WHY SHOULD LAW MATTER? TOWARDS A CLINICAL MODEL OF LEGAL EDUCATION

ANDREW GOLDSMITH*

> [Since their establishment], Australian universities have expanded greatly in size and complexity, but two relationships have remained critical: those with government and the citizenry. As the result of changes in government policy from the mid-eighties, it is the second of these relationships that is now in doubt. The shift from the old civic university to the new market-oriented, semi-public enterprise has thrown in doubt most of the expectations associated with its operation.[1]

> I keep waiting for a book that will explain to Australians why it is that their universities are important, how it is that contemporary Australia is in many respects a creation of the work of universities ... and what needs to be done to forge a continuing working relationship between society and its universities.[2]

I INTRODUCTION

Legal education, many feel, is in crisis. Student numbers have risen dramatically since 1987, while staff increases have tended to be modest or negligible by comparison.[3] At the same time, there has been declining per capita government spending on university students.[4] This has meant inevitably a deterioration in staff–student ratios,[5] increased pressure on buildings and

* School of Law, Flinders University. This paper was originally given at the Commonwealth Legal Education Association Conference, Adelaide, April 2000. It has been revised and substantially updated to take account of developments since that time. It forms part of a corpus of work funded some years ago by the Australian Research Council, whose support for that work is gratefully acknowledged. The author also wishes to thank the two anonymous reviewers for their insightful and constructive comments on an earlier version of the article, and Emma Walters for her research assistance.

1 Stuart MacIntyre and Simon Marginson, 'The University and its Public' in Tony Coady (ed), *Why Universities Matter* (2000) 49, 53.

2 Don Aitkin, 'When in Doubt, Brandish Dawkins', *The Australian* (Sydney), 8 March 2000, 39.

3 See, eg, Craig McInnis and Simon Marginson, *Australian Law Schools After the 1987 Pearce Report* (1994) 129, on the changes at Monash law school between 1987 and 1994. While student numbers had increased nearly 40 per cent, staff numbers had remained 'virtually constant'.

4 In the past decade, government funding per student has fallen from A$10 500 to A$8000. See Jeff Giddings, 'A Circle Game: Issues in Australian Clinical Legal Education' (1999) 10 *Legal Education Review* 33, 36–44.

5 Generally across the university sector, staff–student ratios worsened from 1:11.7 in 1975 to 1:15.3 in 1992. See McInnis and Marginson, above n 3, 18. The next eight years saw further declines in these measures. In Law, while systematic (ie Australia-wide) public data could not be found, deans will admit at least informally to a significant deterioration in staff–student ratios in recent years. At Flinders law

libraries, and a general sense among law teaching staff of a substantial decline in working conditions. Staff–student ratios in Law have been substantially worse than most other university-based disciplines. While the mean nationwide across all disciplines appears to be just below 1:20,[6] Law not uncommonly has ratios in the low to mid 20s or even higher. This represents an upward shift from the mid-1980s, when the Pearce Committee found most law schools to be around 1:18 or 1:20, with the University of New South Wales then enjoying a ratio of 1:12.6.[7] Surprisingly, despite increased strain upon publicly funded legal education, demand for law continues to be strong, measured against most courses or disciplines, though recent graduate surveys suggest that law students are relatively less satisfied with their university education than graduates in most other discipline areas.[8]

This level of dissatisfaction may be linked at least in part to the relative cost of legal education. Law students pay significantly more for their education than, say, students in the humanities or social sciences. Law students pay or incur a liability currently of A$5870 per annum, while Arts, Humanities, Social Studies and Behavioural Sciences students pay or incur a debt of A$3521 each year.[9] Law student contributions under the Higher Education Contribution Scheme ('HECS') are on a par with students in fields such as Dentistry and Medicine, yet government spends considerably more money per capita educating students in those disciplines than on Law — under A$7000 for Law, but over A$18 000 for Dentistry and Medicine.[10] Government, in other words, recoups a far higher percentage (over 80 per cent) of its operating grants paid with respect to law

---

school in 2000, for example, the ratio stood at close to 1:28 (though it has improved *slightly* since then). Class sizes and ratios in the sector have not substantially altered since 2000, except to deteriorate further in some cases. On the growing pressures of academic life associated with rising student numbers and other factors, see Anthony Winefield et al, *Occupational Stress in Australian Universities: A National Survey — A Report to the Vice Chancellors, National Tertiary Education Union, Faculty and Staff of Australian Universities, and the Ministers for Education and Health* (2002) 104, <http://www.dest.gov.au/crossroads/submissions/pdf/336_2.pdf> at 24 November 2002.

6 Ian Chubb, *Our Universities, Our Futures* (Paper presented to the Committee for Economic Development of Australia, Sydney, 1 August 2001) 5, <http://www.avcc.edu.au/news/public_statements/speeches/2001/chubb_speech01082001.pdf> at 26 November 2002. Professor Chubb was 2001–02 President of the Australian Vice-Chancellors' Committee.

7 Dennis Pearce, Enid Campbell, and Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (1997) vol 3, 160, table 3.1.

8 See Graduate Careers Council of Australia, *Course Experience Questionnaire* (1999); Graduate Careers Council of Australia, *Course Experience Questionnaire* (2000). This is particularly so on the 'Good Teaching' Scale.

9 See, eg, Department of Education, Science and Training, *HECS: Your Questions Answered* (2001) <http://www.hecs.gov.au/archived/pubs/hecs2001/2001_2.htm#2_1> at 25 November 2002. These figures are current for 2001. Both figures have risen slightly in 2002.

10 Australian Law Students' Association, *Higher Education Funding Policy* (1998) figure 4.1 'Cost of Course of Various Disciplines as estimated DEETYA', <http://www.alsa.asn.au/educt/policy/higher.htm> at 24 November 2002; see also Australian Law Students' Association, *Submission to the Higher Education Review* (2002), <http://www.alsa.asn.au/educt/policy/ALSACrossroads.pdf> at 24 November 2002.

students than it does for other categories of university student.[11] Legal education is manifestly a 'nice little earner' for the Commonwealth government.[12]

A The Argument

This article will argue that legal academics have been largely ineffective in terms of explaining the value of legal education to a broad constituency outside of as well as within government. The comparatively poor position of law schools makes it imperative that a new rationale and language for discussing the value of legal education be found. The climate is right for a strategic change of this nature. The release during 2002 of a number of Department of Education, Science and Training ('DEST') issues papers[13] on higher education, and ongoing calls for greater deregulation of higher education in Australia,[14] makes it timely to consider the directions in which higher education policy is headed and to question the supposed inevitability of the directions being advocated.[15] Within this setting, it is important to think about the situation of Law and legal education. In particular, I want to call into question the implications of market ideology and the rise of student consumerism for legal education. Is it appropriate to promote the idea that legal education is a commodity purchasable in a market dictated largely by consumer sovereignty? Are there not values other than those personal to the student 'consumer' that might be important within a legal education? The very fact of public expenditure on legal education itself provides a potential justification for a broader bundle of interests to be represented, whether or not we choose to speak in terms of a 'public interest' in legal education.[16] Much more remains to be done to make a case for improvement on Law's present position relative to other disciplines.[17] A clinical model of legal education is proposed as a way of advancing these and other

---

11 Medical, dental and veterinary science students, by comparison, pay (through HECS) around 30 per cent of the course cost met by government: Australian Law Students' Association, *Higher Education Funding Policy*, above n 10, table 4.1 'The Proportion of Cost Contributed by Students in Various Discipline Groups'.

12 See Council of Australian Law Deans, *The Funding of Legal Education* (2000) 29, <http://www.cald.asn.au/FundingV3.pdf> at 25 November 2002.

13 See generally Department of Education, Science and Training, *Striving For Quality: Learning, Teaching and Scholarship* (2002); Department of Education, Science and Training, *Setting Firm Foundations: Financing Australian Higher Education* (2002).

14 Professor Steven Schwartz, Vice-Chancellor of Murdoch University, has described higher education as 'the last of the great socialist enterprises'. Like other advocates of deregulation, he promotes the idea of student consumers having 'greater choice and control over what is taught': see Paul Lloyd, 'Crisis on Campus', *The Advertiser* (Adelaide), 1 April 2000, 71, 72.

15 Ironically, despite the 'issues paper' character of DEST's recent publications on higher education (ie, 'they will identify some, but not all possible responses' and 'will not make recommendations'): Department of Education, Science and Training, *Setting Firm Foundations*, above n 13, Dr Nelson, the Minister, tells us most categorically in his foreword to *Setting Firm Foundations* that a 'return to the days of full public funding of Australian universities will not occur': at v.

