

LAW SCHOOLS IN THE 21ST CENTURY

Not just training legal practitioners

ROB GUTHRIE AND JOSEPH FERNANDEZ

In 2000 the Australian Law Reform Commission (ALRC) report *Managing Justice* contained a review of legal education. The Commission observed that:

The size and structure of the profession as it then existed [in the 1970s] promoted a greater degree of cohesion and solidarity. That position has changed very dramatically over the past three decades. The number of lawyers has grown rapidly ... specialisation is now a feature of practice, there are very large national and international firms ... the number of law schools has nearly quintupled, and the academy mainly comprised of full time academics has a much more attenuated relationship with the practising profession.¹

This article examines the change in the delivery of law degrees in the last three decades. We note how legal education has moved away from traditional methods of teaching with a heavy emphasis on substantive law, but includes the study and practice of a range of skills and practices designed to provide a broad legal education. We consider the apparent over-supply of law graduates. We conclude that changes to the legal profession in the last 20 years, which include a reduced availability of clerkships, require a re-thinking of the delivery of law degrees. We argue that the law degree of the 21st century should focus on a student centred approach which integrates increased skills components in order to enhance the employability of the graduates for the legal profession *and* a range of other professions.

Issues in legal education — the over-supply problem

The Pearce Report 1987 was commissioned by the Commonwealth Tertiary Education Commission and reported to government shortly before significant Federal Labor Government reforms to the tertiary education sector.² The Pearce Report highlighted ineffective curriculum as a major issue for law schools. The Pearce Report focused on the need to include legal skills as a part of a legal education rather than just the traditional legal training centred on black letter law. It recommended that no new law schools be established. It contained recommended standards in relation to class sizes³ and library resources.⁴ It emphasised the 'theoretical and critical dimensions of legal education'⁵ and, perhaps most significantly given recent trends, it urged a culture of reflection by law schools on their teaching standards and course materials so as to include a concept of 'continuous self-improvement'.⁶

The Pearce Report was quickly outstripped by changes in tertiary education policy, and led to increased enrolments in law schools in the 1990s mainly through existing (first wave) law schools increasing their intake⁷ rather than the new (second and third wave) law schools taking up numbers.⁸ Since 1987, despite the recommendation on a moratorium on the establishment of law schools, at least 16 new law schools have opened. There are now 28 law schools in Australia.

As the number of law schools/faculties and law degrees has increased, concerns over the increase in the number of law graduates, with fears of a glut of lawyers or at least an over-supply of graduates leading to under-employment of law graduates has been mounting. Sampford argued that the central question in relation to legal education was one of quality not quantity and noted a study in 1995 showed that less than half of final year law students chose private practice as a first career choice.⁹ He urged a shift to law courses that produce 'law graduates who can find socially useful employment in many fields of endeavour'.¹⁰ According to Sampford the ideal law degree involves a course which includes training in:

- government lawyering
- corporate practice
- family and criminal law
- accounting, management, consulting and international business.¹¹

On the issue of quantity versus quality he concluded:

If we ensure the quality of legal education, the quantity of law graduates is unlikely to be a problem ... [But] it is largely because their graduates will have received the kind of education that both equips them for legal practice in a changing world and for work within the world outside law. It is only if their education is limited to that which is good for nothing more than a traditional practice that the spectre will become a reality.¹²

The oversupply of law graduates is only a problem if law schools and legal academics are seen as

functionaries of the legal profession, and if one assumes that the natural consequence of a legal education is a life in the legal profession. Such a view has its origins in the Pearce Report proposal for a moratorium on new law schools, and creates an uneasy tension between the growing demand by students to study law, and the inevitable employment of law graduates in a range of fields outside the legal profession.

The employment of law graduates — the ‘expectations’ problem

Law graduates have historically shown high employability. In 1994 McInnis and Marginson put the employment of law graduates second only to graduates in medicine.¹³ They also observed that the trend towards the generalist use of law was inevitable.¹⁴ Likewise the Law Deans’ survey *Studying Law in Australia* 2003 noted that law provides a strong general education for people desiring entry into business, banking, technology, the property market and construction and public administration.¹⁵ More than one-third of graduates do not practise law.¹⁶ An increasing number of law graduates will not obtain employment in the legal profession. The increasing number of law graduates does not pose a problem to the legal profession which benefits from the highly competitive market for clerkships and high quality of graduates. However, the creation of alternatives to clerkships via ‘College of Law’ models is evidence that the legal profession and their professional bodies retain a strong ethical and moral sense of obligation to attempt to put in place programs to assist graduates to gain entry into the profession.

