries hold inadequate materials, and Supreme Court libraries restrict access; accordingly, regional university libraries are used extensively by members of the local and visiting profession (including judges and magistrates). This is a major function of university law libraries, over and above satisfying the immediate demands of teaching and research.

6 Inter-library co-operation

6.1 There has been some co-operation in relation both to hard-copy and electronic materials aimed at avoiding duplication of specialised materials, but further co-operation has been hampered by problems at the university library level.

7 The basic elements of a law collection

7.1 The Standards for Australian Law Libraries includes a minimum "core collection" required for a satisfactory law program. The Mutual Recognition developments, and the Law Council of Australia"s moves towards a national accreditation system, may see professional accrediting authorities in the future withdrawing accreditation from law schools not meeting minimum standards.

8 Additional material for research library collections

8.1 In addition to the basic elements, most law schools develop research specialisations and focus their collections in those areas (eg Japanese and Chinese law at Melbourne University). However, few Australian law libraries have extensive collections of materials in non-English languages; and no Australian law library has a world class research collection. This lack of resources makes it difficult for Australia to attract international scholars, and to attract or retain outstanding postgraduate students (particularly significant, as international students are an important source of income).

9 Developments adversely affecting the cost of law libraries

9.1 The cost of establishing and maintaining library "core collections" (a fortiori research collections) is significant, and proportionally higher than other library collections because:

- collections of loose-leaf services and other legal materials are produced primarily for private practitioners, who can pass the cost on to clients;
- the Australian legal market is small;

- exchange rate movements have made monographs and subscriptions to overseas materials more expensive; and
- State and Federal governments in Australia have significantly reduced the free distribution of primary materials.

9.2 The overall result is that Australian law libraries have been forced to reduce significantly the number of monographs and serials purchased, while the cost of on-line searching means that access to this alternative is restricted.

10 New technology and information needs in law schools

10.1 Increasing amounts of basic information are being marketed solely in electronic form (eg CD ROM and electronic data-bases), and priced for the professional or commercial market - these prices, even with publishers' discounts, are well beyond the budget of most university libraries.

11 The needs for 'standards'

11.1 In a steady-state environment, university law schools need to establish benchmarks (for example through library standards) if their poor relative position is not to be further diminished.

A Basic Statement of Standards for Australian Law School Libraries

(without footnotes)

Over the last 25 years, Australian law schools have all complained of serious deficiencies in their library collections. Standards for law libraries have been established in comparable countries, such as the United States and Canada. A very general set of desirable objectives for university law libraries was formulated in the early 1970s, but was vague and quickly became outdated. The Pearce Report on Australian law schools in 1987 1 commented on the poor state of Australian university libraries, and made some suggestions as to the standards they should meet.

Since 1992, the Committee of Australian Law Deans (CALD) and the Committee of Australian University Librarians (CAUL) have been discussing standards for law libraries in Australia. In March 1995, CALD approved a set of basic standards for Australian university law libraries developed by Australian law librarians (the Standards). These Standards represent the statement of "best practice" for Australian university law libraries. They are the result of compromise. For example, the Pearce Committee strongly favoured the establishment of separate law libraries, autonomous from the main university libraries, for each law school. The Standards recognise that some of the newer law schools are organised on a different basis, and that in smaller law schools considerations such as staffing at weekends produce advantages for a single university library. However, the need for separate and differently organised law collections remains.

The Standards stipulate a core collection, without mentioning a number of volumes, for each law school offering the LLB degree.

This position paper is designed to elaborate on the need for standards for law libraries, and to set out some important features of law collections in university libraries. It stresses that the

part which law library collections play in academic and professional activities in the law is more central and vital than library collections are in relation to virtually any other discipline.

The Standards are not to be regarded as an ambit claim, but have been developed in the context of the best practice in North American, especially Canadian, law schools. Most Canadian law schools have a basic library collection of over 200,000 volumes: the better law libraries, adequate for proper legal research, such as those at McGill, University of Toronto, Osgoode Hall Law School and the University of British Columbia each have closer to 400,000 volumes. The Canadian law libraries are still small compared to the leading United States law libraries (eg, Harvard, Columbia, Stanford and University of California, Berkeley).

The standards approved by the CALD reflect the needs of an Australian university law faculty carrying out teaching to LLB level and the type of research and postgraduate activity expected in the medium-size law schools in Australia.

The number and scope of volumes is not the only indicator of adequacy. Law reports, collections of legislation and periodicals are of limited use unless current subscriptions are maintained. Libraries need space and staff, and in some of the better established collections, the primary need is now not so much number of volumes but staff able to provide the necessary support services, or space to store volumes.

The importance of law libraries in legal research, scholarship and education

Law libraries are central to the key activities of law schools, that is:

- teaching the future generations of lawyers, and others who will work in the legal system;
- research; and
- law reform activity.