16 I have tried previously to articulate some considerations that might constitute a public interest in legal education. See Andrew Goldsmith, 'Legal Education and the Public Interest' (1998) 9 *Legal Education Review* 143.

17 I shall comment below Part V(G) on the failure of the Council of Australian Law Deans to make a submission to the 2002 Higher Education Review.

arguments in support of greater public expenditure on Law as a university discipline. I will argue that there are values other than individual choice, access equity, and sheer dollar cost at stake in legal education that warrant a different approach to public expenditure on, and within, universities.[18]

The clinical model proposed is not a reiteration of the need for clinical legal education within law schools. Its cast is more ambitious in scope. It responds to the need *across the range of law school activities* to locate a language, a set of arguments, and evidence for the broader social and economic value of what it is that law schools provide if current public expenditure patterns are to change. Law's historical disadvantage in terms of public appreciation and valuation of what lawyers do[19] must be overcome if there is to be support for change. There needs to be a broadened constituency for Law's case for more favourable funding. The clinical perspective suggested obliges legal academics to re-examine what it is that they do, and then crucially, to explain more convincingly, *and indeed demonstrate*, its value to others. This is an argument that needs to be made within universities as well as in the wider public policy sphere. Universities make choices about how they allocate public funds between their faculties and academic departments. Legal academics must therefore take up their cause within the academy as well as without.

Part II of this article begins by looking at the general situation in Australian universities, in particular at the changes wrought in recent years in the context of reduced per capita government expenditure on universities. It considers some of the costs of this shift, and questions the adequacy of the 'bottom-line' approach to government policy. Part III looks to the discipline of Law, and criticises previous efforts to value as well as cost legal education. Part IV further develops this theme, looking at one attempt by Australian legal academics to assess the cost of legal education. It suggests the need to pursue values of service and mutual obligation in any adequate review of cost and value in legal education. Part V sketches what a clinical model of legal education might look like. This model is offered as a stimulus to further consideration by legal academics about how they can change perceptions about the value of what they do.

II GOVERNMENT WITHDRAWAL FROM UNIVERSITY FUNDING

A Whither the Fiduciary State?

It is now commonplace for critics of government higher education policy in Australia and elsewhere to complain about 'corporate managerialism',

18 The argument about relative expenditure on law is one, as the Council of Australian Law Deans has noted, that relates to internal distribution of public funds within universities by the universities themselves: Council of Australian Law Deans, above n 12.

19 See Marc Galanter, 'The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse' (1998) 66 *University of Cincinnati Law Review* 805.

'economic rationalism' and related sins.[20] However, perhaps the most significant point to be drawn from the shift that has occurred in higher education policy since the mid-1980s is the attempt by government to re-position itself in relation to the provision of public services. In short, it is seeking to reduce its budgetary commitment to fields such as higher education through greater cost-sharing with others. What we are seeing, according to Peter Scott, is 'the shift from a fiduciary state, or the state as trustee of the national interest, to the contractual state or the state as market-maker and over-mighty contractor'.[21] The state, in other words, seeks to relinquish its relatively longstanding privileged and principal responsibility for the costs of higher education, replacing its contributions progressively (at least in percentage terms) by contributions from other sources, whether those sources be philanthropic donations, corporate sponsorships, or student fees.

It is clear enough that the Australian government has been rather successful in achieving this objective. As a proportion of higher education funding, governments in Australia managed to reduce their contributions from 91 per cent in 1983 to 62 per cent by 1994.[22] In the same period, student charges, in the form of HECS, increased from zero to 13 per cent. According to figures produced by the Australian Vice-Chancellors' Committee (reflecting a slightly different method of calculation), between 1989 and 1999, the HECS percentage of Commonwealth government outlay on higher education institutions increased from 3.1 per cent to 20.4 per cent. This is expected to rise to as much as 40 per cent of the government's base grant by 2010.[23] The common justification given is that the rapid expansion of Australian universities during the 1990s, signalling a new era of 'mass higher education', now makes it impossible for government to continue to fund fully all tertiary student places.[24]

The increasingly non-fiduciary character of the government–university relationship threatens to dissolve existing notions of mutual obligation in higher

---

20 See, eg, Graeme Duncan, 'Notes from a Departed Dean', *Adelaide Review* (Adelaide), February 2000, 20, 21:

> Universities are not institutions which can or should be treated as businesses, though they must be run effectively and efficiently. The main problems arise from acceptance of an ill-considered and inappropriate corporate model of the university, which assumes a necessary conflict between managerialism and 'economic rationalism' (or even 'realism') on the one hand and collegiality, 'the academic mind' and democratic governance on the other. The conflict comes when managerialism and economics are taken too far, and are too narrowly conceived.

21 Peter Scott, *The Meanings of Mass Higher Education* (1995) 170.

22 Simon Marginson, *Markets in Education* (1997) 247.

23 Australian Vice-Chancellors' Committee, *University Funding for Teaching and Learning, 1989–2002* (2000) 1. Calculating percentages is made tricky in this area by the various factors that can influence the ultimate cost to the Commonwealth including 'discounts made for fees paid up front or early, death write-downs, special remissions and doubtful debt provisions': Department of Education, Science and Training, *Setting Firm Foundations*, above n 13, ix.

24 This is the clear tenor of DEST's 'issues paper' on university funding, and of course, Dr Nelson's remarks, above n 15.

education.[25] It promises also to replace a deeper, trust-based and long-term relationship with a more narrowly conceived transactional relationship between the university and government-subsidised 'purchasers' of services (that is, students). Market transactions imply a potentially ephemeral kind of contact between the contracting parties, in which supplier substitution is readily possible, and contractual specification replaces inter-party trust. Implicit understandings regarding the value of disinterested inquiry (research) and the 'sceptical articulation of tradition' (education and training) are quickly threatened in such an environment:

> As centers and universities increase participation in the market, the contract between faculty [academics] and society, an implicit contract that grants faculty and universities a measure of autonomy in return for disinterested knowledge that serves the public welfare, may be undermined. To some degree, academic capitalism undermines the raison d'être for special treatment for universities and faculty, increasing the likelihood that universities will be treated more like all other organizations and professionals more like all other intellectual workers.[26]

In such a climate, technical assessments of performance and talk of efficiency replace discussions of desirable higher educational goals. A market-led focus on *costs* in higher education threatens to displace discussions of *value* and *values* as legitimate considerations, and to further absolve government of responsibility for the quality and kind of higher education. Legal educators and university managers must unite to find new ways of arguing for improved resources for legal education. While utility-based arguments may suffice for eliciting support from within the profession and the private sector more generally, more principled arguments need to be found for targeting public opinion as well as public policy makers. A twofold strategy might be envisaged. In part, the need is for a persuasive account of what a good legal education might look like. Another part of the strategy should be to carefully document the losses as well as gains from reduced public expenditure on higher education in law. These are the tasks of the balance of this article, at least in a suggestive form that might provoke more discussion about what *is*, and what *should*, be on offer from Australian university legal education.

B Measuring Costs, Neglecting Value(s)

While government withdrawal from public expenditure on higher education is clearly intended to reduce the burden on government (and presumably therefore, upon the taxpayer), we ought also to have regard to some of the 'silent' costs inflicted by the dominance of market methods. One likely outcome is a serious shift in the internal priorities of universities. Sheila Slaughter and Larry Leslie,

---

25 Stuart Hall, the British cultural studies academic, has noted that the foundational act of the market is to 'dissolve the bonds of sociality and reciprocity. It undermines in a very profound way the nature of social obligation itself', quoted in Zygmunt Bauman, *In Search of Politics* (1999) 30. The irony of dissolving mutual obligation in relation to the university is that the Commonwealth government is in other spheres of public sector expenditure stressing the importance of mutual obligation. The 'work for the dole' scheme is one example of the express obligations being enforced upon dole recipients by government.