The law school curriculum — the paradox of legal education

The ability to deliver a flexible and contemporary law degree has been affected by the dominant role of the *Blueprint for the Structure of the Legal Profession* which includes the so-called Priestley 11 core subjects.¹⁷ The Priestley 11 prescribes the minimum content of those 11 core subjects and facilitates the mutual recognition for admission to practice in each State of students who have undertaken those subjects.¹⁸ This latter element has meant that adherence to the Priestley 11 has generally been robust. The Priestley 11 has not escaped general criticism; for example the observations of Professor Andrew Stewart of Flinders University were noted in *Managing Justice*:

... any review of legal education and ongoing development, of standards [must] be a matter for a body that is much more broadly constituted than the existing [Priestley Committee]. [The Priestley 11] are *outmoded*, and in my opinion have severely and unnecessarily constrained the capacity of Australian law schools to engage in innovative curriculum development.¹⁹

There is no periodic national accreditation²⁰ of law schools, nor any structured quality audit of law school teaching. Many law schools are increasingly providing a more rounded legal education than demanded by the Priestley 11. As the ALRC has noted:

[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.²¹

There are obvious links between what is taught at law schools and the employability of law graduates. The inclusion in the curriculum of skills relevant to the legal profession and skills relevant in other employment contexts has been significant in the law degree. There is evidence that generic skills are those most sought after by employers: written and oral communication skills; critical and creative thinking; and the ability to be able to work in teams.²² Sampford’s earlier discussed thesis suggests that the profession has nothing to fear from the increasing number of students who wish to study law if law schools provide a broad curriculum which includes a *range* of skills which can be used in a *range* of occupations. McInnis and Marginson have pointed out that most law degrees incorporate professional skills such as legal research and client interview skills. They observed that the inclusion of these skills could create tensions in traditional law schools.²³ This tension exists between preparing students for a variety of vocations and the specific preparation for professional legal practice, that is, the black letter law content. It is a tension that also creates a paradox for law schools and the profession. As more generic skills are included in a curriculum, so it is that law graduates are better equipped for taking up employment outside the profession. This raises the perennial question: how much influence should the profession have on curriculum development in law schools? This tension only becomes apparent when a law school sees its only role as being to prepare law students for the legal profession. Given the increasing numbers of students who will not enter the legal profession, universities would do better to ensure that law students are equipped for a range of vocations.

How much influence should the legal profession have on the content of the law degree? As the numbers of graduates who do not obtain employment as lawyers increases, the influence of the legal profession may decrease. This creates another apparent paradox in that the perceived intellectual rigour of black letter law studies required for a law degree may be what makes the degree attractive to employers outside law. If the legal content of the law degree is diminished would this devalue the law degree? The way to address the issue is to take a student-centred approach, so that the focus is on course content, materials and skills students need to gain employment in or outside of legal practice. McInnis and Marginson hinted at this approach when they noted:

The growth of the generalist role of law degrees requires that if anything, preparation should be broader than before. At the same time the present emphasis on work-related skills, whether generic or occupational, implies more vocational specificity and some refashioning of general education as generic work-related skill.²⁴

The challenge is to create a course that does not upset this delicate balance. As Andrew Stewart has advocated, the first requirement is to re-assess the composition of the *Priestley 11*. The *Priestley 11* is focused primarily on the issue of content. It is now recognised that most degrees have a limited shelf life in terms of the content knowledge. Shelf life in this context means the currency of knowledge obtained through a course of study. In the case of law and humanities-based degrees the shelf life is longer than say technology-based degrees. In the latter case the shelf life may be as short as 1–2 years and in the former about 3–4 years. By contrast the *skills* developed in University courses are more likely to have a life long quality. It follows that it is important to integrate generic skills into the course. This is not achieved by simply adding 'skills' units to courses in the manner of a capstone unit. This is only part of the process. It is now well established that the assessment of skills within existing unit content is a key element in developing skills.²⁵ This means that within each unit there should be the assessment and teaching not only of content but also of appropriate skills. Therefore, the reorientation of curricula does not necessarily require law schools to set out to provide non-legal qualifications or skills, but rather to accentuate the existing strengths of legal education.

This leads back to the role of the legal profession. Clearly the legal profession should retain input and perhaps a higher profile in the teaching and assessment of skills. The legal profession retains a gate-keeping role with law degrees as in most States the respective practice boards have to be satisfied as to the status of an applicant's legal study before admission. This allows admitting authorities to influence the content of law degrees. There is little legislative fiat to investigate the quality and assessment of law degrees but this might, and probably should be, the focus in the future. In addition, the ability of admitting authorities to approve legal qualifications only makes sense if all law schools, not simply those seeking accreditation, are required to undergo periodic review of their programs as is the case in other professions such as accounting and engineering.

