

AUSTRALIAN LAW STUDENTS' ASSOCIATION



**SUBMISSION TO
HIGHER EDUCATION AT THE CROSSROADS**

A Ministerial Discussion Paper

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Executive Summary

Higher Education is indeed at the Crossroads. It is necessary that the future of the Australian higher education sector be considered with the notions of equity of access, quality of teaching and learning and the public benefit of education in mind.

1. The Australian Law Students Association

The Australian Law Students Association (ALSA) is the peak representative body of law students in Australia. All 28 Law Students Societies in Australia are members of ALSA, comprising a student membership of over 22,000. ALSA aims to represent and promote the interests and concerns of all Australian law students.

2. Learning Experiences and Outcomes within Law

Recommendations and Submissions:

Qa1. ALSA submits that the critical factor inhibiting increased productivity within legal education is the lack of adequate funding for law schools.

Qa3. ALSA submits that any future national body to set benchmarks in relation to university-based learning outcomes must allow for continued flexibility in course delivery and structure.

Qa3. ALSA submits that uniform national admission standards be adopted for all those seeking admission to the legal profession, in order to ensure that the requisite levels of professional skills are present irrespective of the path to admission.

3. Access to Legal Education

Recommendations and Submissions:

Qb1. ALSA submits that unique structural barriers exist that deter people from disadvantaged backgrounds from participating in legal education. The placement of law in Band 3 of differential HECS, especially when coupled with up front fees for practical legal training, promotes an elite student profile to the detriment of students from disadvantaged socio-economic groups including rural students, indigenous students and students from a non-english speaking background.

Qb1. ALSA submits that practical legal training should be classified as undergraduate, thus making it HECS liable and / or that the PELS program should be extended to all

PLT providers irrespective of their status as a University, so long as they are rigorously and externally assessed for standards.

Qb4. *ALSA submits that the equality of opportunity in legal education and training is essential if the legal profession is to reflect the social and cultural diversity of the Australian people and to serve its needs effectively. ALSA recommends that additional, specifically-targeted, funds should be made available to support bridging and ongoing support programs for law students from disadvantaged social groups.*

4. Community Benefits of Law Schools

Recommendations and Submissions:

Qc2. *ALSA submits that the community benefits inherent in legal education cannot be fully realised without adequate public funding for law schools, and that public funding to law schools should be specifically directed towards activities such as real client clinics that maximise both qualitative and quantitative community benefits from law schools.*

Qc2. *ALSA submits that Commonwealth funding to law schools should take into account both quantifiable and non-quantifiable community benefits derived from their existence.*

Qc3. *ALSA submits that government policy should reward those law schools engaging in clinical programs, by providing specific purpose grants to facilitate these endeavours.*

5. Allocation of Public Subsidies

Recommendations and Submissions:

Qh1. *ALSA submits that the government should not prescribe the size of the higher education sector.*

Qh3. *ALSA submits that performance-based funding for undergraduate legal education is not feasible given the progressive undermining of the quality of legal education as a result of the placement of law in the lowest cluster of the Relative Funding Model.*

Qh3. *ALSA submits that universities have continued to rely heavily on the RFM as a guide for their internal distribution of funds to law schools. Its influence is ongoing and negative.*

***Qh3.** ALSA recommends that law schools should attract increased government funding, either through placement in a higher RFM cluster, a review of the RFM or by other means. Quality, responsiveness, diversity and engagement will only be promoted in law schools if public funding mechanisms are available to supplement block grant funding. Such mechanisms should reward law faculties for enrolling students from under-represented groups, and for provision of legal services to the community.*

***Qh3.** ALSA recommends that mission-orientated funding be used to reward community benefits of higher education, particularly insofar as these are delivered by regional law schools. This funding should be in addition to block grants.*

***Qh5.** ALSA submits that any future time limit on tuition subsidies or cap on student loans must be sufficient to allow law students who are studying a combined degree program to complete the requirements for an honours degree in both disciplines. Thus six years' full time study should be the minimum time limit under consideration. Any time limit should also take into account the specific needs of part-time and mature-aged law students (many of whom come from disadvantaged groups), who require up to ten years to complete a combined law degree.*

1. The Australian Law Students Association

The Australian Law Students Association (ALSA), established in 1978, is the peak representative body of law students in Australia. All 28 Law Students Societies in Australia are members of ALSA, comprising a student membership of over 22,000. ALSA aims to represent and promote the interests and concerns of all Australian law students.

The most significant area of ALSA's work is its research and policy formulation. The focus of these activities is to advance student interests in a quality legal education. Furthermore, ALSA's education policies are strongly geared towards ensuring equity of access to legal education and to a career in the legal profession. ALSA is keenly aware of the future impact upon the diversity of the legal profession should access to legal education at both undergraduate and pre-admission levels be limited to those from a high socio-economic background.

As the peak representative body for law students in Australia, ALSA is uniquely placed to research and collate relevant information from its constituent Law Students Societies. As a result, ALSA is able to represent student interests to the legal profession and in legal education where law students speak with one voice¹.

This submission from ALSA does not attempt to canvass each of the consultative questions within *Crossroads*. Rather, it concentrates on the specific consultative issues which have either a direct or indirect impact on undergraduate legal education. As such, the submission touches primarily on consultative questions Qa1, Qa3, Qb4, Qb1, Qc2, Qc3, Qh1 and Qh3.