26 Sheila Slaughter and Larry Leslie, *Academic Capitalism: Politics, Policies and the Entrepreneurial University* (1997) 222.

on the basis of their comparative study of the United States, Australia, Canada and the United Kingdom, point to the impact these changes can have upon undergraduate teaching:

> The end result of [reduced government expenditure] has been reduced university effort in the area of primary state (and student) interest: instruction and increased effort particularly in the area stipulated in contractual agreements, research. The shift away from instruction may have negative direct consequences not only for students, but it also contributes to increased university alienation from the general public, thereby reinforcing secular tendencies to reduce state general support even more, which in turn further destabilises the universities and ultimately renders them more dependent upon and answerable to contracting and granting organizations.[27]

Despite the rhetoric of 'quality assurance' and 'excellence' that dominates the accountability requirements and marketing imperatives within which contemporary Australian public universities must operate, there is little escaping the massive increase in teaching load upon academics since the late 1980s.[28] Until recently in Australia, there was little systematic data on the consequences of changes to work practices brought about by deteriorating staff–student ratios and other workplace pressures. Now, aside from the personal experience and anecdotal evidence provided randomly by academics, a very recent study by Anthony Winefield and colleagues on occupational stress in Australian universities, confirms the predictive value of staff–student ratios for average levels of job satisfaction among academic staff.[29] In other words, there is a demonstrable relationship between worsening staff–student ratios and decreased job satisfaction among academics.[30]

The study points to the particular deterioration in the humanities and social sciences, where the lowest levels of job satisfaction are reported. Interestingly, these are also the areas that tend to have the lowest per capita student funding and the worst staff–student ratios. At Flinders University, for example, the university's own statistics for 2002 indicate that the highest staff–student ratios are in Law (1:24.5) and Commerce (1:26), while the lowest are in Medicine (1:8.4), then Asian Studies and Languages (1:11.6). The faculty with the lowest ratio is Health Sciences (1:11.9), compared to 1:21 in Education, Humanities, Law and Theology.[31]

The Winefield study also points to the difficulties academics have in teaching well while attempting to publish and obtain external research and consultancy funding.[32] While job performance was not part of the study's objectives, the structural incentives upon educators to cut corners in preparation, marking and

---

27 Ibid 100.

28 Senate Employment, Workplace Relations, Small Business and Education References Committee, Parliament of Australia, *Universities in Crisis* (2001) 293 estimated that in the decade 1990–99, 'the total teaching load has approximately doubled'.

29 Winefield et al, above n 5.

30 The findings of Craig McInnis point in the same direction. See Craig McInnis, *The Work Roles of Academics in Australian Universities* (1999). See also reference to these findings in Senate Employment, Workplace Relations, Small Business and Education References Committee, above n 28, 297.

31 Flinders University, Planning Services Unit, *Student/Staff Ratios by Faculty and AOU, 1998–2002* (2002).

32 Winefield et al, above n 5.

so on, in order to cope with increased numbers of students and to pursue more highly valued research and consultancy objectives, are pretty obvious. And recent experience is confirmatory. Reduction or elimination of tutorial groups, increased 'small' groups of 30 or more students, increased reliance on casual staff, and less time for reading within disciplinary areas to maintain relevance and currency of teaching, are all factors mentioned in recent surveys of academic working conditions in Australia.[33] In various ways, these changes translate into less time for students individually.

The changes have not gone unnoticed by 'consumers'. A recent survey of first year undergraduates, comparing cohorts from 1994 with 1999, noted a 'significant drop (from 48 per cent to 38 per cent) in student perceptions of staff availability to discuss their work.'[34] Also observed was a 'reduction in student perceptions of the extent to which staff usually give helpful feedback on student progress and take an interest in student progress.'[35] Changes of this kind led the Senate Committee to conclude that there had been a 'decline in the quality of education' in Australian universities.[36] These pressures and retrograde changes can not only be linked by related research to impaired job performance and reduced organisational commitment;[37] they also undermine Dr Brendan Nelson, the Commonwealth Minister for Education's own call for greater importance to be accorded to teaching within the university sector.[38] The dangers that these changes pose to academics however are to threaten educational standards, upset students, and thereby further undermine public confidence in universities. In other words, the public responses forced upon academics are at best short-term in nature and in the long-term can have only negative effects, as further erosion of the basis for public support for university education takes place.

Another likely consequence of unleashing market forces is to greatly restrict diversity of course offerings. Simon Marginson has noted that a general effect of greater university competition in recent years has been that '[c]ompetition penalised horizontal diversity, pressing all institutions into a mould, so that universities competed on much the same set of activities.' Not surprisingly, the 'elite' institutions are less affected in these ways by market pressures. As Marginson observed, '[a]s in government school markets, the more conventional buyers' market was found at the lower reaches of the hierarchy, where the need for customers drove marketing and cost pressures forced efficiencies'.[39]

In the legal education context, professional admission requirements impose significant restrictions upon the range of law topics that a student may take

33 See, eg, McInnis, above n 30; Senate Employment, Workplace Relations, Small Business and Education References Committee, above n 28, 29–8.

34 Craig McInnis, Richard James and Richard Hartley, *Trends in the First Year Experience in Australian Universities* (2000) 47.

35 Ibid.

36 Senate Employment, Workplace Relations, Small Business and Education References Committee, above n 28, 294.

37 Ibid 106.

38 Department of Education, Science and Training, *Setting Firm Foundations*, above n 13, v.

39 Marginson, above n 22, 251.

towards his or her degree.[40] Students studying law frequently wish to qualify for practice even if they do not intend to practise upon graduation. Market forces threaten to exacerbate the degree of circumscription in legal education. A few years ago, William Twining criticised the 'football league' mentality among many law schools, whereby law schools sought to compete against each other, while offering near identical mission statements and educational objectives.[41] In Australia today, while there are probably some exceptions as well as variations in educational philosophy and approach, it is far from apparent that the majority of law schools provide programs that readily differentiate one school curriculum from another. There is certainly little or no evidence (to my knowledge) to suggest that the vast bulk of students select their law school on such a basis. And in terms of the final 'product', is a Monash law graduate measurably different from a Sydney graduate, or from a Queensland graduate, or for that matter, from a graduate of James Cook University? We probably can't measure such things readily, so that judgments are likely to be superficial. However, any differences found in terms of 'inputs' or 'outputs', I would suggest, are more likely to be explicable in terms of admission criteria and social background of students, rather than being explained in terms of the intrinsic qualities of the respective undergraduate curricula.[42]

In sum, the climate within Australian universities is scarcely encouraging in terms of foreseeable substantial improvements in the level of government funding to public universities. Nor are alternative sources of funding for basic infrastructural costs (other than through student fees) likely to emerge to offset the trend of reduced per capita government spending on students. In this environment, the relative position of law within the university becomes a particularly important strategic consideration for law deans and academics, given the low baseline from which law schools must presently operate.

III LAW'S UNFAVOURABLE POSITION

A 'Never Mind the Quality, Feel the Width'

One change in universities since 1987 has been strikingly obvious. The massive increase in student numbers has affected each and every part of the university's operation. From library resources to classroom sizes to staff numbers, no area has remained untouched by the dramatic expansion of numbers of students. Law schools have grown in number and size of intake in ways that

40 When Griffith Law School was established in the early 1990s, the Foundation Dean, Charles Sampford, led the design of a curriculum that would allow some curricular flexibility within the requirements of the rather prescriptive Queensland admission requirements. See John Goldring, Charles Sampford and Ralph Simmonds, *New Foundations of Legal Education* (1998).

41 William Twining, 'Rethinking Law Schools' (1996) 21 *Law and Social Inquiry* 1007, 1014.

42 On the relative importance of factors other than the law school curriculum to law student socialisation, see Robert Granfield, *Making Elite Lawyers* (1992).

have no parallel with a country such as Canada.[43] This has inevitably placed severe restrictions upon the ability of some law schools to pursue commitments to small group teaching without an increase in teaching and administrative load broadly commensurate with the failure of public funding on a per capita basis to maintain standards set in the 1970s and 1980s. In the early 1990s, as well as recently, the federal government implemented various 'quality assurance' programs which were designed to encourage universities to continuously evaluate their performance, while being offered up to 2 per cent of operating funds clawed back for just this purpose in order to encourage compliance with this centre-driven initiative.[44]

Since 1991, law schools have had reason to complain about their relative disadvantage under what has become known as the Relative Funding Model ('RFM'), developed by the then Department of Education, Employment and Training. Under this model, 'each discipline was grouped into one of five clusters for the purposes of a one-off system-wide operating grant to institutions from the government.'[45] Law was placed in the lowest band, together with Accounting, Administration, Economics and other humanities, and given a relative weight of 1.0. By comparison, areas such as Political Science, Education and other social studies were weighted at 1.3; not surprisingly fields such as Dentistry, Medicine and Veterinary Science were weighted at 2.7 (the highest band). Critics have pointed to the limited sample upon which the calculations were based, which included two notoriously under-funded law schools, and to the lack of discrimination between LLB teaching costs and law for non-lawyers.[46] In a nutshell, the criticisms point to the limitations of the historical cost method when applied to law.

