

# The Role of Law Reform in the Promotion of Legal Education

By

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## Introduction

Law reform can play a significant role in the promotion of legal education. This is clearly evidenced by the publication, in 2000, of the Australian Law Reform Commission's (ALRC) four-year inquiry into the federal civil justice system and the publication of the report *Managing Justice* (ALRC 89, 2000).<sup>1</sup> The terms of reference for the inquiry directed the ALRC to consider 'the need for a simpler, cheaper and more accessible legal system'. This involved consideration of the case management systems, practices and procedures of the federal courts and tribunals.

However, the ALRC understood that the effective operation of the justice system is not limited to what happens inside the courts and tribunals. The ALRC called for an holistic, collaborative approach to reform of the justice system. Recommendations were directed not only to the federal courts and tribunals, but also to other actors and stakeholders affecting the justice system.

It became evident to the ALRC throughout the course of its inquiry that, while it is of the utmost importance to get the structures right, achieving systemic reform and maintaining high standards of performance rely on the development of a healthy legal culture—one that values lifelong learning and takes ethical concerns seriously. The ALRC thus turned its attention to the education of the legal profession.

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<sup>1</sup> Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, ALRC 89 (2000). The full text of the report can be found at <http://www.alrc.gov.au/>.

This paper will focus on ALRC 89's five recommendations relating to undergraduate legal education. The progress of implementation of the recommendations will be discussed, with particular attention paid to the recommendations that impact on clinical legal education.

### **Recommendations for Reform**

***Recommendation 2. In addition to the study of core areas of substantive law, university legal education in Australia should involve the development of high level professional skills and a deep appreciation of ethical standards and professional responsibility.***

The ALRC was critical of the continuing traditional law school focus on developing analytical skills through a close reading of cases and statutes in subjects organised around bodies of substantive law. While not incompatible with skills teaching, this focus often operates to the detriment of professional skills training. This approach is formalised by the 'Priestley 11' requirements—a list of 11 substantive areas of law which individuals must complete in order to fulfil admission requirements.<sup>2</sup> Although this does not direct law school curricula, universities are under great pressure to make the subjects identified by the Priestley 11 compulsory in order to ensure that graduates satisfy academic requirements necessary to qualify for admission to a professional legal training (PLT) program, and subsequently to qualify for a practising certificate.

The criticism of this focus on substantive law is twofold. First, it is difficult to agree upon a set of 'core' areas of substantive law. Interest and relative importance of some subjects change with time and the changing environment in which lawyers operate. Secondly, a requirement that students must 'master' (or at least 'know') large bodies of substantive law ignores the stark reality that this substance changes dramatically over time—sometimes in a very short time.

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<sup>2</sup> The areas of knowledge are eponymously referred to as the 'Priestley 11' after the Chair of the Consultative Committee, The Hon Justice LJ Priestley. The recommendations are contained in the report of the Consultative Committee of State and Territorial Law Admitting Authorities, *Uniform Admission Requirements*, Discussion Paper and Recommendations (1992).

Law graduates therefore must be equipped with the tools which will facilitate 'lifelong learning'. The ALRC thus advocated the re-orientation of legal education 'around *what lawyers need to be able to do*', rather than remaining 'anchored around outmoded notions of *what lawyers need to know*'.<sup>3</sup>

While acknowledging the resource-intensive nature of professional skills training, the ALRC encouraged law schools to become more innovative in introducing skills training, either as separate skills units, or preferably as modules within substantive units or in clinical programs. At the time of the ALRC inquiry, some law schools were advancing a commitment to professional skills training, but it was not always clear how this commitment was being put into practice. The ALRC suggested that law schools make more explicit the nature and extent of their skills development programs, and how they examine these skills.

Since the conclusion of the inquiry, there has been a promising trend towards better awareness of the need for skills training in law schools, and the development of a number of innovative programs and initiatives. Professor David Weisbrot, President of the ALRC and a former dean of the University of Sydney Faculty of Law, has noted that it is often the newer law schools in Australia that 'have recognised the competitive need for innovation, and development of niche identities, with unique strengths in areas of teaching and research', and these law schools are those most associated with success in integrating professional skills teaching into the core curriculum.<sup>4</sup> However, Weisbrot has also acknowledged that some of the historically conservative law schools have also taken steps in recent years to restructure their traditional law programs to accommodate a greater role for skills development.<sup>5</sup>

Despite these promising trends, a focus on the transfer of principles of substantive law still dominates teaching, and drives the curriculum, in Australian law schools. There is a need to review pre-admission requirements to reflect

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<sup>3</sup> Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, ALRC 89 (2000), [2.21], citing Australian Law Reform Commission, *Review of the Federal Civil Justice System*, DP 62 (1999), [3.23].

