

Australian Academy of Law Launch
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*The recent arrest of Anderson Kill & Olick paralegal Brian Valery for practicing law without a license raises a number of questions about how the ersatz Fordham graduate could have gotten away with representing corporate clients in complex litigation--without ever having gone to law school. The more salient question, however, is: Would it have mattered if he had?*¹

Your Excellency, Chief Justices, Attorney General, Your Honours, Deans, Distinguished Guests. It is a great honour and responsibility to be invited to speak here today, which I feel very keenly on behalf of my many committed academic colleagues and their scores of students – past, present and future.

As we have heard, this initiative grew out of a need articulated by the Australian Law Reform Commission (ALRC) in its 2000 Report, *Managing Justice: A Review of the Federal Civil Justice System*.² The ALRC quite properly there drew attention to the growth and fragmentation of the legal profession and sent the strong message that it was our collective responsibility to work hard and smart to re-establish our profession's credentials, relevance and efficacy. It is worth observing that the recent 2007 publication by the US Carnegie Foundation for the Advancement of Teaching, *Educating Lawyers: Preparation for the Profession of Law*, draws a similar conclusion as regards US lawyering:

Critics of the profession, both from within and without, have pointed to a great profession suffering from varying degrees of confusion and demoralization. A reawakening of professional élan must include, in an important way, revitalizing legal preparation.³

From my own particular perspective as a legal academic, this is my starting point: the Academy presents a much-needed opportunity to focus on taking legal education seriously. In all of their contemporary diversity, the one commonality shared by all members of the profession is the time they spend together in law school studying to be future practitioners. Legal education, if conceptualised as a professional apprenticeship, is a complex process that requires a focused and integrated approach to “[link] the interests of legal educators with the needs of legal practitioners and with the public the profession is pledged to serve”.⁴ The Academy has a vital role to play in determining the future for Australian legal education – as its advocate, its quality assessor and, of course,

¹ C Stracher, “Law schools rarely teach students how to be lawyers”, *The Wall Street Journal*, Meet the Clients, Friday, January 26, 2007. Retrieved July 1 2007 from <http://www.opinionjournal.com/forms/printThis.html?id=110009581>.

² Australian Law Reform Commission, *Managing Justice: A review of the federal civil justice system* Report No 89, 2000. Retrieved July 1 2007 from <http://www.austlii.edu.au/au/other/alrc/publications/reports/89/>.

³ W M Sullivan, A Colby, J Welch Wegner, L Bond & L S Shulman, *Educating Lawyers: Preparation for the Profession of Law*, The Carnegie Foundation for the Advancement of Teaching, 2007, at 19.

⁴ *Ibid*, Summary at 4.

as expert advisor, critical friend and home for the research and debate that needs to be enabled.

As has been discussed, much has changed in the modern world – continuously and dynamically – and legal education and the legal services industry are no more immune to that change than the higher education sector and the globalised workplace of which they are respective microcosms after all. This largely externally driven change has meant that law graduates are entering complex, quite structurally different, professional environments from that of their predecessors, even those of a decade ago, while the content, methods and foci of legal knowledge are also now changing so rapidly that, in many areas of practice, the doctrinal law learnt at law school is no longer current even on graduation.

In answer to the first question posed for this Panel – what do I do that advances the objectives of the AAL – I, like many of my academic colleagues, have sought to engage with the other branches of the profession around the drivers, in legal education specifically and in higher education generally,⁵ that have forced change in the dynamic world post the 1987 Pearce Report on Australian Law Schools.⁶ One need only look to the explosion of law schools nationally to have some sense of the massification and diversity facing our sector: *from* the 12 law schools existing in 1987 when the Pearce Report was written *to* the 29 accredited law schools in early 2007 (not counting Notre Dame's Sydney campus), with at least two more due to start taking students over 2007-2008 (USQ and UniSA) and yet more still proposed. This proliferation has led to a very competitive and challenging environment, in which a large number of generally under-resourced law schools struggle to achieve staffing levels to enable the concomitant flourishing of challenging teaching and research agendas. Simultaneously, law schools strain to differentiate themselves to a now contracting and discerning student market (in the face of the stark reality that what is on offer across all Australian law schools is fundamentally very similar).