¹ The definition of 'undergraduate legal education' throughout this submission is identical to that referred to in the Australian Law Reform Commission's discussion paper 62, *Review of the Federal Civil Justice System*, August 1999, at para 3.9. It refers to "courses leading to the award of Bachelor of Law degree, which is the degree generally recognised for admission purposes." 'Pre-admission level training' refers to the training undertaken by law graduates in order to gain accreditation to be admitted to practise within the legal profession, this includes undergraduate or graduate Practical Legal Training Programs and Articles of clerkship.

2. Learning Experiences and Outcomes within Law

Recommendations and Submissions:

Qa1. ALSA submits that the critical factor inhibiting increased productivity within legal education is the lack of adequate funding for law schools.

Qa3. ALSA submits that any future national body to set benchmarks in relation to university-based learning outcomes must allow for continued flexibility in course delivery and structure.

Qa3. ALSA submits that uniform national admission standards be adopted for all those seeking admission to the legal profession, in order to ensure that the requisite levels of professional skills are present irrespective of the path to admission.

2.1 Adequacy of Funding of Legal Education

In 1987, the first major review of Australian legal education - the Pearce Report - found that law was the most poorly resourced of all the university disciplines.² Since then the situation of law schools has deteriorated rapidly, with current funding arrangements resulting in law students paying for a higher proportion of their education than any other students within public universities.

With the encouragement of successive federal governments the supply of places within higher education increased markedly in the 1980s and 1990s. Although little of this expansion was aimed at law, the result was an increase in the number of universities offering law and the places available for students wishing to study law.

Funding for legal education has not kept pace with the increase in the number of students or the cost of teaching law. The current funding structure of law is adequate only for the purposes of facilitating a teaching and learning environment known as ‘chalk and talk’, whereby the maximum number of students are exposed to a single lecturer, with little or no small group contact or interaction.

This method of teaching law is no longer considered effective or useful in isolation. As such, law schools have moved towards other models for undergraduate legal education. The effectiveness of these models is undermined by funding shortfalls, which mean that a “small group” learning environment may have 60 students with 5 sitting on the floor, due to a lack of space.

² Commonwealth Tertiary Education Commission, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission*, (‘The Pearce Report’), Canberra, AGPS, 1987, p8.

2.1.1 Methods of Teaching Law

The productivity of learning in legal education, as well as completion rates for law students and the skill levels with which law students graduate, depends upon the resources available to implement the most effective, flexible, professional methods to train lawyers to meet the needs of a changing society. Law students are increasingly exhorted to teach their students real legal skills. The Law Council of Australia recognises the need for such skills,³ as does the Australian Law Reform Commission in its *Managing Justice* Report,⁴ in addition to education authorities in the UK, the US and Canada. However, “these teaching methods require investment in intensive tuition (and therefore low student:staff ratios) and the capacity to cope with the rapid growth in information technology.”⁵

The common thread in the flexible and innovative methods of teaching law developed in the last decade is the need for interaction between student and educator, irrespective of the delivery method (distant or on-campus). Such vital interaction is hindered by disparities in student:staff ratios between law and other disciplines, and also between law schools, with such ratios being as high as 50:1 at one regional law school in Australia.

Law schools also face issues of quality associated with the increasing gap between remuneration for their staff in private versus public enterprise. This situation is most pronounced in rural and regional areas that suffer further disadvantages in attracting qualified teaching staff.

2.1.2 Information Technology and Legal Education

There is little doubt that since skills of information literacy are now an integral part of lifelong learning, information technology will play an increasing role as one of the major teaching and learning strategies in legal education.⁶

In order to support this diverse and innovative approach to legal education, law libraries will need to be much better resourced financially than at present. This situation is partly due to the pricing of legal information technology resources at commercial rates by the major legal publishers who focus on commercial law firm markets, placing many of the on-line resources out of the reach of law school budgets. This has had the effect of creating a culture whereby law libraries do without certain resources to gain access to others.⁷

³ See eg Law Council of Australia, *President’s Message*, February 2001, “Future lawyers need these skills. In particular, they need to be technology-enabled and competent in using technology to research, draft, manage, file court and other documents, monitor progress on files, and communicate with clients”.

⁴ Australian Law Reform Commission, Report Number 89, *Managing Justice: A Review of the Federal Civil Justice System*, January 2000, Recommendation 2.

⁵ Law Council of Australia, *2010: A Discussion Paper, Challenges for the Legal Profession*, September 2001, p. 91.

⁶ McGlone, Frances & Rowell, Carol, *How the Use of Information Technology Can Assist Students Studying Law Externally*, unpublished paper presented at Commonwealth Legal Education Conference 2000.

⁷ Council of Australian Law Deans, “Submission to the Senate Inquiry into the capacity of public universities to meet Australia’s higher education needs”, September 2001, at p. 35.