The Pearce Committee, reporting to the Commonwealth Tertiary Education Commission in 1987 on the state of Australian law schools, made the following fundamental observation about the importance of libraries to law schools. It is particularly true of the reference collection, which contains the primary materials that all law students need to access regularly throughout their degree (and in practice thereafter):

> It is essential to the work of teaching and researching law that the staff and students have ready access to the materials of the law. **Without it they cannot undertake their work**. Law library collections include legislation, treaties, reports of decided cases, administrative rulings and other materials which constitute the primary authoritative statements where "the law" is to be found, as well as secondary material where commentary and discussion is found which may be "persuasive or relevant" to the process of establishing the law or the working out of policy and appropriate lines of the law's development, or to its critical evaluation. **The special role of these materials appears to make law libraries more uniquely important to the discipline of law in tertiary education than libraries are to any of the other disciplines.** They are in significant part reference libraries for the staff and students of their law schools and are often compared to the laboratories in science-based disciplines, because so much of the daily work of the law school takes place in the law library. In this reference aspect and in a number of other ways, **each law library functions as a deeply integral part of the law school it services**. This results in relatively high usage within the law library of its collection, seats and special facilities for reference, for training of students in research skills, for moot preparation and for other group work.

> Relatively high levels of reshelving work are indicative of these features of the law library's role. So are the arrangements in relation to research and writing programs. (Australian Law Schools, 1987, para 19.2). [emphasis added]

This passage was repeated and endorsed by the impact study of the Pearce Report commissioned by the Department of Employment, Education & Training (DEET), (C McInnis and S Marginson, Australian Law Schools After the 1987 Pearce Report, AGPS, Canberra, 1994, esp, chapter 19 and Table A6 2.) It is significant that while the Pearce Committee was comprised of lawyers, the 1994 study was conducted by non-lawyers.

Law libraries are for a number of reasons "in a process of quite rapid transition" (Twining at p.117). In particular, since the Pearce Committee reported, two major developments have affected the way law libraries operate, to the particular disadvantage of university law libraries. Both these developments are aimed (and priced) at the libraries of the practising solicitors and barristers, who can readily pass on the costs to their clients.

The first is the increasing tendency of legal publishers to transform leading practice texts from bound volume to loose-leaf format. This reflects the very dynamic nature of law today, which is constantly changing and therefore in constant need of updating. This high volatility is, if not unique to law, at the very least a special and pronounced feature of the legal system. For example, a quick check suggests that in just one aspect of law, income tax, in 1994 there were published in Australia some 1,766 pages of reported court and tribunal decisions (and many more unreported decisions available electronically), over 5,000 pages of new or amending legislation and accompanying explanatory memoranda, almost 1500 pages of draft/issued rulings and guidelines, and many thousands of pages of journal articles and commentaries, conference and seminar papers, and the like.

Publishing texts in loose-leaf format allows them to be kept up to date, but also transforms them, in library parlance, from a "monograph" to a "serial", and therefore from a fixed budget to a recurrent one. University libraries have to be much more reluctant to commit themselves to the purchase of serials than they are to monographs. This exacerbates the problem caused by the fact that many of the primary legal sources already appear as "serials". Further, the dismantling of government publishing offices in several states has meant that the only timely access to some legislation is through the commercially published loose-leaf services. The resulting problems have been heightened because these developments have occurred in a period when many law libraries have seen their funding effectively reduced.

The other development is in the area of electronic reference services, both on-line and in CD-ROM format. Again, access is easier, but because of pricing may not be feasible for many university law schools, and commercial CD-ROMS have not yet reached a level of reliability and accuracy which would enable them to be relied on as a replacement for hard copy.

Unlike other library resources in Australian universities, the law library is the research laboratory for law teachers and law students, not an adjunct to research. Legal scholarship depends largely on the access of legal scholars to primary and secondary legal materials - and, it must be noted, unlike some other disciplines, the hard copy law reference materials must be kept on hand, and cannot be taken away by students for study outside the library.

Law students must learn how to conduct legal research using primary legal materials - indeed, the range and thoroughness of their research will (inter alia) significantly affect a student's assignment grade, and if they cannot conduct independent legal research when they

graduate, they have not satisfied a major learning objective of university law studies. In order to do this, they need access to basic legal materials.

Regrettably, while law libraries are under-resourced, law schools are forced to produce and print cases and materials in class, at great cost to the law schools and to their students. No law school library could cater for the demand when anything between 60 and 300 law students seek access to the same primary source materials in the same time. Yet reproduction of materials is recognised these days as a less than perfect form of education for lawyers, because it results in students believing they can access the law without research. It also leads them to the belief that learning skills, such as research skills, can be separated from other learning activities. To counter this tendency, law schools require students to complete research essays or projects, either as a separate requirement, a component of an honours degree, or as a requirement in some subjects; however the success of these, in turn, depends upon access to a well resourced library. Many smaller law schools are finding that their students are looking for the resources in the larger libraries, themselves under severe strain in any event.

Growth of university law schools: different approaches to legal education and research

The university law faculty, with a staff of predominantly full-time teachers, is a relatively recent development in Australia. Until 1960, most law faculties employed predominantly part-time staff. They did not maintain extensive research libraries, because little high-level legal research was done in Australia, and most of the teachers relied on their private professional libraries for teaching. The last 30 years, as the Pearce Report and other literature demonstrates, have seen a very significant increase in both the number and proportion of full-time law teachers with obligations to conduct research. These personnel have limited access to court libraries, and usually no access to private libraries. Their library and information needs, however, both in preparing and presenting academic courses of high quality and in conducting research, extend beyond basic local and imperial law reports and statutes, though these are central.