Michael Chesterman has suggested that had these matters been addressed in the methodology, and the costs of teaching law to non-lawyers excluded from final calculations, the results would have pointed to law belonging in the second band (RFM 1.3), rather than the lowest band. Part of the problem, it seems, is that once these exercises have been completed, there is little incentive for federal education bureaucrats to reopen matters in response to dissent and criticism, so that they tend to stand as pertinent benchmarks for subsequent decision-making for many years to come. While it appears practice within universities has varied, one of the criticisms articulated by some Australian law deans is the reluctance shown by some Vice-Chancellors to vary internal funding formulae from the RFM model. This has had the consequence of binding many law school budgets

43 In Canada, there has been virtually no growth in the number of law schools in more than a decade. There are presently 19 law schools, 15 of which offer instruction in common law. These schools serve a national population of 31 million, whereas Australia's 32 law schools serve a population of 19.8 million.

44 Marginson, above n 22, 231.

45 Centre for Legal Education, *The Cost of Legal Education in Australia: The Achievement of Quality Legal Education — A Framework for Analysis* (1994) 1.

46 See Michael Chesterman, 'Budget Allocation to Law Schools' (1994) (unpublished, copy on file with author).

for nearly a decade to a formula intended to be quite limited in its operation, and widely held to be flawed in terms of its methodology.[47]

Questions about the appropriateness of present law student funding, relative to funding for students in other courses, continue to be timely. How funding levels are studied and evaluated is of crucial importance. Yet the initiative in this area has come largely from the Commonwealth government. Nearly three years ago, the then Commonwealth Department of Education, Training and Youth Affairs ('DETYA') engaged KPMG Consulting to undertake a costing of teaching in higher education. The study was envisaged to be carried out over the year 2000 and was to focus mainly on cost data for the 1999 year. While this particular study was short-lived, other exercises of this kind cannot be ruled out.[48] The approach to be taken in any future assessment of university teaching costs is as yet unknown. Nonetheless, it remains useful to consider some of the key ingredients of the proposed (but now abandoned) KPMG approach to cost calculation in this sector in order to appreciate some of the difficulties the discipline of Law may face in a future exercise of this kind.

The KPMG study's objective was to 'determine the relative costs of teaching in higher education and develop a matrix of relative teaching costs.'[49] It did not seek to address the issue of the level of funding, but rather to 'identify the costs of current provision'. The proposed study avoided any attempt 'explicitly to seek best practice or any hypothetical "efficient" delivery'.[50] The overt attempt to avoid controversy by ignoring the issue of absolute funding levels is hardly surprising. As noted above in Part II(B) however, law schools need to be attentive to the long-term consequences of these sorts of exercises. When these occasions arise, they need to do everything possible to ensure that the methodology adopted by the consultants is at least broadly representative of a range of different law schools. Also, in terms of what law schools do, there should be an adequate understanding of the differences in terms of costs, for example, between teaching LLB students and other kinds of law or legal studies teaching that follow a more traditional humanities model.

It was by no means evident that the methodology proposed by KPMG was going to do justice to the diversity of circumstances faced by Australian law schools. It was planned that the consultants would 'select a minimum of 2–3 AOUs [Academic Organizational Units] within each discipline', though for 'larger or more diverse disciplines it may be more'.[51] Given the likely policy significance of this kind of exercise, some guarantee of diversity of teaching

47 See Ralph Simmonds, 'Funding for Law Schools in Australia: A Briefing Paper Prepared on Behalf of the Council of Australian Law Deans' (1999) (unpublished, copy on file with author). This briefing paper was prepared for for a meeting with representatives of the Law Council of Australia, Sydney, 16 December 1999. Simmonds concludes that not only should Law be funded at a level higher than the Commonwealth's base rate of 1.3, it should be funded at a level higher even than 1.6. This position was endorsed by the Council of Australian Law Deans at its meeting in Perth on 30 March 2000.

48 Dorothy Illing, 'Review of Teaching Costs Scrapped', *The Australian* (Sydney), 5 April 2000, 33.

49 KPMG Consulting, *Costing Teaching in Higher Education: Overview Paper — Methodology* (2000) 2 (unpublished, copy on file with author).

50 Ibid 5.

51 Ibid 23.

styles and philosophies within the group selected is imperative if the problems for law arising from the first RFM exercise are to be avoided.

A final point law schools need to keep in mind in order to put the current costing exercise in perspective is the 'apples and oranges' issue of whether comparable outputs are being measured. Chesterman quotes from a study conducted in the late 1980s by R A Williams and others, comparing costs of teaching undergraduate law or legal studies at three Victorian institutions: the University of Melbourne, Melbourne College of Advanced Education ('MCAE') and Ballarat College of Advanced Education ('BCAE'). The Williams study interestingly found that LLB teaching costs were substantially higher at University of Melbourne, compared to the costs of teaching law to non-law students at the (then) MCAE. Teaching costs relating to law for non-law students (for example business students, teaching students) were slightly less only at BCAE.[52] As Chesterman wryly notes, the significance of this study seems to have been completely overlooked in subsequent policy developments on tertiary costing. Any proper study of law teaching costs needs to ensure that costs are being measured against a broadly accepted and standardised conception of quality. Chesterman quotes from the Williams study:

> For unit costs to be a measure of efficiency, the quality of output (or value added) must be comparable across institutions. This jump in argument cannot be made without much further research. In some instances the output is clearly not the same. In law, for example, the University of Melbourne cost estimates relate to a degree which permits graduates to practise as lawyers; this is not the case at Melbourne and Ballarat CAEs ...[53]

Identifying what constitutes a quality legal education remains a fundamental consideration for the purposes of public funding debates. While ideally legal educators might like to argue that any quality determination should accommodate diversity of educational approaches, in an exercise such as the one recently abandoned, Australian law schools will be lucky if the survey attempts to focus on broadly similar outputs. Nonetheless, legal educators need to improve their game considerably in terms of defining what a quality legal education looks like.

Part of the necessary response, as Part IV explores, lies in challenging the influence of consumerist thinking upon legal education, and arguing for a more outwardly responsible and ethically motivated view of legal practice within the law school setting. Here I draw upon the idea that there are reciprocal obligations and opportunities between law schools and the wider communities in which they operate.[54]

---

52 R A Williams et al, *Relative Teaching Costs in Higher Education: Selected Victorian Institutions* (1989) 53 (commissioned by the National Board of Employment, Education and Training). The unit costs per equivalent full time student ('EFTSU') found at that time were: University of Melbourne LLB, A$5700; MCAE, A$3400; La Trobe University, A$5600.

53 Chesterman, above n 46, 2.

54 Goldsmith, 'Legal Education and the Public Interest', above n 16. See also Andrew Goldsmith, 'Is There Any Backbone in this Fish? Interpretive Communities, Social Criticism, and Transgressive Legal Practice' (1998) 23 *Law and Social Inquiry* 373, 414.

IV THE LIMITS OF CONSUMERIST IDEOLOGY

There are dangers in the present trend to 'commodify' legal education. Lawyers already stand accused of overweening self-interest by public opinion polls and popular media representations.[55] As government subsidies diminish and student charges grow, it becomes more, not less, likely that students will see their legal education in terms of 'consumer' self-interest, rather than of vocation and service. Two recent submissions from law students' associations to the Higher Education Review lend support to this proposition.[56] The logic of market ideology is about individual choice, and ultimately about pursuit of self-interest in the use of the positional goods offered by higher education.[57] While markets can assist in the distribution of scarce resources, the ability to pay will effectively determine their distribution. Markets can also induce new providers into fields where there is strong demand (with potential downward pressure on prices, and hence affordability), but as recent experience with mail-order degrees shows, there is nothing intrinsic to educational markets that ensures appropriate standards. Making the student responsible for a higher percentage of the cost of his or her education is likely to affect career choice within the profession, often from perceived or actual necessity, as students look for higher paying jobs in order to repay educational charges and student loans. While markets for services can promote positive gains for consumers (more information, more choices etc), we should not be blinkered in how we let them influence higher education. Markets should be servants, not masters, in terms of shaping higher educational policy.

Therefore, if legal academics are to promote the idea of the study of law as one that is not simply self-interested activity, market ideological influences need to be kept within fairly narrow limits. Other rationales are needed for how legal education is structured and funded. The idea of *service* is a fairly obvious one in terms of legal professional self-imagery, yet is one that receives little attention in the context of legal education curricula.[58] It is also a claim that is treated with considerable scepticism in the wider society increasingly accustomed to services premised upon the 'user pays' principle. Indeed, it must be admitted that in the

---

55 See, eg, Galanter, above n 19.

56 See Tim Finney, Catherine Leslie and Natasha Stojanovich, on behalf of the Monash University Law Students' Society, *The Road Less Travelled: An Investigation into the Effects Upon Law Students of the Proposed Changes to the Higher Education System in the* Crossroads *Article* (2002) (Higher Education Review Submission 304); Australian Law Students' Association, *Submission to the Higher Education Review*, above n 10.