The other reason for the need for increased resources for law libraries in order to support ICT is that on-line resources create a greater demand for library resources, specifically a need for more paper journals. Canadian data suggests that on-line resources have fuelled demand for a greater variety of paper journals due to the ease at which students obtain relevant citations. The survey also concluded that the real costs of information technology are hidden. Although cheaper to set up than to purchase large numbers of paper based applications; the real cost of information technology is in staff time, down time, maintenance, communication costs and the provision of physical facilities for their use.⁸

Although Australian law schools currently produce lawyers of high skill levels, the quality of the education they provide is being eroded by steady losses of human and research resources as the gap between salaries for academic lawyers and lawyers in private practice widens.⁹

2.2 Accreditation regimes and quality assurance

Legal education, like all other professional disciplines, adheres to standards set by external bodies, specifically the Supreme Court in each jurisdiction. Australian law students must possess knowledge of specific subjects upon graduation known as the Priestly 11. For those seeking admission to legal practice, minimum competencies are prescribed by through the APLEC 9. There is, however, no indication of the standard of skills expected of students completing these compulsory units, or of the skills expected of a law graduate generally.

Further to these standards legal professionals within the jurisdictions of NSW, ACT must undertake continuing legal education (CLE) as part of the ongoing regime of education to ensure that those individuals practising with the legal profession remain up to date.

In both the US¹⁰ and the UK, statements of minimum skills standards exist, which guide law schools in terms of minimum levels of performance required for completion of a law degree at any institution.

In the United Kingdom, the Quality Assurance Agency published benchmark standards for a law degree in April 2000. Any student graduating in Law must show achievement in all of the following areas of performance, demonstrating substantially all of the abilities and competencies identified in each area of performance. The standards include:

- Subject specific abilities: knowledge, application and problem solving, and sources and research;
- General transferable intellectual skills: analysis, critical judgement and evaluation, autonomy and ability to learn; and
- Key skills: communication and literacy, numeracy, information technology and teamwork.

⁸ Canadian Association of Law Libraries, CLIC Inforlinx Project, *Phase I: Occasional Paper No 1*, November 1992, CLIC, at p. 18, 19.

⁹ Appendix A: Contains a detailed analysis of the result of funding cuts on the quality of legal education provided in Australia.

¹⁰ As part of the Statement of Skills and Values set out in the MacCrate Report, op. Cit., at pp. 139-40 implemented through the Association of American Law Schools accreditation standards.

2.2.1 Need for National Uniform Standards

There is an extensive and ongoing debate in Australia as to the appropriateness of some sort of accreditation regime for law schools.¹¹ The Australian Law Reform Commission felt unable to make a positive recommendation in January 2000 about the nature, function or composition of an accreditation body. However it was noted that there is a strong public interest in the creation of a body, possibly akin to the Councils of Legal Education, which exist in New Zealand and England.

The function of this body would be to set appropriate national minimum standards for legal education. The notion of high national minimum standards is currently being pursued by the discussion papers circulated by the Standing Committee of Attorney General's regarding national admission standards.

ALSA supports the creation of a body to ensure quality assurance in the provision of undergraduate and graduate legal education. It is imperative that requisite professional admission units are imparted to law students to a uniform minimum standard. These standards should be flexible enough to safeguard the inherent freedom of institutions to design their own curriculum. To this end, ALSA believes that a national body setting minimum skills play a productive role in assisting the development of a national profession.

ALSA maintains that wide ranging diversity amongst law schools in Australia, can and should continue to exist in any regulated environment. It is important that the diversity within law programs in terms of the course structure, units offered and school specialisation (ie, ethics, business, and human rights) is retained within the undergraduate legal education environment to facilitate student choice.

If the federal government considered introducing a national regulatory body for the purposes of benchmarking and quality assurance, ALSA submits that this organisation's terms of reference should keep in mind the fundamental intellectual purpose of an undergraduate legal education. Law schools should not be forced to provide a bachelor of laws course narrowly geared for only one style of legal practice. With the breadth of law students' career destinations, and considering that over 60% of law graduates do not aspire to private legal practice, any standards that are too narrowly focussed will have an adverse effect on the national profession and the Australian community.

It was recommended by the Australian Law Reform Commission in its *Managing Justice* Report that Australian Law schools should undergo a quality-assurance auditing process (including independent review) every five years.¹² This recommendation is important. However, ALSA submits that the major inhibitor of quality outcomes within legal education is a lack of resources, as a direct result of a lack of funding for law schools. Significant law school

¹¹ Australian Law Reform Commission, Discussion Paper Number 62, *Review of the federal civil justice system*, August 1999, at para3.66 - 3.74. Also ALRC, Report Number 89, *Managing Justice*, paras 2.25-2.77.

¹² ALRC 89, *Managing Justice*, op.cit., recommendation 3.

resources are already devoted to complying with quality assurance mechanisms within individual universities, as well as national organisations with allied purposes such as the Australian Universities Quality Agency and the Australian Universities Teaching Committee, which is currently examining learning outcomes and curriculum development in law. It is important that any future accreditation regimes do not place a further drain on the amount of law school resources flowing directly to students.

3. Access to Legal Education

Recommendations and Submissions:

Qb4. ALSA submits that the equality of opportunity in legal education and training is essential if the legal profession is to reflect the social and cultural diversity of the Australian people and to serve its needs effectively. ALSA recommends that additional, specifically-targeted, funds should be made available to support bridging and ongoing support programs for law students from disadvantaged social groups.