If they are to conduct effective research and to include relevant comparative and other relevant material drawn from historical, philosophical and other disciplines in their teaching material, law teachers and scholars need access as well to a wide range of journals and comparative materials. Very few, if any, Australian law school library collections can provide access to anything like such a collection across the board [cf Twining at p.92]. The significant growth in the number of postgraduate students over recent times has exacerbated the problem.

The last 30 years have also witnessed a marked change in the methods of teaching law, from the traditional lecture and tutorial approach to a range of new approaches which involve law students in active learning - including the solution of legal problems (see M LeBrun and R Johnstone, The Quiet Revolution, Sydney, Law Book Co., 1994; Fielden at p.8). Any extensive use of problem solving approaches in law teaching increases demands on library resources, because the solutions to legal problems lie mainly in primary legal materials - in the library.

The lack of proper teaching and research resources in libraries means that very good teaching staff and potential postgraduate students are attracted away from Australia, particularly to

North America, where almost all accredited law schools have library collections and support services which put even the best Australian collections to shame.

In the United States, law degrees are accepted as a basic qualification by the authorities responsible for professional admission only if they have survived a rigorous process of accreditation, which includes an audit of library resources. Institutions which wish to attract students to their law degree courses must therefore devote adequate financial resources to the development and maintenance of law libraries. In those countries, academic courses depend far more on income generated by student fees than is the case in Australia.

In Australia the number of university law schools has risen from 12 in 1985 to 26 in 1995. This reflects a very strong demand for places in undergraduate law courses. The demand may not continue with the same strength, but we expect that the actual number of students seeking admission to law degree courses is unlikely to fall significantly.

The growth in the number of law schools has meant a diversification of the library resources available to them. The older law schools, and those established in the 1960s with adequate capital funding, have had the opportunity to develop significant collections. The newer law schools have found it necessary to be selective in their collection development, with significant effects on their approach to teaching, and especially in their research and postgraduate activities.

The relative disadvantage of law schools in attracting university and other research funding

The development of legal research and much postgraduate teaching in Australia today is hampered severely by the lack, within this country, of a world-class legal research library collection. The way in which current research funding mechanisms work has created a very serious disadvantage for law, relative to other academic disciplines, which is now discouraging first-rate legal research and the attraction of leading legal scholars to this country.

Though law has long been taught in Australian universities, legal research and scholarship is relatively new, as a concomitant of the employment of full-time law teachers in place of practitioners teaching part-time. This means that the infrastructure of law libraries has not had time to grow.

There is another reason for relative disadvantage. It flows from the nature of legal research and scholarship. Although many legal scholars are developing cross-disciplinary approaches, and are conducting surveys and other empirical research, the bulk of legal scholarship and research remains library-based: the collection and analysis of rules and precedents. This work, though absolutely essential to the development of law as an intellectual discipline and for the work of law reform, requires information resources and time. As more and more legal information is stored electronically, technical equipment is required to access it, but the vast majority of legal information remains on the printed page. In the technologically based disciplines, laboratory space, equipment, technical support staff and other resources for experimental research form a major element in funding. Each of these items is expensive, and quite divorced from general library funding.

In law, as described more particularly below, the library is the resource and the laboratory, but historically, the provision of books, serials, and library staff has not been seen in the same way as the provision of laboratory equipment and staff for the technological disciplines.

This initial disadvantage has been exacerbated by the policy adopted by DEET in linking Mechanism A grants and other research funds to amounts obtained in Australian Research Council (ARC) Large Grants and other Commonwealth competitive project grant awards. Such grants are not appropriate for many legal research projects, and in any event, law applicants often do not require this type of support. The major components of law grants are costs of travel to overseas and interstate libraries, purchase of literature not available in this country, and research assistance. If law applicants succeed in receiving these grants, the amounts are relatively small, because the amount of special equipment and other costly resources required for individual legal research projects have traditionally been minuscule., although the increasing use of technology may increase costs somewhat in the future. Yet the cost of sources of legal information is becoming increasingly prohibitive for universities, even though in most cases they are a common resource for a large group of scholars, rather than the preserve of a small team of researchers.

Every law teacher and virtually every legal researcher needs access to both a basic collection of legal materials, and also to specialist materials in his or her area of research or scholarship. While the latter materials may be analogous to the specialised equipment needed by experimental scientists for a series of experiments, the former are much more closely analogous to the provision of basic laboratory space, and basic equipment, water, power and gas. It is therefore unfair to legal scholars as a group, to deprive them of the basic necessities of research by:

(i) treating the law library in exactly the same way as other sections of the university library when its role and needs are quite different (cf Twining at pp 92, 93-5, 117); and

(ii) tying the allocation of research funds to the allocation of large competitive grants or some other rigid and artificial quantitative measure, such as student numbers.

Legal education in this country will stand still so long as its libraries continue to be underfunded.