57 According to Marginson, above n 22, 38:

> Positional goods in education are places in education which provide students with relative advantage in the competition for jobs, income, social standing and prestige. They are status goods. Places in elite schools and the professional faculties of leading universities are the most desired form of positional goods ...

58 This is probably less true of those law schools that offer clinical legal education, or which require some kind of community service as part of the educational process, such as the University of Notre Dame. It is scarcely obvious that classroom based topics have much to offer in this regard; even practical skills classes, because they lack the experiential component provided by off-campus life, and so seem likely to emphasise *technical* rather than *humane* abilities.

past the traditional justifications for legal monopoly over legal services sounded increasingly hollow to many, precisely because the bargain struck with society in return for the monopoly was not perceived as beneficial. In other words, the apparent hollowness of service claims by lawyers lent weight to calls for deregulation of legal services.[59]

A Finding a Justification for Mutual Obligation

A theoretical basis for greater *mutual obligation* between law students and the wider society is needed. Mutual obligation, in contrast to relationships fostered by the market, rests upon a longer-term commitment by those involved. It requires the expression through actions as well as promises of some measure of ongoing care and commitment to the members of the relationship in question. The idea of mutual obligation arises in more than one context; the situation of the family is perhaps an obvious example and possibly a useful analogy here. Even in an age of 'high consumerism' such as the present, we recognise the absurdity of talking about the 'efficiency' of our offspring, spouses or ageing parents, based upon an appreciation of the longer-term nature of these relationships and their foundation upon an ethics of care.

It is true that the law student–taxpayer relationship is a far more abstract and impersonal one than most family relationships. It is nonetheless possible to conceptualise the relationship as an ongoing one, based upon service to individuals whose needs and interests are likely to exceed those of the immediate transaction that is the focus of the lawyer–client contact at any given time. If legal academics accept the *client-centred*, rather than *transaction-based*, view of professional legal services, then they are on firmer ground in terms of arguing the appropriateness of an *ethics* (or *morality*) *of care* standard for lawyer–client relations.[60] Policy makers in higher education, rightly conscious of the fact that taxpayers contribute towards a service (higher education) that taxpayers themselves may not participate in directly, are likely to find the case for increased public funding of university courses of this nature more persuasive, compared to arguments relating to more market-focused forms of vocational and professional education. Legal academics need to develop legal education in ways that foster and reinforce values, ethical commitments, and technical skills appropriate to the ideals of service and mutual obligation. Part of the solution, as I develop below in Part V, lies in finding ways in which law students are able to contribute directly to areas of public need as part of their studies. Changing the perception of the value of legal education means that the rhetorical case must be substantiated through action.

It is important to recognise that strategies of the kind being proposed here are working on difficult terrain. Changes in higher educational funding are not unconnected to pervasive societal attitudes framed around consumer sovereignty, which emphasise the 'bottom line' and the short-term over notions of

59 See Christine Parker, *Just Lawyers* (1999).

60 The 'morality of care' perspective is developed in detail in Rand Jack and Dana Crowley Jack, *Moral Vision and Professional Decisions: The Changing Values of Women and Men Lawyers* (1989).

interdependency and shared membership of a broadly constituted polity or community. As social theorist Zygmunt Bauman recently put it:

> This code prompts one to treat the world as primarily a container of potential objects of consumption; following the principle of consumption, it encourages the search for satisfaction; and following the principle of the consumer society, it induces individuals to view the arousal of desires clamouring to be satisfied as the guiding rule of the chooser's life and a criterion of a worthy and successful life.[61]

Higher education and law school funding arrangements presently reinforce the idea of the law student as consumer. Mooted changes towards an even greater reliance upon student contributions towards the 'here and now' cost of university education (without allowance for the longer-term investment value provided by such education) threaten to further entrench the consumerist mentality, and to render even more difficult the realisation of ideals of service and mutual obligation. Without more reflection and some deliberate policy work by legal academics, the present stance of agnosticism or passivity towards the impact of consumerism is likely to mean that notions of the professional 'good life' among law students and law graduates will remain narrow and highly self-interested. So far, little progress has been made to address this problem in Australia.

B The Limits of the Centre for Legal Education Approach

Efforts to date to look at questions of cost in legal education have been limited in nature. Using stakeholder theory as a tool for doing so, I shall argue below in Part V the need to identify and adopt a set of wider involvements and shared obligations by law schools and law students than the consumerist model encourages. First, however, I want to consider the limitations of the principal attempt to date to state a detailed position on costing legal education in Australia. This was the study undertaken jointly by the Centre for Legal Education and the Council of Australian Law Deans ('the CLE study'). In particular, I shall use my critique of their approach to try to show how more needs to be done to demonstrate the costs and benefits of a 'good' legal education.

An explicit object of this study was to 'delineate, in general terms, what the purpose of a modern quality-based undergraduate law course should be'.[62] Based largely on existing law school statements of objectives as well as discussion of the Pearce Report and similar studies overseas, the CLE study identified a range of components for an undergraduate degree widely agreed as fundamental:

- research skills;
- the acquisition of knowledge;
- context and perspective;
- critical analysis;
- synthesis, the development of arguments and policy formulation;
- communication skills;
- analysis of ethical dimensions; and

---

61 Bauman, above n 25, 76.

62 Centre for Legal Education, above n 45, 5.

- in some schools, practical skills.[63]

On the basis of their discussion of these skills, the CLE study concluded that a teaching program for a 'proper law degree' needed to contain:

- a strong element of small group teaching;
- other intensive student–teacher interaction in some areas;
- continuous assessment of work which displays students' increasing mastery of the law and of intellectual and practical skills;
- opportunities for students to develop and display communication skills, such as in mooting; and
- in some law schools, at least, practical training including possibly clinical experience.[64]

The prescribed teaching program as described is to be applauded in general terms, although I would have preferred to see greater confidence in relation to the importance of practical legal training, and in particular, clinical legal education. However in order to make the case for such an approach to legal education (which is clearly more resource-intensive than large lecture-based teaching), there is a need to go further than simply listing and briefly discussing a range of skills of competencies that broadly enjoy the support of current law deans or other legal educational experts. The basic problem I have with this approach is its limited impact upon others. There is an element of preaching to the converted, or at least of failing to adequately demonstrate how and why these skills, aptitudes, and competencies are worthy of further public investment.

For example, 'research skills' are referred to in the CLE study in terms of the current need for students to be able to find and research the law, including being familiar with computerised databases. They are said to have their 'own special character'.[65] Yet the distinctiveness of *legal* research is not extensively developed or justified. Similarly, in relation to 'context and perspective', the CLE study quotes former High Court Chief Justice Sir Anthony Mason to support the need for law students to have a 'breadth of vision ... generated within the law itself'. Students, it is noted, cannot acquire such skills in isolation, nor can they be properly tested by end of semester examinations.[66] While this is fine so far as it goes, the lack of concreteness about appropriate contexts and perspectives, and an absence of explanations of how they might contribute to the development of desirable professional practices, remain real lacunae in terms of explaining to others what is on offer in return for a more expensive form of legal education.

So far the case for the uniqueness of legal education, compared to accountancy and 'other humanities', remains weak. The lack of distinctiveness of legal skills is a key difficulty to making a persuasive case for more public funding. To argue for critical analysis, communication skills, and synthesis as central features of a good legal education is hardly to differentiate it from the

63 Ibid 30.
64 Ibid 39.
65 Ibid 31.
66 Ibid 33.

objectives (implicit and explicit) associated with other disciplines. Without reviewing here a range of course objectives from other disciplines, an ability to communicate orally and in writing is hardly one needed only by lawyers. The same point could be made about context, critical analysis, and indeed the study of ethics.

The point that needs to be made publicly and persuasively lies less in the distinctiveness of lawyers' skills and aptitudes imparted in university, and more in the nature of the settings in which lawyers work professionally. Specialised knowledge is important, but more than just technical knowledge (know-how) is needed. The appropriate skills include an awareness of the potential implications of the application of particular techniques. This awareness implies the need to address the particular interests and balances of power in a broad variety of relationships in which transactions are sought or conflicts arise.[67] The importance of *situated judgement* skills, rather than knowledge of rules and principles, is crucial to the responsible practice of law in situations in which power imbalances and differences of interest need to be identified, understood, and responded to.