In an era of diminishing public funding, while of course remaining conscientious about their commitment to the profession, law schools have also struggled to manage the changed expectations and accountabilities increasingly demanded of them as participants in the “higher education industry”. Chief amongst these are the public obligations imposed by government and university policy to leverage new understandings around effective learning, teaching and assessment practices. In legal education particularly, this has led to dramatic change.⁷ The traditional transmission mode of legal education, so dominant at the time of Pearce, which was allegedly certified by 100% closed book examination, has been proven to be educationally ineffective, and just will not produce the significant qualitative changes in student learning outcomes that both graduates and their employers demand today (e.g. the highly sought-after employability skills of oral and written communication; teamwork;

⁵ See, for example: S. Kift, For Better or For Worse?: 21st Century Legal Education. In *LAWASIA Downunder 2005*, Gold Coast Convention Centre, March 2005, retrieved July 1 2007 from <http://eprints.qut.edu.au/archive/00007439/> and S. Kift, A Tale of Two Sectors: Dynamic Curriculum Change for a Dynamically Changing Profession. In *Proceedings 13th Commonwealth Law Conference 2003*, Melbourne, Victoria, Australia, retrieved July 1 2007 from <http://eprints.qut.edu.au/archive/00007468/>

⁶ D Pearce, E Campbell and D Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission*, Canberra, ACT, Australian Government Publishing Service, 1987 (“Pearce Report”).

⁷ R Johnstone and S Vignaendra, *Learning Outcomes and Curriculum Development in Law*, AUTC, 2003, Canberra. See also M Keyes and R Johnstone, “Changing Legal Education: Rhetoric, Reality, and Prospects for the Future” (2004) 26 *Sydney Law Review* 537.

problem solving; self-management; planning and organisation; technology; lifelong learning; and initiative and enterprise⁸). In a similar vein, traditional assessment methods (such as examinations) cannot validly assess these new learning outcomes and this has led to further transformation in and diversification of assessment practices, including the identification of assessment criteria and a focus on providing feedback to students on their performance as against those criteria in aid of their ongoing learning and improvement.

When thinking about the continuum of legal education and its staged articulation – from law school, through Professional Legal Training (PLT) and into Continuing Legal Education (CLE) – a particular challenge for legal educators, the profession and now the Academy is to understand the ramifications for the profession of learning conceptualised as a life-long – some refer to it as a “life-wide” – process. We have already seen echoes of this in the profession’s embracing of mandatory CLE and judicial education. For our graduates to be “globally portable” and to engage effectively in knowledge management and generation in increasingly diverse and globalised workplaces, law schools have an obligation to equip students with the knowledge, skills and attitudes they require to facilitate their own learning engagement on into the future. Relevantly in the legal context, in 1998 Vignaendra⁹ identified that the most frequently used skills by law graduates in any type of law-related employment were those of communication (both oral and written), time management, document management and computer skills. Legally specific skills, while important to private professional practice, were not the most frequently used. We have slowly come to the realisation that a doctrinal-heavy education will not necessarily equip law graduates with many of the necessary practice and lawyering skills and attitudes, particularly the strong ethical base and sense of professionalism, needed to perform effectively in the modern global workplace. Add to this that research has consistently shown that only 50%-60% of law graduates will remain in longer term legal practice¹⁰ and that in any discipline (law being no exception), graduating students will now routinely go through several changes of career in their working lives, it may be appreciated how the approaches to legal education have had to change.

Having set out that background, there are three points that I particularly want to make in the context of the Academy’s launch, which may indicate some priorities the Academy may wish to pursue –

1. The urgent need to reconceptualise the law curriculum;
2. Underfunding and the effect of the high cost of legal education on diversity;
3. The necessity to develop models for sustainable professional practice.