Law libraries are a community resource

The effective functioning of the legal system requires community access to the raw materials of the law: the legislation and the law reports which are available only in printed form. It also requires access to secondary sources, such as the serials and monographs held by law libraries. The public libraries, to a very limited extent, provide some basic legal materials, but even in the larger states have had to restrict their holdings of foreign and other specialist legal material [cf Twining at p.92]. The libraries of the Supreme Courts, and those operated by the professional associations, cater for some needs, but recently have found it necessary to restrict access to the collections, even for academics and legal practitioners. Regional universities find that their libraries are used extensively by members of the local and visiting legal profession, including judges and magistrates, and some have entered into formal arrangements with the regional universities so that members of the judiciary and government officers have access to the law collections of the university libraries. The provision of information services to the legal profession is a major function of university law libraries, but

it is a service that the law libraries provide over and above satisfying the immediate demands of teaching and research.

Canada, where the development of legal education and scholarship is closely analogous to that in Australia, has had an inquiry into legal scholarship and research (Consultative Group on Research and Education in Law, HW Arthurs, Chair, Law and Learning, Ottawa, 1984). The report of that inquiry concluded that:

> Finally, we wish to stress that the improvement of legal research tools, and of the primary materials to which they give access ought not to be regarded as a matter of parochial concern for private practitioners and legal scholars. Law is not simply part of our cultural heritage; it is a fact of daily life that affects the activities of governments and businesses and individuals. Law belongs to everyone - not just to lawyers. **Legal materials and law libraries should therefore be viewed as a national resource** (p. 125). (Emphasis added)

Inter-library cooperation

As pressures on library funding and resources intensify, law libraries need to develop methods for collaboration with other libraries and information providers 3. There has been a degree of cooperation between universities (especially in New South Wales), with a view to avoiding the duplication of specialised materials. For example, in 1991, the Universities of Technology, Sydney, and Wollongong succeeded in an application for a Mechanism C grant to establish a national research collection in Natural Resources Law. In 1992 and 1993, the five Sydney law schools (Sydney, New South Wales, Macquarie and Wollongong Universities, and the University of Technology, Sydney) joined forces in an application for a Mechanism C grant to develop their collections of Asian and European Legal Materials. This application was, unfortunately, unsuccessful, but indicates the steps that these law libraries were taking to avoid duplication of material outside the standard teaching collection (ie, the collection of materials it needs to be able to provide effective instructional standard required for the LLB degree).

There has also been co-operation in relation to electronic information and materials: for example, through the Australasian Legal Information Institute (UTS and UNSW), and the ANU Uniserve-Law Clearinghouse. It is possible that the specialised research collections of all Australian law libraries might be rationalised further. Moreover, the advent of efficient and relatively cheap facsimile and computer networks means that:

- a user in any part of Australia can access the catalogue of any law library in Australia;
- a request for books or extracts from serials can be sent by fax instantaneously; and
- the library can transmit copies of a report or article by fax the same day, or send a printed volume within days.

There are costs to such arrangements: hardware costs and costs of staff time, but those costs are significantly less than the costs of acquiring and maintaining multiple copies of a publication that attracts little use. However, in practice, little seems to have been done to move towards rationalisation primarily because of difficulties at the university library, rather than at the law library, level.

The basic elements of a law collection

The Standards for Australian Law Libraries includes a statement of a "core collection" of materials without which no law school can realistically offer a program of law studies of the quality now demanded by the professional authorities for accreditation. Recently, as a result of the Mutual Recognition legislation, the bodies responsible for accrediting legal practitioners in all Australian States and Territories have agreed on a minimum set of academic requirements for any law graduate seeking professional qualification. It is likely that this will lead to further cooperation, and indeed the Law Council of Australia is moving actively towards a national accreditation system for law schools and law degrees. It is possible, if not immediately likely, that if minimum standards are not met, the professional accrediting authorities may withdraw accreditation from some of the newer and smaller law schools, and from older schools whose collections are not maintained adequately.

The legal materials in the "core collection" referred to in the Standards relate only to teaching at LLB level, rather than research, and include

- the Acts of the Commonwealth, State and Territory legislatures, and
- subordinate legislation;
- the reports of the decisions of all Australian courts and administrative
- tribunals;
- Imperial legislation and reports, in particular the reports of the English courts, which are still an important source of Australian law: and
- basic Australian and English legal texts and journals.

All these items are essential to effective teaching and learning of law in each law school. Some of them should be available in multiple copies. In addition, Australian courts and lawyers rely increasingly on the statutes and precedents of other Commonwealth jurisdictions with similar economies and cultures, particularly New Zealand and Canada, and on the laws and decisions in the United States. Some primary and basic secondary materials from these jurisdictions are necessary to maintain the standards of teaching and learning expected in LLB courses in Australia today.

All of these materials are, in the librarians' terms, "serials": they are published periodically, and are of very limited use unless constantly kept up to date.

Additional material for research library collections

In addition to the basic materials, most law schools develop a number of research specialisations, usually driven by the academic interests of their most prominent staff. For example, the University of Melbourne has Australia's most extensive collection of Chinese and Japanese legal material; the University of New South Wales has developed research collections in taxation law, human rights law, and legal issues relating to aboriginal Australians; and the Australian National University has extensive research collections in comparative constitutional and administrative law and in public international law. Few Australian law libraries, however, have extensive collections of materials in languages other than English; and only the larger law collections (University of New South Wales, Monash, Australian National University, Melbourne and Sydney) have anything approaching the

holdings of North American materials which would be found in the smallest accredited law schools in North America.