Qb1. ALSA submits that unique structural barriers exist that deter people from disadvantaged backgrounds from participating in legal education. The placement of law in Band 3 of differential HECS, especially when coupled with up front fees for practical legal training, promotes an elite student profile to the detriment of students from disadvantaged socio-economic groups including rural students, indigenous students and students from a non-english speaking background.

Qb1. ALSA submits that practical legal training should be classified as undergraduate, thus making it HECS liable and / or that the PELS program should be extended to all PLT providers irrespective of their status as a University, , so long as they are rigorously and externally assessed for standards.

3.1 Under represented and disadvantaged groups in legal education

University law schools are not representative of the Australian population; they differ on the basis of socio-economic class, ethnic composition and education advantage. Empirical research supports such a conclusion suggesting that a typical first year student,¹³

- has a father who was in fully employed in paid work (73%)
- has a mother who is almost as likely to be fully employed in paid work (53%)
- has a father whose annual income fell in the highest income bracket (47%) and not the lowest (13%)
- had a father of European descent (73% of students)
- had a mother of European descent (63% of students)

A series of demographic studies conducted at ten-year intervals revealed that the high socio-economic status of law students has not changed. Over the same period, metropolitan and older law schools have in fact been absorbing a smaller proportion of students from lower socio-economic backgrounds than previously.¹⁴

¹³ Goldring, J and Viagnaendra, S, *A Social Profile of New Law Students in the Australian Capital Territory, New South Wales and Victoria*, Centre for Legal Education, Sydney, 1997, at p.3.

¹⁴ Ibid, at p. 12.

In recent years, no money has been forthcoming to law schools to implement the essential pre-law bridging courses required to encourage students from disadvantaged backgrounds to enter tertiary study.¹⁵ The one exception to this is pre-law courses for indigenous people, but many of these have become shorter or merged with such courses at other law schools in the last ten years, as has been the case at Griffith University, Queensland University of Technology, Monash University and the University of New England.¹⁶

Law schools lack the resources or the funding to employ specialist staff to encourage and support students from disadvantaged backgrounds during their degree.¹⁷ Anecdotal evidence further suggests that retention rates would be increased by the provision of law electives of relevance to indigenous students, such as customary indigenous law, which many law schools are unable to offer due to lack of funds.

The provision of additional resources in the form of support staff, contact hours with lecturers, facilities (common rooms and meeting places) all add to the ability of students irrespective of their background to become engaged and be encouraged to remain at university.

3.2 Structural impediments to equity

The barriers which inhibit students from low socio-economic (SES) backgrounds, including rural students, indigenous students and students from a non-English speaking background from gaining access to and becoming admitted to practice can be categorised as cost related. The first of these barriers is the burden of differential HECS; the second barrier is the impact of full upfront fees for practical legal training (a prerequisite to admission as a lawyer) in most states and territories.

DEST accepts that students from low SES backgrounds are particularly under-represented in HECS band 3 fields including law, with only 12.3% of commencing students in this band in 1998 coming from low SES backgrounds.¹⁸ It is critical for the profession that students enter law who fall within this category to ensure that the profession is diverse and representative of the Australian community. The legal profession is attempting to encourage these students through its own schemes, such as mentoring programs for high school students¹⁹ and mentoring programs for indigenous students.²⁰ These programs are not national and require government co-operation with the profession in order to facilitate their national extension, including the provision

¹⁵ Weisbrot, D, "Access to Legal Education in Australia", in Dhannan, R, Kibble, N and Twining, B, (eds) *Access to Legal Education and the Legal Profession*, Butterworths, London, 1989, at p. 102.

¹⁶ H Douglas, "The Participation of Indigenous Australians in Legal Education 1991-2000" (2001) 24 *UNSW Law Journal* 485 at 500.

¹⁷ See Lavery, D, "The Participation of Indigenous Australians in Legal Education", (1994) 4 *Legal Education Review* 177, which found that 75% attrition rate was common amongst indigenous students.

¹⁸ Andrews, L, *Does HECS deter? Factors affecting university participation by low SES groups*, Higher Education Division, Department of Education, Training and Youth Affairs, DETYA occasional Paper Series 99F, August 1999, Table 1 at p. 27.

¹⁹ NSW Young Lawyers - High School Students mentoring scheme.

²⁰ Bar Association of NSW – Indigenous Lawyer's Strategy (2001).

of resources and incentives to law schools to encourage them to devote their staff time and resources to such initiatives.

3.2.1 Differential HECS

In 1996, the Higher Education Council suggested that differential HECS might have an effect on equity of access in entry-level profession education courses.²¹ The council further indicated that students from poorer backgrounds had an aversion to committing to debt and that fewer of these students could take advantage of the discount of up front payment. The study indicated that the profile of subjects placed in the highest band of HECS such as law were likely to change as a result of differential HECS.

ALSA submits that this thesis is accurate and that it is compounded by the type of services the debt will be incurred for, that being educational services.²² Arguments can naturally be mounted that individuals from low SES backgrounds are willing to commit to high levels of personal debt in the form of a mortgage. This form of debt is easily distinguished from debt incurred for educational services on the basis that it relates to a tangible object, not a 3 or 5 year degree where the benefit is not immediately apparent and the debt exceptionally large in comparison to those studying arts for instance.

Further, the cost of travel, accommodation and texts hamper students, particularly from remote (rural) backgrounds as well close knit family structures from attending Universities primarily located in large metropolitan areas.