The issue then is not simply one of special *techniques*, but also of *values* and *consequences*. This requires a deep appreciation of a wide range of legal settings, not simply the large firm environment. Without acknowledging the power of legal practice in university legal education and its associated responsibilities, legal academics undermine the force of the claim that lawyers' education warrants greater quality control in terms of funding levels and teaching inputs. Those involved in law teaching must acknowledge and respond effectively to the fact that students arrive at law school with preconceptions about what it is to be a lawyer and to practise law, as well as with a deep thirst for opportunities within the structure of their law degrees to get practical experience.[68] This set of factors has implications for when over the course of professional preparation for practice students should be introduced to clinical settings — briefly put, preparing students for the responsible exercise of power in clients' lives through the practice of law requires an earlier start, and a less technique-focused approach, than is typical or possible under the postgraduate practical legal training model. In order to advance the argument further, so as to make a credible case for funding parity with other professional disciplines, I propose that law teachers consider the relevance of a *clinical model* of

---

67 The importance of this requirement within legal education was recognised, somewhat obliquely or in part, by the Pearce Committee in 1987. It noted as one key deficiency of legal education at that point an 'under emphasis on policy and social context issues.' Dennis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission: A Summary* (1987) 35. I have argued elsewhere that the analysis of the operation of power in terms of particular interests, and a focus upon the consequences of legal and other kinds of social action, ought to be an important element of a legal education oriented to the 'real world'. See, eg, Andrew Goldsmith, 'An Unruly Conjunction? Social Thought and Legal Action in Clinical Legal Education' (1993) 43 *Journal of Legal Education* 415.

68 I have looked at this issue in another paper with my colleague David Bamford: Andrew Goldsmith and David Bamford, 'The Value of Ptactice in Legal Education' (2001) (unpublished, copy on file with author).

professional university education for Law. Without acceptance of such a model, Law is unlikely to achieve parity with disciplines such as Nursing (1.6 RFM),[69] let alone Medicine and Dentistry.

V A CLINICAL MODEL OF LEGAL EDUCATION

While clinical legal education would form an important component of what I am proposing now, the two should not be assumed to be synonymous. While live-client clinics and supervised field placements can play a key role within the model I am proposing, there is the opportunity as well as the need to look further afield as its potential can be more broadly conceived. In large part, the idea of clinical teaching involves preparing students for the provision of a vital human service, under conditions that require close supervision. It presupposes the need to cultivate and inculcate the art of practical judgment under often quite dynamic and unpredictable conditions. The richness in professional terms (technique, ethics, judgement) of the clinical setting offers Law a basis for, in effect, reconceptualising what a good legal education should look like. The clinical setting provides a realistic[70] or real world site in which the student can come to understand and practise the kinds of abstract skills listed earlier. While clinical legal education provides some important starting points and overall inspiration for the development of this model, other concrete forms of teaching and learning need to be identified and described in order to flesh out what is implied by my argument. The clinical model, I want to suggest, is about a *kind of approach* to teaching and learning as well as about *incorporating realistic and real world environments* into the pedagogical process.

Those law schools that have established clinical programs have an advantage in terms of making the case more generally, as their clinical component has usually been funded at a higher rate than other parts of the law curriculum.[71] While recent experience has suggested the higher costs associated with such programs have deterred other universities from entering the clinical field,[72] this in a sense underlies the basic problem — Law has been seen as a university discipline with, at best, a marginal claim to clinical status. From a lay perspective, the clinical nature of Medicine is largely self-evident, failing to require much justification. The same argument would seem to apply to Dentistry and areas such as Veterinary Science and Nursing. While the general public seems to have an endless thirst for courtroom and legal practice dramas on television and in movies, this seems to come with little or no intuition about how

69 It is interesting that Visual and Performing Arts are also rated at 1.6. Preparing lawyers to be ethical as well as competent performers in legal arenas would scarcely seem to demand less funding than these other areas of performance.

70 Simulation can provide a suitable substitute or alternative to 'real world' experience in relation to some clinical education. Both forms of learning however require more intensive teaching than the lecture–tutorial model requires.

71 Staff–student ratios of 1:8 have been used previously in Australia as the basis for in-house style clinics.

72 Giddings, above n 4.

lawyers are prepared for practice. Whereas the pain associated with a mishandled scalpel is readily appreciated by all sentient beings, there is no readily imaginable equivalent experience in legal practice that can serve to underline the importance to the public at large of properly trained lawyers. These circumstances point to the difficulty of the challenge, especially in law schools with no significant clinical component.

A Finding Clinical Analogies

In order to advance the case, law academics need to tackle the gap between the valuation of legal work and, for example, health services. As implied already, tackling everyday opinions and perceptions of different kinds of services is vital to this strategy. Saving lives is currently a more compelling basis for government funding at higher levels than is teaching law students 'critical thinking' or 'legal research'. These latter objectives of legal education are frequently incanted by legal educators, but receive little detailed attention or discussion.[73] Not surprisingly in the case of Law, they don't serve to persuade those who must be persuaded. The average citizen can be readily forgiven for thinking in these ways. Bad health, sick pets, and toothache provide stiff competition for others seeking to make clinical analogies. Nonetheless, legal educators need to better communicate the risks of bad legal work. Without seeking to appear morbid, they need to make clear to ordinary citizens (including our politicians) how legal work poorly done can cause enormous personal distress as well as financial cost.

Lawyers, as a group, have done a particularly poor job in this respect to date. While lawyers often chuckle knowingly among themselves about the risks of 'do-it-yourself' wills and conveyancing kits (and sometimes make this point publicly), few outside would appear to be listening.[74] Aside from 'hopeless criminal case' scenarios, the lay public has few images available to them of lawyers earning their keep (and thus warranting their professional education). The difficulties lawyers and legal educators face are compounded by the fact that while we can each, as mortal creatures, anticipate medical or dental problems, most of us cannot (and statistically, should not) assume that we will become involved as participants in serious criminal trials at some point in our lives. More stories are needed about the value of legal services of a broad variety for ordinary citizens. Without a general grasp of the potential value of good legal work to personal security and peace of mind, Law remains destined to remain on a par with the non-clinical areas such as History, Philosophy, Economics and Cultural Studies.

One virtue of the clinical model is its obvious connection to human service provision. All the critical thinking by law students in the classroom or library is unlikely to compare in terms of perceived 'value adding' with the public interest in the kinds of low-cost or free services provided to needy persons by clinics. Clinics, in other words, provide natural settings in which professional students

73 See Pearce, Campbell and Harding, above n 67. See also Centre for Legal Education, above n 45, 32–3.

74 The popularity of such kits and paralegal services that assist in these areas would suggest this was the case.

may be seen to meet obligations of service in return for their publicly supported university education and training. For this reason alone, law schools cannot ignore the opportunity provided by clinical legal education. However, taking a broad view of what may be regarded as 'clinical', law schools also need to find other ways of providing services to others that nonetheless retain their pedagogical justification.

B *Pro Bono*

Here, *pro bono* services during the law degree provide an opportunity for, and exposure to, values development inseparable from the mature practice of a profession.[75] '*Pro bono*' can be defined in a number of ways,[76] but broadly speaking refers to legal services provided without charge or at a reduced price by professionally qualified lawyers in cases where deserving clients are otherwise unable to afford the services provided. Often the focus of *pro bono* work is assisting not-for-profit organisations engaged in social welfare or public advocacy on behalf of disadvantaged groups or individuals. While a commendable activity for practising lawyers, there is a strong case for sowing the seeds of *pro bono* work early on in professional development for lawyers, in the course of law students' formal education. The National Pro Bono Task Force, appointed by Commonwealth Attorney-General, Daryl Williams, in 2000, recently recommended:

> Australian law schools should be encouraged to support programs that (a) highlight the legal profession's service ideal and promote a pro bono legal culture, and (b) enable students to acquire 'high order professional skills and a deep appreciation of ethical standards and professional responsibility'.[77]

The Task Force anticipated a range of activities that law schools could actively promote, including internships, outreach programs with a *pro bono* focus, clinical placements, clinical elements within the academic curriculum, and stand-alone electives such as 'Public Interest Advocacy'.[78] The Task Force's conclusions recognise the important professional learning opportunities potentially available to students during their degree through *pro bono* programs. However, despite some promising developments in this field, the Report notes, very few Australian law schools 'have a considered or coherent policy in relation to developing a *pro bono* ethos in law students.'[79] The significant cost factor associated with establishing programs of this kind has been mentioned as one reason why Australia has not advanced as far as the United States or Canada.[80]

---

75 National Pro Bono Task Force, *Report — Recommended Action Plan for National Coordination and Development of Pro Bono Legal Services* (2001), <http://www.ag.gov.au/aghome/commaff/flad/legal_aid/finalreport/finalreport.html> at 26 November 2002.