No Australian law library has a world-class research collection, and few have collections adequate to support basic teaching, in any of the following areas:

- laws of the European Communities;

  current law of any European country other than the United Kingdom (UK) and Ireland;

- laws of any Asian country;
- laws of the countries that comprised the former Eastern European Bloc;
- laws of the South Pacific countries; and
- international trade law.

The lack of resources hampers Australia's international competitiveness in attracting leading legal scholars to visiting and permanent academic positions, in retaining a good deal of the most talented Australian legal scholars in this country (within the last six years, at least four outstanding Australian academic lawyers, each with a world-class reputation, have left to take up positions in the UK), and attracting of international postgraduate students. As international students are an important source of foreign exchange for Australia, this factor is economically, as well as academically, significant.

Developments adversely affecting the cost of law libraries

The cost of establishing and maintaining library "core collections" is significant, and those of research libraries even more so. The costs tend to be proportionally greater than those applying to other library collections for the following reasons:

- Collections of law reports, legislation, and especially the loose-leaf services which represent much of the learned writing in significant areas of law, as well as electronic services, both CD-ROM and on-line, are produced primarily for a market consisting of solicitors and barristers in private practice, who are able to pass on to their clients the whole of the cost. For example, the CCH Australian Federal Tax Reporter loose-leaf service costs $1656 pa, the Torts Reporter $705 pa.
- Legal monographs in Australia are produced for a similar market, and reflect similar pricing policies.
- The changes in exchange rates have made subscriptions to overseas journals, law reports and legislation series, especially those produced in North America and continental Europe, significantly more expensive for Australia than was the case several years ago.
- Materials produced in the UK, including material which is essential to a basic teaching law collection in Australia, have also been affected by price increases in the UK and by deteriorating exchange rates.
- Governments in Australia, both Commonwealth and State, have significantly reduced the free distribution of primary materials (eg legislation and parliamentary papers).

The overall result of these developments has been that, despite increasing enrolments of students in law courses, especially at postgraduate level, where good library facilities are

essential, Australian law libraries have actually been forced to reduce significantly the number of monographs and serials purchased. The newer law schools are facing the prospect of seeking to establish new courses with inadequate library support; established collections have had to cancel subscriptions to important series of periodicals, collections of legislation, and reports, and cannot maintain loose-leaf services which are essential to the effective teaching of some subjects. Purchase of monographs published outside Australia has virtually ceased in some Australian law libraries. "Seeding" grants have been used to acquire some new technology and databases, but often more for their novelty than for their efficiency or practical utility. In any event, the cost of providing on-line access to staff, let alone students, means that access is restricted.

New technology and information needs in law schools

Developments in information technology have significantly affected law libraries, with the trend accelerating [cf Twining at pp 117-8]. Some legal information is now available in electronic form: CD-ROM, on-line data bases and the like. Most reference tools are, or will shortly become, available in electronic form, and some primary material, (such as reports of decisions of the Land and Environment Court of NSW) are now available routinely only in electronic form. The electronic materials are designed specifically for commercial use, and are priced accordingly - way beyond the budgets of most university libraries. In theory, these should assist legal research and teaching, but in practice either access to the services, or the cost of the hardware necessary to allow general student access, are far too expensive.

A report by the Canadian Legal Information Centre (CLIC) Advisory Group (which was a response to the Price Waterhouse findings on "Cost Projections for Canadian Law Libraries" (Canadian Association of Law Libraries, CLIC Infolinx Project, Phase I: Occasional Paper No 1, November 1992, CLIC) at pp 18-19 observed (in part) that:

- On-line sources have not replaced the traditional law library. If anything, they have increased the demand for and use of print materials. Because users are provided with many more citations rather than simply filling a void, electronic formats often increase user expectations;
- The real costs of technology are often hidden. Any savings may be more than eradicated by increased costs associated with staff time, equipment, physical facilities and communications;
- The implementation and maintenance of technological access to information often requires organisations to increase staff, hire staff with different sets of skills, or at minimum realign responsibilities.
- The physical requirements of electronic equipment and its maintenance may create more space problems than are solved;
- Technology is often implemented by way of separate or special funding. This distorts its value in relation to other information products and services;
- The effective exploitation of technology means that law libraries must continually plan and budget for upgrades to hardware and software or the implementation of entirely new systems.

On-line data bases. On-line search of legal data bases is charged by unit of time, and because full-text retrieval is the only feasible method of using virtually all legal data bases, the connect time charges are often significant, especially as many of the data bases are in Europe or North America, and communications charges are also significant. Searches of electronic data bases are much more efficient and effective ways of conducting legal research than manual searching: not only is less time consumed, but a far wider range of data can be accessed in practical terms, and there is far less risk of omission or error.

While the costs of photocopied, faxed, or electronically transmitted items (articles, cases and statutes) may be less than the cost of maintaining the hard-copy source, in practice access is severely restricted. Most law libraries are now accustomed to increased use of services such as CARL/UNCOVER for staff research purposes and access to journals, particularly those published overseas. For the printed primary sources, the law reports and legislation needed for student teaching and for basic research, these services are not presently an adequate substitute.