ALSA submits that the placement of law in band 3 of differential HECS has serious implications for equity of access to legal education. Law is becoming less affordable for students from disadvantaged backgrounds and bridging courses and outreach programs are being wound back by universities due to funding cuts. The exclusivity and privilege associated with being a law student is thus compounded.

3.2.2 Interchange between HECS and fee-paying places

Anecdotal evidence suggests that an emerging trend advocated by some universities encourages students to enrol in a full fee paying place (domestic) during their first year of study. At the conclusion of that year the student then applies, and if successful, transfers into a HECS place subsidised by the Government. Some law schools are even suggesting that internal transfer into a law degree after the first year of undergraduate study offers an “equitable” safeguard for publicly-subsidised students unable to qualify for a HECS place in law upon first application, while at the same time encouraging students to transfer internally into a full-fee paying place in law with considerably lower first year results than those seeking to transfer into a HECS place.

²¹ Higher Education Council, *Professional Education and Credentialism*, National board of Employment, Education and training, December 1996, at p. 58.

²² *Ibid*, at p. 25.

These practices are inequitable and encourage students with significant financial resources to buy entry into a LLB program of their choice, then transfer into a HECS subsidised place after one year, although they were ineligible for a publicly subsidised place when they initially applied.

ALSA recommends that DEST investigate and if necessary addresses this practice, closing a loophole which favours those students with money and disadvantages those students without it from gaining access into LLB programs. If the higher education sector aims to be equitable it must remove structural inequities that favour individuals from specific socio-economic backgrounds.

3.2.3 Categorisation of Practical Legal Training as graduate

With students from low SES backgrounds having already illustrated an aversion to the incursion of significant HECS liability, their road to admission as a legal practitioner is further blocked by the categorisation of Practical Legal Training (PLT) courses as graduate and therefore not liable for HECS.²³

Although several institutions offer a combined LLB and PLT course thereby creating an opportunity for students to incur a HECS liability for this cost,²⁴ students who do not attend these universities are subject to fees of up to \$9,000 post-university to be admitted to practice²⁵.

ALSA submits that practical legal training, as a requirement to practice should be categorised as undergraduate legal education and therefore be subject liable for HECS.

Currently four law schools offer integrated programs that allow students to access HECS for the cost of PLT. Students at the other 25 law schools are at a clear disadvantage since they are required to pay up front fees for a service that other students can defer through HECS. ALSA hoped that this inequity would be addressed through the introduction of the Postgraduate Education Loan Scheme (PELS).

The decision to limit the PELS to Universities only has resulted in two significant PLT providers, the College of Law in NSW and Leo Cussens Institute in Victoria, being unable to offer students PELS as a payment option.

The College of Law is not only one of the premier providers of PLT nationally; accounting for approximately 45% of the marketplace, it is also the major provider of PLT within NSW.²⁶ It is

²³ Please note that only specific jurisdictions require the completion of PLT by students.

²⁴ The following Universities offer PLT programs in conjunction with the undergraduate degree, the cost of this course is liable for HECS. Newcastle University, University of Western Sydney, UTS, Flinders University

²⁵ Bond University Legal Training Institute \$9,800.

²⁶ College of Law accounts for approximately 70% of the NSW PLT cohort.

a not-for-profit subsidiary of the Law Society of NSW, which is a statutory corporation. The College offers courses of academic rigour with significant external accreditation.

The decision to limit the application of PELS has caused significant hardship and created a clear inequity between students, particularly in NSW. The decision to limit PELS to universities in this instance cannot be justified on the basis of profit making motives or market share. The College of Law is a clear example of the legal profession ensuring that the burden of training future lawyers is shouldered internally without recourse to the public purse.

ALSA therefore submits that PELS should be extended to include PLT providers such as the College of Law, where those institutions can demonstrate appropriate accreditation by vocational training agencies, as well as regulated responsibilities through legal professional associations in the areas of financial audit and public reporting.

3.3 Participation in comparable nations

Studies in comparable nations have revealed the need for adequate support of students from disadvantaged groups throughout their legal education. Recently in the UK, the Lord Chancellor's Legal Services Consultative Panel concluded that contraction in the per capita funding of higher and professional legal education "particularly affects the learning experiences of students from disadvantaged educational backgrounds".²⁷ The report recommended that funds be provided to enable law schools to make greater use of access schemes and alternative entry routes in order to make the social, ethnic and age distribution of law students more representative of society at large. It also recommended that provisions should be made to provide financial support to students undertaking the post-university professional training part of their studies.²⁸

ALSA submits that these recommendations also bear application in Australia. There is a need to increase the funding for access programs, specifically targeted for professional qualifications, where the greatest disparity in terms of equality of representation occurs. There is significant scope within current policy settings to remedy the economic disincentives resulting from law being placed in band 3 of differential HECS, particularly via the extension of PELS to non-university PLT providers and the provision of specific funding for pre-law courses for those from disadvantaged backgrounds.

²⁷ Legal Services Consultative Panel (formerly Lord Chancellors Advisory Committee on Legal Education), *First Report on Legal Education and Training*, April 1996, at p. 41.

²⁸ *Ibid* at p. 45 and 50.