⁸ Most recently see Precision Consultancy, *Graduate Employability Skills*, prepared for the Business, Industry and Higher Education Collaboration Council, 2007. Retrieved September 20 2007 from <http://www.dest.gov.au/NR/rdonlyres/E58EFDBE-BA83-430E-A541-2E91BCB59DF1/18858/GraduateEmployabilitySkillsFINALREPORT.pdf>. See also see C Ryan and L Watson, *Skills at Work: Lifelong Learning and Changes in the Labour Market*, EIP 03/14, 2003. Retrieved March 1 2005 from <http://www.dest.gov.au/highered/eippubs.htm>; Evaluation and Investigations Programme, Department of Education, Training and Youth Affairs (EIP DETYA), *Employer Satisfaction with Graduate Skills: Research Report*, 99-7, Canberra, February 2000. Retrieved March 1 2005 from <http://www.dest.gov.au/highered/eippubs1999.htm>.

⁹ S. Vignaendra, *Australian Law Graduates Career Destinations*, Centre for Legal Education, Sydney, May 1998 at 39.

¹⁰ See, for example, The Steering Committee on the Review of Legal Education and Training in Hong Kong, *Legal Education and Training in Hong Kong: Preliminary Review*, Report of the Consultants, August 2001, (the “*Hong Kong Report*”), retrieved February 20 2003 from <http://www.hklawsoc.org.hk>, at 27, citing *Scottish Legal Education in the Twenty-first Century: A report to the Joint Standing Committee on Legal Education in Scotland* (April 2000), para 4; M Karras & and C Roper, *The Career Destination of Australian Law Graduates*, Centre for Legal Education, Newcastle, 2000: 58% of those who completed their legal education in 1997 in Australia were still working in private legal practice three years later.

Reconceptualising the law curriculum

The Academy provides the ideal forum within which an informed, constructive and inclusive debate may be progressed amongst all branches of the profession around the future vision for legal education and the constitution of law curriculum. It is gratifying also that the Academy's launch coincides with the Law Council of Australia elevating the profile of this issue with the formation of a legal education committee.

The ALRC in *Managing Justice*¹¹ urged a re-orientation of traditional approaches away from a content focus towards skills and values acquisition and training, exhorting a move from “what lawyers need to know” to “what lawyers need to be able to do [with what they know]”.¹² The achievement of this objective, which has become an international priority,¹³ requires that a number of initiatives be adopted, but I will confine myself today to the most pressing. Fundamental to this discussion is the issue that Australian law school curricula are all very similar and have been hindered in their development by the necessity to focus on coverage of dated areas of substantive law content.

The “Priestley 11” prescribed “areas of knowledge”, as formulated in 1992 by the *Consultative Committee of State and Territory Law Admitting Authorities* (the “Priestley Committee”), are a significant constraint on re-formulating Australian legal education in ways that are modern and relevant. The Priestley 11 have been subjected to much robust and valid criticism. A particular concern is their “solitary preoccupation with the detailed content of numerous bodies of substantive law”¹⁴ at the expense of skills and capabilities: nothing in the Priestley 11 formulation refers to student acquisition of any intellectual and analytical skills (e.g. problem solving, critical analysis), of practice skills and indeed of any other desirable lawyering or generic skills or attitudes. Even ethics training has languished under the current regime, with little regard had to the affective (cf cognitive) domain nor adequate recognition that professional responsibility is a complex interplay of interpersonal skills and attitudes linking ethical conduct to communication, professional competence and management skills.¹⁵ It is beyond argument that the traditional approach to ethics training should have delivered better outcomes for the public, the profession and individual practitioners. The essential assertion here is that theory and content should not be separated from practice, that abstract knowing is of little value absent the professional ability “to do”, and that law students need to be exposed pervasively over the course of their degree to professional responsibility contextualised in professional experience: in short, that practical experience, ethical responsibility and lawyering skills should be integrated with the study of doctrine throughout the law degree. “Students must be made aware of the values that legal solutions carry, and of the ethical and humanitarian dimensions of law as an instrument which affects the quality of life”.¹⁶

¹¹ ALRC Report No 89, above n 2.