76 Ibid 4–8.

77 Ibid 30. The quote within the quote is from Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) [2.89] (recommendation 2).

78 Ibid 30–1.

79 Ibid 31. This observation is based upon a survey of Australian law schools in 2001, conducted by some summer law clerks at Mallesons Stephen Jaques.

80 Ibid.

The Task Force might have strengthened the case they made for *pro bono* developments within legal education by drawing attention to the material rewards that the public can expect from greater service provision to needy clients.

C Small Groups

The issue of values development raises a key plank of the clinical model position — the importance of facilitating small group instruction, and indeed, for some matters, one on one instruction. Few ethicists would argue that ethical training occurs effectively in large groups organised around lectures. Ethics and values, while being essential to good legal practice, demonstrably benefit from small groups and more intensive teaching that Australian law schools are increasingly unable to offer their students. While large lecture settings can provide the occasion for inspiration and instruction at a general level, it is difficult to explore ethical issues of a practical nature when the instructor is effectively prevented from interacting individually with students. Resolving ethical dilemmas of professional practice is a very different exercise from demonstrating the solution to a maths problem on a blackboard or outlining a set of legal principles within a particular area of substantive law. It is an example of the transmission of a clinical skill — confronting a set of circumstances in professional practice that requires a sound and prompt resolution. Close-up observation, discussion, and supervision are needed. There is no apparent reason why exploring how to resolve an ethical problem in legal practice should require a less intensive teaching effort than demonstrating to and supervising a medical student how to cope with a burst appendix.

The university setting, rather than the practical legal training institute, provides a more ample setting and scope for the inculcation of this aspect of clinical practice. The sequential nature of moral development theory points to the relative advantage of a structured approach to ethical training over several years,[81] in contrast to an intensive rules-focused exploration of professional responsibility issues during a densely packed practical program of 6–12 months duration. However, with the exception of the University of New South Wales, I am not aware of any Australian law school that historically has committed substantial resources to mainstream ethics teaching in small groups. The group size appropriate for different clinical activities will vary, but current trends in law schools towards 'small groups' of 30, 40 or more are excessive for most, if not all, such activities. I am unaware of any university that is teaching topics of this kind in small groups of eight or 10, where extensive participation through dialogue, supervision, and peer feedback is possible. Teaching ethics incidental to clinical legal education programs is perhaps the only exception to my point.[82]

---

81 See Steven Hartwell, 'Promoting Moral Development Through Experiential Teaching' (1995) 1 *Clinical Law Review* 505. See also Adrian Evans, 'Client Group Activism and Student Moral Development in Clinical Legal Education' (1999) 10 *Legal Education Review* 179.

82 As a clinical supervisor at Monash University's legal clinic during the early 1990s, I would work with four students each semester on a shift.

The situation today across the board is even further removed than it was in 1987 from the staff–student ratio proposed by the Pearce Committee as necessary for small group teaching — no more than 1:18, but 'desirably' 1:15.[83]

D Instilling and Demonstrating Mutual Obligation

The clinical model offers, in effect, a public demonstration of the mutual obligation notion outlined above. The university offers a free or low cost service in return for the government funding provided which enables the service to be offered. A patient or client often has an ongoing relationship with the clinic, as the service provided requires time for delivery and follow-up. The relationship may continue also through the client returning with other matters in the future. The model also enables the coordination of education with the provision of an essential service. The guarantee of quality service provision, as indeed of quality instruction, lies in the supervisory arrangements in place during the relationship between trainee service provider and client or patient. The person instructing and involved in supervision must be a skilled practitioner as well as educator.[84] The trade-off for the service provided must be adequate opportunities for feedback and reflection upon the clinical experience. While other students can play a role here, the relationship between educator and student is necessarily resource-intensive in terms of time and attention if the vital learning processes of feedback and reflection are to occur in a useful way. If not already obvious, the risks of poor clinical training must be made apparent. Telling examples are needed. Innocent persons persuaded to plead guilty or unrepresented clients appearing for themselves on serious matters might be two kinds of example. The potential consequences of bad service provision must form part of the context of public valuation of professional education.

E Implementing the Clinical Model

So far, three elements of the clinical model have been suggested: a clinical legal education program, a diverse *pro bono* program that complements the clinical legal education component, and small group teaching of professional values, ethics, and responsibility. In relation to the former, the kind of closely supervised field placement discussed above in Part V(D) is central to this notion. In large part this would require university-run or controlled legal clinics, in the style of hospital clinics attached to universities. The cheaper alternative for law students is frequently seen to be an external placement program in legal working environments. Here the risk is always the potential override of the importance of

---

83 Pearce, Campbell and Harding, above n 67, 161.

84 I recognise the difficulties associated with finding persons sufficiently competent in both practice and pedagogy for this purpose. While historically, clinicians at US law schools and elsewhere have often felt like second-class citizens in comparison to their classroom-based colleagues (on the issue of tenure, particularly), there is no reason (other than cost) why law schools could not offer clinical salary loadings to law teachers competent in both fields as an inducement to academics to prepare themselves for this work. Medical academics, as well as business school academics, are often paid clinical loadings, so why not law academics in appropriate cases?

pedagogical goals by the immediate (and often more seductive) goals of the professional milieu to which a student is attached. However, integrated seminar programs as part of 'externships' or other kinds of clinical legal education offer chances for reflection upon workplace student learning.[85] The legal profession's values and ethics education would benefit from close ties to the experiential environments offered by the law school. Clinical legal ethicists,[86] like hospital ethicists, should be involved in mainstream legal education as well as accessible to students on-site in clinics and work placements.

Like in the case of medicine, law schools will need to enlist the cooperation of the profession and government in order to secure sufficient variety and numbers of settings within which clinical practice by students is possible. Work placements of various kinds in law firms and other legal work settings, already widely practised and valued by law students,[87] provide a promising foundation for the approach being advocated here. Legal aid bodies and community legal centres have the potential to play a more significant role than previously. Sharing of facilities and staff is a possibility open to all law schools, but perhaps even more so for law schools located in outer metropolitan and regional areas. While inevitably there will be concern regarding the 'down-costs' of human service agencies being involved in student education, these costs may not be so large, especially where law students have been selected and educated in the balance of their curriculum on the importance of service. The will to learn through service, in combination with effective complementary education in such areas mentioned earlier (critical analysis, communication, contextual understanding, etc), should go some way to increasing the value of student contribution to the placement agency's service. Clearly, a more favourable government funding position for Law would enable law schools to provide better on-site supervision of clinical work than is currently possible, thus helping to reduce the risks to the placement agency while ensuring an effective clinical experience for the student.

A move to a clinical model does not imply abandoning the classroom, nor indeed require the deletion of a substantial amount of the content of what is presently being taught by law teachers. Abilities in legal analysis, effective communication, critical thinking, computer-assisted research skills and so on will continue to have their place within a good legal education. However, law teachers must improve their abilities to provide skills of these kinds to students, as well as at demonstrating their value to university administrators, public policy makers, law students, and practitioners. This does not imply that good legal academics must be practitioners. Rather, it requires them to acknowledge the environments in which law is practised in their teaching. What form this

---

85 See also Simon Rice and Graeme Coss, *A Guide to Implementing Clinical Teaching Method in the Law School Curriculum* (1996) 57.

86 This breed of legal educator is extremely rare. David Luban is an ethicist attached to the clinical programs at Georgetown Law Center, Washington DC. Few law schools in the world can make similar claims to Georgetown in terms of integrating specialist ethical analysis with clinical training. What is necessary nonetheless, and more commonly available, is the availability of good clinical instructors with competence in ethical analysis in legal settings.

87 As a former clinical supervisor, this was my experience. Also, the trend for law students to obtain law-related employment during their LLB studies points in the same direction.

acknowledgment takes will vary from topic to topic and from teacher to teacher. However it does require that contextual variables that influence legal outcomes become part of what is taught. This is to take an expansive view of 'clinical,' I admit, but it is to recognise that the practice of law is socially grounded and at times compromised by a range of external variables. It is clear from what has been said so far that there are professional development implications for law academics in moving in the clinical direction. Ways of encouraging academics to equip themselves and develop their teaching accordingly need to be found and funded. It must be remembered here that law school deans need to do their persuasive work not just with government policy makers but also with their Vice-Chancellors, especially in those universities where the RFM has heavily influenced internal funding decisions in the past.