<sup>4</sup> D Weisbrot, 'Taking Skills Seriously: Reforming Australian Legal Education' (2004) 29(6) *Alternative Law Journal* 266, 270.

<sup>5</sup> D Weisbrot, 'Taking Skills Seriously: Reforming Australian Legal Education' (2004) 29(6) *Alternative Law Journal* 266, 271.

better the need for equipping graduates with the necessary professional skills as well as substantive knowledge. Further, government and university administrations need to recognise the cost of a sustainable integrated skills program—both in terms of the time required by academic staff to deliver a quality product, and the financial resources required to achieve acceptable student/staff ratios.

The historic view that law is a discipline that can be taught with high student/staff ratios at low capital cost must be revisited.<sup>6</sup> This is a cry that has gone unheeded for decades. Stated simply, without adequate resources the ALRC's recommendation that 'university legal education in Australia should involve the development of high level professional skills and a deep appreciation of ethical standards and professional responsibility' will struggle to move from aspiration to sustainable reality.

***Recommendation 3. All university law schools should engage in an on-going quality assurance auditing process, which includes an independent review of academic programs at least once every five years.***

Quality assurance in higher education was an issue receiving some attention at the time of the *Managing Justice* inquiry. In 2000, the federal government established an independent Australian Universities Quality Agency (AUQA) to conduct periodic (at least five-yearly) quality audits of academic institutions as well as accreditation authorities. While the ALRC supported this process as an important framework for quality assurance in university education generally, it considered there was a need to encompass, or be supplemented by, a review process which is specific to law schools.

The AUQA process of auditing all Australian self-assessing universities is underway with the first cycle covering 2002–2006. The ALRC is not aware of any intention to subject law schools, separately from the university institution as

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<sup>6</sup> L McCrimmon, 'Mandating a Culture of Service: Pro Bono in the Law School Curriculum' (2003–2004) 14(1) *Legal Education Review* 53, 72–73.

a whole, to periodic quality audits. However, some law schools have been included in the reviews undertaken to date by AUQA.

***Recommendation 4. The Commonwealth Department of Education, Training and Youth Affairs (DETYA) should give serious consideration to commissioning another national discipline review of legal education in Australia, commencing as soon as practicable.***

The ALRC heard from numerous bodies about the remarkable changes in Australian legal education brought about, in large part, by the 1987 Pearce report.<sup>7</sup> The ALRC recommended that the time was right for another national discipline review focusing on such matters as the:

- impact of the dramatic growth in law school numbers on diversity and quality;
- balance in law school curricula between library and professional education;
- teaching of professional skills (including legal ethics and professional responsibility), and the mounting of clinical legal education programs;
- trend towards location of PLT programs in law schools; and
- resource base for law schools and law libraries.

Around the time of the *Managing Justice* report, the Australian Universities Teaching Committee (AUTC) of the Department of Education, Training and Youth Affairs was considering undertaking a set of projects focusing on issues of teaching and learning within representative disciplinary and cross-disciplinary areas. Following the ALRC's recommendations, law was selected to be among the first three disciplines in which projects would be initiated (together with nursing, and communication and information technology). A consortium of law

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<sup>7</sup> D Pearce, E Campbell and D Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (1987).

schools led by the University of New South Wales was the successful tenderer for the project. In recognition of the ALRC's role in this initiative, Professor David Weisbrot was asked to serve on the AUTC Steering Group overseeing the project.

The final report, *Learning Outcomes and Curriculum Development in Law* by Richard Johnstone and Sumitra Vignaendra, was completed in early 2003 and is available from [www.autc.gov.au](http://www.autc.gov.au). The authors stress that the report is a 'stocktake' rather than review of curricula and teaching and learning in Australian law schools. They note significant changes in the last 15 years, 'the most notable being the infusion of ethics, legal theory and generic and legal skills teaching into LLB curricula, a more informed and "student-focused" approach to teaching, and greater rigour in subject design'.<sup>8</sup> The authors also note, with a few exceptions, the lack of a systematic coordination of the development of curricula, in part due to resource limitations.

***Recommendation 5. While ensuring that specified standards of minimum competency are achieved, admitting authorities should render practical legal training requirements sufficiently flexible to permit a diversity of approaches and delivery modes.***

The ALRC noted a considerable flux in the PLT component of legal education, with a recent entry into the field by university law schools, substantial modifications to the format and content of PLT programs, and the beginning of diversity as to modes of delivery. Questions about the best venue for PLT had been overtaken by the need to clarify the goals, improve the content and develop a set of national minimum standards and competencies.