¹² Australian Law Reform Commission *Review of the adversarial system of litigation: Rethinking legal education and training* (Issues Paper 21) 1997; see also Australian Law Reform Commission, *Review of the Federal Civil Justice System* (Discussion Paper 62), AGPS, Canberra, 1999.

¹³ See most recently for example, Sullivan et al, above n 3. Also, R Stuckey et al, *Best Practices for Legal Education: A Vision and a Road Map*, 2007, CLEA, retrieved August 30 2007 from http://law.sc.edu/faculty/stuckey/best_practices/best_practices.pdf; Law Society of Scotland current consultation, *Shaping the Future of Legal Education And Training*, retrieved August 30 2007 from <http://www.lawscot.org.uk/training/consult>

¹⁴ ALRC Report No 89, above n 2, at 2.82.

¹⁵ See, for example, the ALRC's conceptualisation in ALRC 89 of a “healthy legal culture” characterised by: an honest, open and self-critical nature; a respect for, & effective communication among, stakeholders; a willingness to adapt and to experiment (or, put another way, one that is not resistant to change); a commitment to lifelong learning as an aspect of professionalism; and deep ethical sense and commitment to professional responsibility.

¹⁶ The Lord Chancellor's Advisory Committee on Legal Education and Conduct, *First Report on Legal Education and Training*, London, 1996 at 19.

The Priestley 11 have also been criticised on the additional bases, variously, that they –

- are not contemporary and their “straightjacket” approach is incapable of accommodating the changing nature of the legal profession for which law students are now prepared; that is, the “areas of knowledge” are outmoded and inconclusive (international law and the lack of attention to generic and lawyering skills are the areas most frequently mentioned in this regard, but reference is also made to comparative law and to the ramifications of information and communication technologies (ICTs), amongst others);
- necessarily fail to address issues around how “internationalisation” of the curriculum might be progressed and equally how embedding Indigenous content and perspectives should be advanced (while other examples exist such as embedding cultural literacy; ethical values; *etc*);
- demand a limiting “preoccupation with local law”, which is inappropriate for our increasingly globalised industry and society;
- assume a rigid divide between law school education, which teaches legal rules, and PLT courses, where practice and skills are taught. The questions around the articulation of undergraduate law into PLT and, indeed, from PLT out to professional practice are exceptionally vexed. This has been compounded in recent times by the very strong push in universities for undergraduate curriculum to embrace work-integrated learning. This latter is generally poorly conceptualised in the humanities and is not well understood in the legal context of PLT. Further again, the opportunities for clinical legal education are currently quite limited in most Australian law schools, though some notable exceptions exist, chief amongst which is the University of Newcastle’s programs. The recent US Reports canvassing legal education¹⁷ refer to clinical training as “the underdeveloped area of legal pedagogy”,¹⁸ which is true also in the Australian context. Given the pervasiveness now of PLT, this may or may not be an issue of concern to the profession, but it would seem desirable that the discussion be had and that we are all clear about the how and why (and quality of) PLT and the principled articulation into and out of that stage of legal training.

Underfunding and the effect of the high cost of legal education on diversity.

The Council of Australian Law Deans (CALD), in its 2007 submission to the federal government on the funding of legal education,¹⁹ under the heading “Entrenchment of historical underfunding of law” said as follows –

The discipline of law has been chronically underfunded since the development of the Relative Funding Model in the late 1980s. Estimation of the historical cost of teaching law was based on fundamentally flawed case studies that (a) confused and conflated the teaching of law to law students and the teaching of law to non-law (eg commerce) students, and (b) so far as it did examine law teaching to law students, chose atypical examples. Even more importantly, the parameter of historical cost made no allowance for the steady change in the imperatives of law teaching from the passive imparting of a body of knowledge to students in large groups to the active acquisition of skills in necessarily smaller groups, requiring significantly more

¹⁷ Sullivan *et al*, above n 3; Stuckey *et al*, above n 13.