CD-ROM. Where legal data is available in CD-ROM format (such as Commonwealth statutes, and indexes to legal materials) the cost is high, especially if the CD-ROMS are networked to allow more users access. Moreover, in addition to the CDs themselves, the law schools and university libraries must make available additional personal computers, printers and network hardware.

The capital cost and maintenance of this equipment is high, and can be cost-justified in a commercial environment because of the more efficient use of staff time that the technology makes possible. The demands of professional training, and of academic staff time, mean that it is highly desirable for university law libraries to have access to electronic sources of information to facilitate sophisticated legal research. The same efficiencies apply, but the costs cannot be passed on to clients.

In Europe and North America, suppliers of commercial electronic sources of legal information have been relatively generous to law schools and have provided access to electronically stored data either free of charge or at rates significantly less than the commercial rates. In Australia this has not happened to the same extent. University law schools cannot count on having access to the most up-to-date data and information retrieval tools.

The need for standards

Australian higher education is now in a "steady state" and established disciplines are competing fiercely for ever diminishing and ever more expensive resources. University law schools, both as centres for professional education and training, and as centres of scholarship, need to establish benchmarks if their relative position, bad initially, is not to be diminished further. The standards for Australian law libraries are designed to this end.

2.4 Law deans' submission to the Pearce Committee

In 1985 the Australian law deans made the following submission to the Commonwealth committee to review legal education in Australia. In it they said –

> The discipline of law is a fundamental and very diverse intellectual discipline. Law deals with the ways in which people , institutions and nations deal with each other. There is no part of human activity which is beyond the reaches of the law or legal analysis. The analysis may have a philosophic, scientific, economic, commercial, social, political, comparative or cultural dimension.
>
> The primary law course aims to produce graduates who understand the diverse concepts, values, rules and principles which underlie the fabric of the legal system. A law graduate should not only be able to describe what the fundamental rules and concepts are; the graduate should be able to critically evaluate their suitability to contemporary conditions and comprehend and devise ways in which they may be modified to suit current or future times.[1]

On this basis the deans defined the collective aim as being to assist students "to develop intellectually so that they become independent, informed, creative and perceptive analysts and critics of the legal regulation of social conduct.

The deans submitted that law students should acquire the following skills in their law degree –

i. the ability to locate, understand and analyse all source materials relevant to a legal rule or concept or to the resolution of a problem and, in particular,
   a) analyse judicial decisions;
   b) distinguish situations of law or fact;
   c) use and interpret words and phrases encountered in judicial decisions or statutes; and
   d) comprehend the relative importance of each of the source materials to the formulation of the rule or concept or the resolution of the problem.

ii. the ability to characterise a fact situation as involved particular legal concepts or rules.

iii. the ability to compose a legal opinion or argument, having regard to relevant case-law, statutes and equitable and social policy considerations, and to communicate that opinion or argument with precision and clarity.

iv. the ability to explain a legal concept or rule in terms of its history and social, economic or political purpose and the social values inherent in it.

v. the ability to evaluate critically the suitability of a legal concept or rule for its stated social, economic or political purpose and in the light of principal legal theories.

vi. the ability to suggest improvements to a regulatory system or rule.

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[1] Law deans' submission, p 5, quoted in *The Cost of Legal Education in Australia: the Achievement of Quality Legal Education*, Centre for Legal Education, Sydney, 1994.

2.5 Information technology for learning and research

2 Where we are now

3.1 Federal Government funding to universities

The Commonwealth through the Department of Education, Training and Youth Affairs (DETYA) provides the bulk of the funding for most of the public universities (the universities in the National System) through "block operating grant funding". One private university, the University of Notre Dame Australia, also receives such funding. Other Commonwealth funding is provided, for research support; and Commonwealth policy is to encourage universities to secure non-government funding on a larger scale than previously. However, the block operating grant remains the largest single source of funds, over 50% of the total for all universities.

The amount of the funding for a university is based on the size of its enrolments across the disciplines (its 'profile'), using different levels of funding for enrolments in different disciplines. The first such determination was made for most of them in 1991, when the current system was introduced. 'Profiles' have changed since, as will be indicated. The system this represents is called the Commonwealth Relative Funding Model (RFM).

The RFM uses a base dollar amount for a student enrolled in a full-time load in an undergraduate degree program. That amount is called Cluster 1 funding, and that student is called an Equivalent Full Time Student Unit (EFTSU). Enrolments in each of the university discipline areas are weighted according to the Cluster assigned to that area.

"Law and Legal Studies" is a discipline for this purpose, and is weighted in Cluster 1. That is, enrolments in Law (the LLB) or in Legal Studies, along with disciplines like Accountancy, Economics and "Other Humanities", are weighted lowest for funding purposes.

At the other end of the scale, enrolments in Medicine are weighted at the highest, in Cluster 5, at 2.7 times the amount allocated to Cluster 1 enrolments. In between are enrolments in disciplines like Education, in Cluster 2, at 1.3 times the Cluster 1 amount; there are two other Clusters, 3 and 4, returned to below.

Students enrolled in joint degrees, who are the majority of Law students, are weighted according to the Cluster numbers of Law and Legal Studies and the other discipline(s) in which they are enrolled.