4. Community Benefit of Law Schools

Recommendations and Submissions:

Qc2. ALSA submits that the community benefits inherent in legal education cannot be fully realised without adequate public funding for law schools, and that public funding to law schools should be specifically directed towards activities such as real client clinics that maximise both qualitative and quantitative community benefits from law schools.

Qc3. ALSA submits that government policy should reward those law schools engaging in clinical programs, by providing specific purpose grants to facilitate these endeavours.

Qc2. ALSA submits that Commonwealth funding to law schools should take into account both quantifiable and non-quantifiable community benefits derived from their existence.

ALSA believes that there is an inherent public value in legal education. Without adequate levels of funding this public value cannot be realised to its full potential. ALSA submits that even if a minimalist model of the externalities attributable to legal education is adopted, significant public benefits may be attributed.

4.1 How do law schools give back to their local communities?

The value of a law school is not always immediately apparent, however law schools do give a significant amount to the community in which they are situated. This value is increased in regional areas as law schools attain the status of a key legal resource for the local community.

- (a) **Law Libraries** are often the only legal resource that is publicly available, user friendly and up to date. Public libraries hold inadequate collections due to the special resources required within a law library; Supreme Court libraries have restricted access. Law school libraries therefore in many cases provide members of the public with access to resources to understand their legal rights.

Law libraries are aware of these demands in their local community and actively seek to satisfy these demands as well as those of teaching and learning.²⁹

- (b) Law Schools increasingly are providing services directly to their local community. These services more often than not take the form of **Clinical Legal Education (CLE)**

²⁹ Committee of Australian Law Deans, *Australian Law School Libraries: A position Statement and Standards*, Centre for Legal Education, Sydney, June 1995, p. 3.

programs.³⁰ As access to legal aid decreases, in many communities, university legal centres are filling the breach, with some law schools being fortunate enough to receive government grants to operate this service.³¹ Provision of such services through universities also enables the avoidance of conflicts of interest by legal aid services.

Clinical programs also have indirect benefits. The programs instil in participants the importance of pro bono legal work, which if fostered correctly will lead to these legal professionals carrying this attitude into their working life, increasing the direct benefit to those in the community least able to afford legal advice.³²

At this point in time 16 law schools offer clinical programs. However, the number of places in these programs is limited and places are highly contested. The primary reason for these limitations is that there is no reward (incentive) for the provision of this valuable community service.

An expansion in the number of clinical legal education programs can only come about as a result of increased government funding to law schools.³³ ALSA submits that the Commonwealth should investigate direct funding grants for CLE to reward universities for service to the community.

- (c) Universities and Law schools research centres are fast becoming the key **repositories of knowledge**. University research capabilities far exceed those of the private profession as they react quickly to legislative or judicial change. Law schools are also **valuable collaborators and educators** of the legal profession providing continuing legal education and opportunities for partnerships in ethics, human rights and other areas of particular research development.
- (e) Law schools **engage with local high schools** through the provision of resources for the teaching of legal studies, coaches for school mock trial teams and most importantly, mentoring for disadvantaged students interested in law, inspiring them to consider this career path and thereby making the profession more representative.³⁴
- (f) Law schools are fast becoming contributors to an **export industry**. With Australian universities looking for other means of attracting funding in addition to public funding, many

³⁰ These programs include real client programs where students work under supervision with community legal centres and external placements in community organisations.

³¹ See Appendix B for a complete listing of the CLE programs currently in place nationally.

³² McCrimmon, L, "Promoting a Pro Bono Ethos Through Legal Education: Thoughts from the academy" Briefing paper for Session 3B, Pro Bono and Legal Education, *The First National Pro Bono Law Conference: Abstracts and Briefing Papers*, 4-5 August 2000, at p. 85.

³³ Australian Law Reform Commission, Report Number 89, *Managing Justice: A review of the Federal Civil Justice System*, January 2000, at para. 2.19.

³⁴ For example, the Schools Legal Education Group at the University of NSW Faculty of Law, the Streetlaw program at the University of Sydney Faculty of Law.

Australian law schools have developed significant legal education programs in other jurisdictions. The positive trade balance in legal services grew to \$136 million in 1999-2000, up from \$108 million in 1998-99. Import penetration of the Australian market for legal services has also been stopped by domestic growth, with imports of legal services falling by 40 per cent in 1999-2000.³⁵

ALSA submits that Law schools and universities will better engage themselves with the community when the benefits of community involvement and the provision of services at no cost to the community are rewarded through government financial assistance.

³⁵ Australian Bureau of Statistics Catalogue Number 5363.0, *Balance of Payments and International Investment Position, Australia, 1999-2000*, released 21 May 2001, see table 11 for international services credits.

5. Allocation of public subsidies

Recommendations and Submissions:

Qh1. ALSA submits that the government should not prescribe the size of the higher education sector.

Qh3. ALSA submits that performance-based funding for undergraduate legal education is not feasible given the progressive undermining of the quality of legal education as a result of the placement of law in the lowest cluster of the Relative Funding Model.

Qh3. ALSA submits that universities have continued to rely heavily on the RFM as a guide for their internal distribution of funds to law schools. Its influence is ongoing and negative.