¹⁸ Sullivan *et al*, above n 3, at 24.

¹⁹ Council of Australian Law Deans (CALD) Review of The Impact of the Higher Education Support Act 2003: Funding Cluster Mechanism, Submission, 26 February 2007, at 1. Retrieved July 1 2007 from <http://www.cald.org.au/docs/CALD%20submission%20on%20DEST%20review%20of%20HESA%20-%20final.pdf>

favourable student/staff ratios. All Australian law schools have been struggling ever since to maintain quality and to produce competent and ethical lawyers in an environment of significant underfunding. Law schools have either had to rely unduly heavily on part-time or casual teachers or, where they have the capacity, to subsidise their LLB programs from other parts of their operation such as full-fee paying postgraduate programs, consultancies, or endowments.

A particular anomaly is that, while the government contribution to legal education is exceptionally low (law as a discipline is in the lowest cluster level for commonwealth contribution), law has always been classified as one of the most expensive courses in Australian higher education (in the highest band level along with dentistry, medicine and veterinary science). The consequence is that law students pay an inequitably high proportion of the cost of their education comparative to other disciplines.²⁰ Indeed, there is a very real possibility that they may be paying more than the actual cost of providing the degree to them.

The Academy has some important work to do here on two fronts. To date, for whatever reason, the academic community has not gained traction with its arguments that government funding for legal education is sadly and comparatively inadequate and that law schools are simply not sufficiently resourced to maintain, let alone enhance, the quality of their programs, nor to fulfil their remit of providing quality professional education. The Academy presents a unique and timely opportunity for the profession to press an agreed conceptualisation of legal education as one that is little different to the education of other professionally-focussed disciplines (such as doctors, veterinarians, dentists, *etc*), whose courses have long been recognised as resource-intensive and necessarily practice-based. Legal education, with its traditional focus on doctrine and content, has sent mixed messages about its positioning as a professionally-focussed, practice-based discipline, and stands in stark contrast to other professional disciplines by virtue of the pedagogies it has traditionally adopted (those of “cheap” large group lecturing and tutoring, divorced from small group clinical experience to practise performance of the professional role). The Academy, speaking for the whole profession, represents our best opportunity in recent times to reinvigorate this debate and reassert the validity of legal education’s requirement for a similar funding platform to the other professions: lawyering must be practised and reflected on to be acquired and cannot be learnt solely by reading and talking about it in the abstract.

A second front for the Academy to tackle under this head is to research and monitor the effects of the high cost of legal education on the demographics of those who now seek to study law, who are retained to graduation, and who ultimately seek admission to practise. The cost of the LLB (with students graduating with debts in the order of \$40000-\$80000) can be quite prohibitive and a very real disincentive in many instances, but especially amongst first generation law students, those from Indigenous backgrounds, from low SES groups, and from rural and isolated areas. We in the law schools have seen an obvious drop-off in the diversity of entering cohorts – an issue with which I think the profession is obliged to contend. As many institutions move towards offering full-fee paying places, the imperative to address the equity and diversity issues raised for the make-up of the profession is becoming critical.

²⁰ The National Tertiary Education Union (NTEU) has suggested that law students may be paying as much as 84% of the cost of their degree. See “Reveal real cost of degrees, union urges Govt”, *ABC News*, January 15, 2007. Retrieved July 1 2007 from <http://www.abc.net.au/news/stories/2007/01/15/1826792.htm>.