It is important to note that this intricate model was meant to determine the operating grants to the universities, *not how they were to spend that grant.* That is, they did *not* have to mirror the model in determining how much to provide their disciplines.

Since the initial application of the RFM in 1991, adjustments have been made to the funding it has produced. This has been to reflect changing government policy on the amount of the base allocation per EFTSU (that amount has declined slightly in real terms since 1991), the size of total enrolments in the National System to be funded (generally this has increased since 1991, so as to yield greater total Commonwealth block operating grant funding each year, at the price of larger and larger enrolments) and special initiatives the Commonwealth has fostered (such as research funding provision, and regional campuses). The net effect is that base operating grants to universities are still related to enrolments, but no longer in precise (if in substantial) correspondence with actual enrolments by discipline.

Law's allocation in the RFM to Cluster 1 is a matter of continuing concern, even although the Universities are not *required* to fund Law at that level, as previously indicated, because it is

based on a fundamental miscalculation of the real cost of teaching Law. The Commonwealth determined the Cluster weightings based on information it received from the Universities in the late 1980s about how much they spent to support their disciplines. For this purpose, Law and Legal Studies were combined, notwithstanding data that showed that Legal Studies (principally, teaching Law to non-Law students) cost about 60% of Law (the LLB). And it appears that the data used to determine the allocation of Law and Legal Studies came from two universities one of which at the time was allocating to Law significantly less than most universities with law schools.

3.2 What students pay

What students pay is their Higher Education Contribution Scheme (HECS) contribution, which is typically a deferred liability, payable after graduation through the tax system, although students have the option of paying it up-front, at a discount of 25%.

Since 1997, the HECS contribution has varied with the individual units they study. Those units are allocated across three bands, with the lowest, at (1999 figures, before the 25% discount) $3,409 for full time enrolment exclusively in such areas as Humanities, Education and Justice & Legal Studies, and the highest, at $5,682, for such enrolment in Law, Medicine, Medical Science, Dentistry, Dental Services, and Veterinary Sciences.

It is important to note that this contribution is *not* paid to the universities, but to the Commonwealth, and does *not* affect the universities' block grant. There is an exception to this, if a student pays HECS fee up-front. If so, the student pays the university the up-front fee ($4,261 for Law, being $5,682 less the 25% discount), and the money is held by the university and deducted from its operating grant. Universities are in fact starting to report HECS up-front payment as student funding. However, the fee paid is understood not to affect the universities' allocations to the respective disciplines, which remain the same throughout.

Data supplied by a number of law schools to the Council of Australian Law Deans, and confirmed by work done by the national association of law students (ALSA), suggests that even for relatively well funded law schools the amount allocated per undergraduate EFTSU in law is (if the HECS liability is deferred) no more than about 88% of the HECS amount attributable to such EFTSU, with percentages for other disciplines varying from 104% for Arts to 168% for Medicine and for some other disciplines in some universities even higher percentages. That is, law students alone of all classes of student are asked to pay more than is spent to educate them.

However, if up-front fees are paid, things change. The universities receive the money, while, as has been indicated, it is understood that the amount allocated to the various disciplines by them does not change. The result is that more is spent than the student pays. (The figures the CALD has are, about 113% (for Law), 139% (for Arts) and such as 224%(for Medicine).) Most students do not pay up-front, however – the percentage across all students in all public universities varies from about 20% to about 40%.

3.3 Funding of law schools by their universities

The various public universities fund their law schools in a variety of ways. Most use a variation on the RFM model that has been described above. That is, they allocate Law EFTSU to a funding "Cluster". This allocation then determines the operating grant to Law. This is the principal source of funding, with other funding coming from such as research funds, fee income and the like.

Although universities have freedom to determine the internal allocation of funds received from DETYA, in fact a significant number of them using an RFM allocate Law to their Cluster 1. However, a number of other universities put Law in a higher funding Cluster. In the latter cases, however, the amount per EFTSU so provided is not easily compared either with other universities or with the Commonwealth funding for the same EFTSU. The reason for the latter difficulty arises out of changes to the way universities have been funded since the beginning of the Commonwealth RFM system, as described above. The reason for the difficulty in making comparisons across universities is that the universities using the RFM model allocate the costs of law school operations in different ways. Thus, by way of example, some fold funding for the law library into law school operations, while others treat the law library separately, as part of the funding of the university library.

Allowing for such difficulties, the Council of Australian Law Deans is of the view that no law school in a public university is providing funding at levels corresponding to a multiple of Law EFTSU higher than 1.3; and, as has been noted, a significant number of them are funded at a lower multiple.

The one exception is for the funding provided by some universities for their law schools' clinical legal education programs. The EFTSU in these programs attract a higher multiple, although not one higher than 1.6. A multiple of 1.6 corresponds to the multiple for Commonwealth Cluster 3 (including Nursing, Computing and Other Languages).

Some universities have not adopted an RFM for internal funding purposes. In these universities, allocations are made on a grant basis. The funding here can be expressed in terms of funding per EFTSU, although comparisons with universities using the RFM are even more difficult. That having been said, it is believed none of these universities are funding their law schools on a per EFTSU basis at levels dramatically greater than a multiple of 1.3.

This last point is important because, as will be explained below, Law should be funded at a level higher than 1.3 the Commonwealth's base rate, higher even than 1.6.