Qh3. ALSA recommends that law schools should attract increased government funding, either through placement in a higher RFM cluster, a review of the RFM or by other means. Quality, responsiveness, diversity and engagement will only be promoted in law schools if public funding mechanisms are available to supplement block grant funding. Such mechanisms should reward law faculties for enrolling students from under-represented groups, and for provision of legal services to the community.

Qh3. ALSA recommends that mission-orientated funding be used to reward community benefits of higher education, education, particularly insofar as these are delivered by regional law schools. This funding should be in addition to block grants.

Qh5. ALSA submits that any future time limit on tuition subsidies or cap on student loans must be sufficient to allow law students who are studying a combined degree program to complete the requirements for an honours degree in both disciplines. Thus six years' full time study should be the minimum time limit under consideration. Any time limit should also take into account the specific needs of part-time and mature-aged law students (many of whom come from disadvantaged groups), who require up to ten years to complete a combined law degree.

5.1 Current funding distribution mechanisms

The block-operating grant from the Commonwealth remains the largest single source of funds for public universities. The amount of funding a university receives is based on its profile of enrolments across the disciplines, using different levels of funding for enrolments in different

disciplines depending on the cluster assigned to each discipline area. The system this represents is called the Commonwealth Relative Funding Model (RFM).

The quality of legal education is being undermined by the placement of law as a discipline in the lowest cluster of the RFM. Innovation in teaching and learning and the differentiation of law as a discipline is discouraged by the apparently inflexible nature of the current model. ALSA submits that although a discipline-based funding model such as the RFM should be retained, funding should be equated with the actual cost of providing a high quality legal education.

5.1.1 *The Relative Funding Model*

Law's placement in the lowest cluster of the RFM is a matter of ongoing concern for ALSA, because of:

- the doubtful accuracy and reflectiveness of the calculations used to achieve law's placement at the RFM's inception;
- the persistence of the RFM as a means of allocating funds within universities; and
- the absence of any review of the discipline weights since 1991.

“Manifest defects”³⁶ in the development of the RFM formula for law resulted from the fact that the discipline group labelled “law” actually includes the areas of “legal studies” and “justice” as well as “law”. As a result of this, the findings of the teaching costs survey which formed the basis of the RFM formula included the distinctly lower costs of teaching law to non-lawyers, for example in business studies courses. A second error was made in choosing studies featuring costs figures from only two LLB programmes to provide virtually all the evidence of the costs of teaching law when developing the RFM. The two programmes used, Melbourne and UWA, were at the time amongst the lowest-funded in the country,³⁷ and both used large lecture-style teaching methods.

Producing quality legal education for law students today requires students to be given a good grounding in the analytical, communication and practical skills required to be a lawyer in modern society. Law schools must teach legal research and electronic retrieval, skills such as legal writing and drafting, negotiation, mediation and advocacy, and provide clinical experience of some form.³⁸ This is so *even if* law schools do not place a primary emphasis on the skills teaching which is increasingly demanded of them, but merely seek to produce an adequately qualified law graduate.

³⁶ Chesterman, M, “Budget Allocation to Law Schools”, Addendum to *The Cost of Legal Education in Australia*, A project of the Centre for Legal Education in conjunction with the Committee of Australian Law Deans, Centre for Legal Education, Sydney, 1994 at p.1.

³⁷ For evidence of the underfunding of Melbourne University at the time, see the *Pearce Report*, op.cit., Volume 1, para. 5.36, and in relation to UWA see Volume 1, para. 5.66 and Volume 3, para. 16.38. The Melbourne LLB was part of the report by RA Williams used by what was then DEET, the UWA LLB was part of the report by Interex. See Chesterman, *ibid*, at pp. 2-3.

³⁸ This reflects statements made by the Committee of Australian Law Deans and the Law Council of Australia which can be found *ibid*, at pp. 28-29.

The costs inherent in preparing law students for their profession simply do not apply to teaching non-law students and are not incurred by “chalk and talk” lecture style teaching, which has been identified³⁹ as inadequate for the purposes of teaching the elements noted above.

ALSA recognises that the RFM was intended to determine operating grants to the universities, not how they were to distribute that grant internally. Universities did not have to mirror the RFM in funding their disciplines. The Minister for Education, Training and Youth Affairs’ office has argued this point repeatedly in correspondence both with ALSA directly and with other Members of Parliament and Senators who have written to him on our behalf. As a Jim Barron, a Senior Advisor to the Minister argued:

As universities are autonomous bodies set up under State legislation, the allocation of Commonwealth funds within them is a matter for individual universities to determine...Importantly, the RFM was designed for use at the system wide level only, and was not intended as a mechanism for the internal allocation of institutional resources, which is entirely a matter for individual institutions.⁴⁰

ALSA submits that this argument is flawed, because whatever the RFM may have been intended for, universities have continued to rely on it heavily over the last decade as a guide for the internal distribution of funds, and the baseline position from which any variation must be justified. The Council of Australian Law Deans has recognised that a significant number of universities using an internal RFM allocate Law to their own cluster 1.⁴¹

In late 1999, a review of the relative costs of teaching in various disciplines at both postgraduate and undergraduate levels was commenced. The review was due to have been completed in September 2000,⁴² but instead was abandoned. ALSA realises that determining the real costs of teaching various disciplines is a difficult task. However, ALSA believes that such a review of the RFM is very important in order to provide an up-to-date model, which would ensure the equitable funding of higher education institutions in relation to the structure of their teaching profile.