Developing models of sustainable professional practice

The high level of attrition from professional ranks, even allowing for current generational churn, should be a matter of concern to all of us who are committed and passionate about the value of the lawyering role and its potential for public good. What strategies do we have in place, and what pathways do we offer, to encourage early career lawyers to embrace the prospect of a satisfying, long-term, *sustainable* career? What values do we share around our professionalism ethos (and our “professional élan”) that we can communicate with constancy to new entrants? How do we imagine the lawyering work-life balance? What shared models exist for HR policies around inclusive and flexible work practices that may be used to assist and support practitioners to enact sustainable working lives? I chose to use my third wish for Academy action on us addressing the vexed issue of developing and promulgating better models for sustainable practice in order to stem the tide of professional flight; particularly within three years of graduation and especially for women who, despite their high graduating numbers, remain seriously unrepresented at senior levels.

There could be any number of reasons why lawyers choose not to stay in practice and this is one area where an evidence-based approach to generating solutions is clearly needed. The Academy, working across the profession, could play a critical role in such investigations and data gathering.

Of particular concern in this context is the state of our profession’s mental health, starting with student well-being at law school.

It is well-known that lawyers suffer higher rates of depression, anxiety and other mental illness, suicide, divorce, alcoholism and drug abuse, and poor physical health than the general population or other occupations. These problems are attributed to the stress of law practice, working long hours, and seeking extrinsic rather than intrinsic rewards in legal practice.

It is less well-known that these problems begin in law school. Although law students enter law school healthier and happier than other students, they leave law school in much worse shape. “It is clear that law students become candidates for emotional dysfunction immediately upon entry into law school and face continued risks throughout law school and subsequent practice.”²¹

The state of our practitioners’ health is a matter for which we must all assume responsibility – those of us who set the professional tone and prepare law students to enter practice; the law’s practitioners, all of who are models and mentors for newly admitted graduates; and the profession’s leaders who can speak out about the intrinsic rewards of practice and healthy approaches to work-life balance. With concerted effort, it does not seem impossible that we should be able to make gains in this area and resurrect our somewhat demoralised profession.

It is easy to speculate that many of the subtle messages about what counts for professional success, first inculcated in law school and then replicated in legal practice, have something to answer for here. Most students enter law school naturally idealistic and positive about their legal future and with a degree of altruistic intent regarding the potential value and meaning of their lawyering work. Most expect to be imbued with a

²¹ Stuckey *et al*, above n 13, at 22, references omitted.

moral imperative for public good. Unfortunately, the tradition has been for law school to quickly instil an ethos of lawyering as an extremely competitive, high stakes, zero-sum game, where rationale, objective analysis is privileged to the exclusion of most other qualities and where the prevalent philosophy is of law as a “value neutral” zone. The Council of Australian Law Deans has further conjectured that the low government contribution to legal education (and high student contribution) of itself sends an unfortunate message to many; that is, that the profession is more about individual material and financial gain than it is about contributing to the public good and that “being a lawyer is about looking inward rather than outward, and dampens the aspirations of law schools to harness the natural idealism of many beginning law students and to educate them not only for selfish but also for altruistic ends.”²²

It is to be hoped that, if legal education can achieve a “re-balancing” away from its “relentless focus... on the procedural and formal qualities of legal thinking”²³ and embrace a more pervasive approach to a professional apprenticeship that attends to developing the ethical and social dimensions of practice and engages the “moral imagination” of students, some of these negative effects may be mitigated. However, much deeper structural work for a professional paradigm shift also needs to be embraced to address these important issues and revitalise the appeal and sustainability of professional practice. It is suggested that the Academy might profitably assume a leadership role in this regard.

Conclusion

This launch is an exciting event and these are exciting times. The joining together of the various branches of the profession and its leading thinkers under one body to consider our future and direction and what constitutes us as a profession, rather than disparate legal occupations, is to be welcomed and nurtured. I wish the Academy well and trust it to enhance the standing of our great profession.

²² CALD, above n 19, at 3.

²³ Sullivan et al, above n 3, at 145.