F Linking Research to Practice

Part of the current problem preventing more effective presentation of the value of legal education arguably lies in the disjunction between what constitutes legal research and the needs of mainstream legal practitioners. Legal educators under the clinical model must strive with clearer, renewed purpose to convince students, practitioners, and others of the value of what they do (including teaching) through the establishment of palpable links between their research, the teaching needs of their students, and the 'law in action'. High-level doctrinal analyses may influence and impress a few judges, leading specialist barristers, and other academics, but it hardly slakes the thirst of students, practitioners, or laypersons for grounded legal knowledge.[88] Developing further the point that to teach the law contextually is to act consistently with the clinical model, legal scholars have the opportunity through their research to demonstrate the potential consequences of particular legal developments.[89] To research in this way does not imply the abandonment of disinterested inquiry as a scholarly research ideal. Rather it permits a degree of *rapprochement* between the otherwise conflicting demands for academic scholarship *and* relevance to 'consumers'.

Ways of developing the clinical analogy and implementing the clinical reality require more thought than is possible in this preliminary account. Legal educators need to find new ways of challenging their relatively low funding position. Law's ability to show some clinical bases for higher education funding should enable it to make some compelling arguments for increased public funding, at *at least* the same level as areas such as languages, visual arts, education and behavioural and social sciences. If they do little else, legal educators should at least effectively question their low standing relative to other fields. They need to make their case publicly. They need to think laterally about what the clinical model implies. For example, like Georgetown Law Center in

88 Of course, if law students are not offered any alternative during their LLB years, they are likely to take longer to discover the limits of appellate doctrine as a form of legal knowledge.

89 See Andrew Goldsmith, 'Standing at the Crossroads: Law Schools, Universities, Markets and the Future of Legal Scholarship' in Fiona Cownie (ed), *The Law School — Global Issues, Local Questions* (1999) 62, 85–90.

Washington DC, law schools could engage in a kind of 'clinic' where the 'clients' are not necessarily persons with particular legal problems but indeed perhaps young persons at school or on the street,[90] or prisoners, with limited awareness of their rights. Law students then play a part in educating sectors of the populace in matters of legal process and legal rights. This is another example of how law schools can demonstrate the kind of mutual obligation ethos I am arguing should be a key part of their attempts to enhance the level of public funding they receive for their activities.

G Repositioning the Law School

Rethinking the kind of legal education that a law student should have access to has obvious implications for the role of law schools both within the university and with the wider community. I have suggested there are implications for how legal academics research as well as how they teach — the study of law in context can and ought to be reconciled with the study of law as a clinical profession. This implies a broader conception of legal knowledge than traditionalists assume.[91] These changes can only occur and make sense if there is a commensurate shift in law school priorities and the allocation of university resources to law schools.

Law schools should become more active advocates on behalf of legal education. The record of law deans as a group in recent times has been patchy, and could certainly be improved. The Council of Australian Law Deans ('CALD'), the umbrella group for law schools, recently declined the opportunity to make a submission on legal education to the Higher Education Review process. This is despite the fact that it previously has acknowledged the possibility that further funding for legal education could come from a broader commitment to clinical legal education in the conventional sense.[92] It is true that CALD has made submissions to previous inquiries including the Senate inquiry in 2001, and has a publicly available position paper on legal education funding.[93] However, the 2002 Higher Education Review initiated by Dr Brendan Nelson is a far-reaching review with likely crucial consequences for the future shape of university education funding and policy direction. CALD's failure to act on this occasion unfortunately reinforces the basic argument of this article — that law deans, and academics more generally, as a group have been poor public advocates of the distinctiveness and value of legal education. It is significant that in a list of over 350 submissions to the DEST Higher Education Review, which includes various submissions from professional associations and discipline-based

90 The 'Street Law' project has been in existence for many years at Georgetown. See Kaminda Pinder, 'Street Law: Twenty-Five Years and Counting' (1998) 27 *Journal of Law and Education* 211. Examples of this kind enable us to think more broadly and creatively about how the clinical model might look in any particular law school.

91 See Andrew Goldsmith, 'Standing at the Crossroads', above n 89, 62, 85–90.

92 Council of Australian Law Deans, *The Cost of Legal Education in Australia: The Achievement of Quality Legal Education* (2000) 51, 73. I am grateful to one referee of this article for drawing this point to my attention.

93 See Council of Australian Law Deans, above n 12.

academic bodies, just three clearly relate to Law — two from law student bodies, and one from the Australian Professional Legal Education Council. Of the three, only the law student bodies address legal education in broad policy terms. In short, why Law should matter more than it presently does, for the purposes of the Higher Education Review, remains unaddressed by the key representative body for Australian law schools.

The public advocacy required should occur more than it has in the past with respect to the profession, the university, the government, and the community. The clinical model proposed here offers a way of making more visible and persuasive the case for greater public funding and community support. *Pro bono* work and law student clinics are two ways in which the service ethic can be cultivated and made transparent to others. Like corporations[94] and governments,[95] law schools need to think about their broader responsibilities through identifying and engaging with their 'stakeholders'. These are not limited to private paying clients, a message reinforced by student involvement in, and law school support for, *pro bono* and other service activities. Such engagement with stakeholders would reinforce recognition among law schools of the interdependence, rather than absolute autonomy, of their institutions with the wider environment. The clinical model of legal education is a significant step towards operationalising each law school's set of practical and ethical commitments. Improved access to law for the 'have-nots' of society through, for example, the provision of advice, conflict resolution services, and assistance in handling court appearances, has the potential to achieve a number of objectives. These include drawing attention to the broad constituency that Law in fact has as a discipline, while also making transparent its ability to contribute substantively to the easing of conflicts and the alleviation of need. The broader public interest in meeting legal need, in other words, should be demonstrated in concrete, practical terms time and time again. Intermittent, self-justificatory claims have not proven to be effective. Other ways of developing and entrenching the clinical model through teaching, research, and community outreach activities are still needed.[96]

VI CONCLUSION

There is no obvious reason why public expenditure on university education should treat Law less favourably than disciplines such as Nursing and Visual and

94 Stakeholder theory has a long association with corporate governance, in relation to defining those to whom the corporation is in some sense responsible. See R Edward Freeman, *Strategic Management: A Stakeholder Approach* (1984).

95 In 'Cool Britannia' under Tony Blair, there is considerable discussion about the 'stakeholder society' and the 'stakeholder economy'. In short, these are concepts which suggest broad social and economic inclusion, in return for an acceptance of the mutuality of obligations as well as rights. See William Hutton, 'An Overview of Stakeholding' in Gavin Kelly, Dominic Kelly and Andrew Gamble (eds), *Stakeholder Capitalism* (1997) 3.

96 Andrew Goldsmith, 'Is There Any Backbone in this Fish?', above n 54, 414–17.

Performing Arts. Yet law deans and legal academics have done little to challenge, let alone change, the status quo. Developing the case for the public importance of good lawyers should begin by reviewing the orientation of law schools towards their students, the profession, and the community more broadly. The clinical model is intended as a means to challenge the current position with respect both to the federal government and university administrations in terms of how they conduct their own internal allocation of funds between the disciplines.[97] It suggests a way of demonstrating value to the ordinary taxpayer as well as the importance in the practice of law of values other than self-interest and personal advancement.

Repositioning law schools, as the opening quotations suggest, requires more in the present climate than simply making vague allusions to notions of the 'civic university'[98] or indeed to a 'civic law school'. Such appeals, whether rooted in myth or substantive traditions, are likely to fall on deaf ears. A more demonstrable case for improved public funding must be made by law deans in setting directions for their law schools, as well as by academics through their teaching and research. Preparing ethical and service-oriented, as well as competent, law graduates is part of the service that law schools can provide. Law schools, by taking these responsibilities seriously, offer not just a better, more principled preparation in law, but also provide a service to the legal profession through the preparation of more civic-minded graduates. As legal educators, we act everyday as if law matters in what we teach and write, and with those whom we serve. If legal academics are to survive and improve their position in a climate of 'outputs', 'outcomes' and 'accountability' rather than succumb to a 'consumer rules' mentality, they must do a better job at explaining to a broad constituency just how and exactly why legal education matters.

97 Ralph Simmonds, above n 47, 2.

98 This concept is invoked in MacIntyre and Marginson, above n 1, 53. It arguably underlies at least some of the other contributions to the collection of which it forms part.