The two sets of standards for PLT that were in place at the time of the *Managing Justice* inquiry—the 'Practical Legal Requirements' (the Priestley 12) endorsed by the Council of Chief Justices, and the 'Standards for the Vocational Preparation of Australian Legal Practitioners' (the APLEC Prescription)—have

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<sup>8</sup> R Johnstone and S Vignaendra, *Learning Outcomes and Curriculum Development in Law: A report commissioned by the Australian Universities Teaching Committee (AUTC) (2003)*, 468.

been replaced by a single accepted standard. The new document, 'Competency Standards for Entry Level Lawyers', was jointly developed by the Australasian Professional Legal Education Council and the Law Admissions Consultative Committee. First published in 2000, and updated in 2002, the Competency Standards include requisite competencies for a range of skills, practice areas and values. While providing a minimum set of standards for the delivery of PLT, the document specifically states that the Competency Standards are designed, where possible, to allow competence in one relevant area to be acquired in the course of acquiring competence in another relevant area. The Competency Standards also allow PLT to be delivered in flexible and innovative ways.

The new PLT requirements have been flexible enough to allow for continuing diversity of approaches and delivery modes for PLT courses. A number of universities have established new PLT courses since 2000, and both the new and old programs have developed a range of delivery modes. A full list and description of PLT courses available in Australia can be found on the Council of Australian Law Deans' website at <http://www.cald.asn.au/slia/chap6.pdf>.

***Recommendation 6. The federal Attorney-General should facilitate a process bringing together the major stakeholders (including the Council of Chief Justices, the Law Council of Australia, the Council of Australian Law Deans, the Australasian Professional Legal Education Council, and the Australia Law Students Association) to establish an Australian Academy of Law. The Academy would serve as a means of involving all members of the legal profession—students, practitioners, academics and judges—in promoting high standards of learning and conduct and appropriate collegiality across the profession.***

The ALRC reflected on the huge changes to the legal profession over the past three decades. In the past, the relatively small size and the structure of the profession gave it a degree of cohesion and solidarity. However, the ALRC identified a growth and fragmentation of the profession that present serious challenges to the maintenance of a coherent professional identity.

In the ALRC's view, there is a need for an institution to draw together the various strands of the legal community to: 1) facilitate effective intellectual interchange of discussion; 2) facilitate research of issues of concern; and 3) nurture coalitions of interest. Such an institution should have a special focus on issues of professionalism (including ethics) and professional identity, and on education and training. Similar bodies have been established in other countries, including in the United States and Singapore.

In September 2002, the Council of Australian Law Deans (CALD) resolved in principle to institute a body to be known as the Australian Academy of Law. A small committee has worked to gather support for the proposal, including securing the support of the federal Attorney-General and the Chief Justice of Australia.

Some 35 distinguished persons—including judges, law deans, academics, law reformers and leading practitioners from around the country—have accepted invitations to become Founding Fellows of the Academy. A draft Constitution has been prepared, and the inaugural meeting of the Founding Fellows was held in early June 2005. A public launch for the Academy is planned for October 2005.

## **Conclusion**

For clinical legal education to survive, much less flourish, in Australian law schools, the funding pie must be expanded. As one of the authors has argued,

this will require the coordinated efforts of the major stakeholders—university administrations, law schools, government, the private legal profession, and the students themselves. It will also require the participation of faculty alumni and private foundations—a relatively untapped resource to date in Australia.<sup>9</sup>

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<sup>9</sup> L McCrimmon, 'Mandating a Culture of Service: Pro Bono in the Law School Curriculum' (2003–2004) 14(1) *Legal Education Review* 53, 72.

This observation was made in the context of providing opportunities for law students to undertake pro bono work as part of their degree, but the same applies to clinical legal education.

Of the recommendations in the *Managing Justice* report relating to legal education, the one that has the potential to provide the greatest boost to clinical legal education is the establishment of the Academy of Law. The Academy will provide an influential voice for Australian legal education and, in turn, clinical legal education. Clinical legal educators are ideally placed to provide a bridge between the law school, the judiciary and the practising profession—a fact which has not escaped the attention of the Founding Fellows of the Academy. Clinical legal educators should welcome the opportunity to become involved in the activities of the Academy, and should use the Academy as a vehicle to advance the promotion of clinical legal education in Australia.