The law degree of the 21st century

Sampford has pointed out that if the content of a law course holds to traditional black letter law and ignores demands for skills and contemporary issues it will probably be open to criticism from the profession for not assisting in the training of lawyers and from the community at large for not equipping the student for alternative employment. If the course includes a range of generic and professional skills both the profession and the community at large benefit. It follows that the objectives of the law degree of the 21st century should be:²⁶

- Suitably qualified academics and practitioners should teach the course, using contemporary materials and methods which integrate a range of professional and generic skills to provide the foundation for law graduate employability in a range of activities and fields.
- Those who complete the law degree will be skilled in oral and written communication, advocacy, legal research, client interviewing, listening and negotiation and possess an openness to inquiry and critical thinking.
- The law graduate is adaptable to change and understands the phenomenon of change in the law; the law's context and legal processes and the rules governing particular interactions in society. The study of law should be concrete and practical.
- The approach to teaching a law degree is student-centred, and the course should be designed to allow for part-time study and encourage graduate entry students and mature age students. Wherever possible the law degree should include clinical experience as a course requirement.
- The central aim of a legal education is the education and training of legal practitioners, recognising that such training has utility for a range of other occupations and that the distinguishing attribute of a legal education is the development of practical judgment and skills.²⁷

Sampford and Wood argue that the best form of legal training includes a course that provides an overview of the law that is necessary for students to understand the context of legal practice so that they can choose the style of legal practice to pursue or in fact whether to enter legal practice at all.²⁸

Some conclusions

A law degree should include and integrate into its curriculum a number of generic and professional skills, including skills relating to legal research, writing and argument. The integration of skills should not simply be on a capstone basis, but part of a 'unit by unit' scheme. It should also integrate sufficient elements of legal theory, which would include elements of feminist legal theory, jurisprudence, ethics in the law and community legal service.²⁹ A law degree premised on the above features will be attractive to students who wish to enter the legal professional and to those who wish to pursue alternative careers. Many law graduates do not practise law, although the practice of law is still the aim of most law students. The legal profession and other employers value the skills acquired through legal education. Legal education should be a continuum involving theory and practice at every point.³⁰

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2. Dennis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (The Pearce Report) (Canberra: Australian Government Publishing Service, 1987).
3. A recommendation or class sizes of 15:1 ratio.
4. A recommendation of 100,000 volumes per library.
5. The Pearce Report, above n2, 241-3.
6. Ibid 244, 246
7. Some established schools tripled their intake.
8. Charles Sampford, *The Panic Over Numbers*, in J Goldring et al, *New Foundations in Legal Education* (1998) 70.
9. Ibid (Sampford) 69 referring to the Pearce Report.
10. Ibid 73.
11. Ibid 73.
12. Ibid 75. See also C McInnis and S Marginson, *Australian Law Schools after the 1987 Pearce Report* (1994) 28.
13. McInnis and Marginson, above n12, 27
14. Ibid 27.
15. Law Deans, Chapter 3, *Studying Law in Australia*. See similar sentiments in ALRC 89 *Managing Justice* [2.116].
16. Australian Law Reform Commission, *Review of the Adversarial System of Litigation — Rethinking Legal Education and Training*, Issues Paper No 21 (1997) [5.15].
17. Law Council of Australia, *Blueprint for the Structure of the Legal Profession* (1994). Notably, Priestley also recommended a range of skills to be included in the law courses.
18. R Simmonds, 'Growth Diversity and Accountability' in J Goldring et al *New Foundations in Legal Education* (1998) 60.
19. ALRC, above n1, [2.65] (emphasis added).
20. The ALRC has noted the need for national standards and/or accreditation: ALRC, ibid [2.25].
21. Ibid [2.78].
22. S Vignaendra, *Australian Law Graduates' Career Destinations* (1998) ch 4.
23. McInnis and Marginson, above n 12, ch 16.
24. Ibid 27.
25. S Christensen and S Kift, 'Graduate Attributes and Legal Skills: Integration or Disintegration?' (2000) 11 *Legal Ed Rev* 207.
26. These objectives are adapted from the comments made in J Goldring, 'The Future of Legal Education; Doubtful Assumptions and Unfulfilled Expectations' and J Goldring, 'Tradition or Progress in Legal Scholarship and Legal Education' in J Goldring et al, *New Foundations in Legal Education* (1998) 27.
27. *Practical judgment* is defined by Simmonds as 'the ability to, in a stress-filled, conflicted situation where no high order rule can in real terms neatly resolve the problem, deliberate about the alternatives and make sensible and reasoned decisions'. R Simmonds, 'Legal Education for Future Professionals' in J Goldring et al, *New Foundations in Legal Education* (1998) 94–6.
28. C Sampford and D Wood, 'Theoretical Dimensions in Legal Education' in J Goldring et al, *New Foundations in Legal Education* (1998) 101. These authors make a case for theoretical questions to be included in the curriculum in a more prominent manner, calling in aid the Pearce observations that legal education has been too rule oriented. Arguably, introducing the additional theory into the law is contrary to the recommendations of Pearce that courses include greater skills content.
29. Referred to as the Integration Model. L Taylor, 'Skills: Skills-kind Inclusion and Learning in Law School' (2001) (3) *UTS Law Review* 85, 103–5.
30. ALRC, *Rethinking the Legal Education and Training*, Issues Paper No 21 (1997) [1.23].