3.4 The demands on funding: what should a good legal education cost?

Models for a good legal education consistently indicate that funding is required at levels substantially above the base in the Commonwealth RFM. These models particularly take account of changes in the understanding of what a good legal education requires over the period of the first major modern review of higher education in this country, in 1964.

The Law Council of Australia has itself made these points in submission to the Higher Education Council of Australia, as follows:

> a good law degree can no longer be seen as a cheap commodity. Staff need to be attracted, libraries need to be developed, skills inculcated. This cannot be done at an adequate level if law schools continue to be funded on a cluster 1 basis.
>
> The placing of law in cluster 1 is based on historical cost factors associated with outmoded, traditional styles of teaching which proceed from the assumption (which, if it was ever correct, is no longer tenable) that skills can be superadded to theory after graduation. It does not recognise that modern teaching methods and needs in the law schools, and the demands of practitioners, require 'small group teaching' as well as more library and computer resources, simulation exercises involving interpersonal skills (negotiation, mediation) and clinical programs.
>
> Source: ALSA Higher Education Review submission

The models underlying this position highlight the following factors that make a good legal education more expensive than its Cluster 1 allocation would suggest:

- increasing concern with the quality of student learning, leading to a greater use of small-group teaching — with obvious cost implications;
- increasing use of modern technology as teaching aids (Powerpoint presentations, computer aided learning packages,
- email communication between students and staff);
- increased reliance by staff and students on computer-based research — mirroring developments in the private legal profession and society generally, and necessitating the provision of fully outfitted computer law laboratories and computer facilities for staff (while Science and other courses are funded for laboratories and "consumables", law courses are not);
- integration of generic and specifically legal skills into the LLB curriculum, in order to produce not only better practitioners but … generally well-rounded non-practising graduates — necessitating small groups, intensive supervision and hence lower staff/student ratios for optimal learning, as well as very expensive resources for teaching/learning purposes; and
- use of student "placements" in law-oriented environments (with the private profession, government departments, community bodies and the like) to enable law students to obtain practical experience of the application of legal theory — which require heavy resources in terms of staff time, materials et al (it is surely anomalous that while the value of practical experience gained through such placements is widely acknowledged for potential practitioners and non-practitioners alike, the funding of education and health faculties includes a component for the costs of such placements, including supervision, where the funding of law courses does not.

  Source: CALD Higher Education Review Submission

This submission goes on to note that, "[a]lthough some of these factors may be common to other RFM1 disciplines, the last two certainly are not".

This last point is of crucial importance. Law, whether practised by lawyers or by others with legal training, is a performance oriented university discipline, that is, it marries training in high order social theory with training in highly sophisticated social practice. Those who need people with this sort of training rely on the university to provide the base for life-long, internationally competitive legal competency. At the same time, this base has proved of

interest and value not only to those who end up as lawyers but also to the many students drawn to law who end up in other careers.

The principal components of this base are two. They are learning how to understand a modern legal system, and learning how to understand the law in action.

The first component implicates particularly the law library, which is central to law in a way that has no parallel for any other university discipline. It is so central because not only is it used (as in other disciplines) to learn *about* the discipline's subject-matter, but also it *is* much of that subject matter. That is, the law is *in* the library as much as it is social activity. The law is the statutes, the cases, the administrative policies and the like that the books or their electronic equivalents record. And Law libraries are *very* expensive, because the rate of expansion of law and the costs of legal materials more than offset the savings to be gained from the trend to electronic materials. Yet universities throughout Australia are reining in library expenditure, in ways that have hit Law hardest.

The second component, learning how to understand modern legal practice, takes the student beyond the library, and beyond the lecture theatre. It requires the student to enter into what it is to be concerned with social ordering. This includes what is to recognise, and deal with, disputes, including planning for their avoidance. But it also includes working to channel the way social (including economic) relations are structured and maintained, so as to make for more productive such relations.

This second component requires the sorts of access to others, especially teacher-mentors, and opportunities to do legal tasks, that lectures, the cheapest form of university instruction, are not meant to accommodate. These sorts of access are to opportunities to develop skills in negotiation, documentation, and dispute management.

Here the analogy with disciplines traditionally much more highly funded than Law, like the visual and performing arts (Cluster 3, at a multiple of 1.6 in the Commonwealth RFM), let alone medicine or dentistry, is very close.

The Council of Australian Law Deans in a 1994 publication (Costs of Legal Education in Australia) attempted to work out the cost implications of these features. They came up with a figure for per EFTSU funding (including Library costs) that would imply placing Law at a funding multiple between 1.6, that for Cluster 3 (presently including, as has been noted, the Visual and Performing Arts, as well as Computing, Nursing and Other Languages) and 2.2, that for Cluster 4 (including Engineering, Science and Surveying).

3.5 Going outside public funding

It is becoming clear that some law schools have effectively abandoned the attempt to increase their share of public funding from their parent institutions and are instead concentrating on increasing their fee income. It is important to realise that not all law schools are equally placed to achieve reduced reliance on public money, so the arguments made here will remain relevant to those less able to follow this path. More than this, even those law schools generating significant fee income may need to argue the case for keeping a larger share of that income than might otherwise be the case.