5.1.2 Internal university distribution of block grants

Although law schools are internally funded by their universities in various manners, the prevalent model is some variation on the RFM structure outlined above. Even allowing for the difficulties of comparing between universities who allocate the cost of law school operations in different ways, the Council of Australian Law Deans is of the view that “no law school in a public university is providing funding at levels corresponding to a multiple of Law EFTSU higher than

³⁹ For analysis of the inadequacy of these methods, see the Pearce Report, McInnis, C, and Marginson, S, *Australian Law Schools After the 1987 Pearce Report*, op. cit., and the *The Cost of Legal Education in Australia*, op. cit.

⁴⁰ Letter, Mr Jim Barron, Senior Advisor, Office of the Minister for Education, Training and Youth Affairs, to Ms Tanya Plibersek MP, Member for Sydney, copy dated 26 November 1999.

⁴¹ Council of Australian Law Deans, *The Funding of Law Schools*, Draft of 22 December 2000, at p. 30.

⁴² Letter, Mr Jim Barron, op. cit.

1.3 [the level of funding for cluster 2 in the RFM]...and a significant number of them are funded at a lower multiple.⁴³

Some universities have realised the problems of using the RFM for the internal allocation of funds, for example:

this type of 'relative funding model' is based on a quick and dirty mindset of the late 1980s, and was born out of the integration of the Colleges of Advanced Education into the University system...even if they once did, the current weightings no longer make sense.⁴⁴

Unfortunately, without government recognition that the total block grants provided to universities no longer equitably reflect the costs of teaching in different disciplines, individual law schools are disadvantaged in pressing their claims for adequate resources for legal education within their own universities. The view that law is a low cost discipline is reinforced by media statements, such as those issued after reports that the University of Western Sydney was underfunded, which stated that "At the University of Western Sydney around 60 per cent of undergraduate enrolments are in low cost disciplines such as accounting, administration, education, law, and the humanities."⁴⁵

ALSA believes that such statements inappropriately group law with other disciplines, which do not require training in both high-order social theory, and sophisticated skills, which can only be taught in an environment of intensive access to teachers and mentors.

5.2 The impact of other funding models on legal education

5.2.1 Complete deregulation of the sector

Within a completely deregulated model, universities would be able to set the price for each course and charge fees at that rate. Under this model many of the issues of quality within legal education could foreseeably be redressed. With access to a larger pool of funds, those law schools able to charge high fees could provide more teaching contact hours, greater access to current technology and lower student: staff ratios.

Fee deregulation is based around the flawed premise that greater competition between the law schools will be created, resulting in an increase in the quality of the education. ALSA submits that fee deregulation will not create an environment of greater competition in this sense. Rather, fee deregulation will shift the basis of competition away from course quality and diversity to the dollar cost of delivery to students. Course quality will not be an obsolete means of distinguishing between law faculties, however the importance of competition based on course quality will be

⁴³ Council of Australian Law Deans, *The Funding of Law Schools*, op. cit., at p. 30.

⁴⁴ University of New South Wales, Office of the Vice Chancellor, *The Report of the Ways and Means Task Force*, July 2000, at para. 5.17.

⁴⁵ Media Release, "University of Western Sydney not Under-Funded", Minister for Education, Training and Youth Affairs, K60, 21st March 2001.

greatly diminished in favour of the cost of delivery to students. This will have a negative impact on the quality of legal education.

Total deregulation of the university sector may indeed create “classes” of universities. Law schools within the Group of Eight could theoretically charge a premium for their status, thereby creating two classes or universities, one for students who have unlimited funds and one for students who although equally meritorious academically do not have the funds. An increased emphasis on competition based on dollar course cost will result in small and regional law schools retaining fewer resources. They will simply be unable to demand the same fees as their older, larger competitors. Accordingly, they will not have the financial capacity to be flexible and responsive to student and industry needs, whilst maintaining competitive course costs. ALSA submits that because of the high level of competition and specialisation that already exists amongst law schools, in the discipline of law the introduction of deregulation may therefore have a tendency to defeat the very reasons for its introduction.

Equity of access to legal education or any discipline group would no longer be a reality under a completely deregulated model. This submission appreciates that any future deregulated model in Australia would feature a significant number of scholarships for students from low SES backgrounds. New Zealand research indicates however, that enrolment from low SES backgrounds fell after the introduction of the student based loans scheme.⁴⁶

Further, the deregulation of fees has been identified in the United Kingdom as being of particular sensitivity to middle income families. If the higher education sector was deregulated, although scholarships would exist for students from low SES backgrounds, significant adverse effects on the socio-economic composition of law schools can be anticipated.⁴⁷

5.2.2 Learning entitlements (Vouchers)

Vouchers have long been considered a possible option for adjusting the mix between public and private input into the higher education sector. Universities would set the price for a specific degree and the government would provide a voucher to a specific dollar amount. Any difference between the voucher and the real cost would be met by the student.

Vouchers may have the result of equalising each individual’s share of public funds, however vouchers rely on certain assumptions. ALSA submits that vouchers, although equalising the government contribution per student, do not take into account the need to distinguish between students on a merit basis.

If the government did determine to introduce vouchers, it must be done so on the basis that some regulation be put in place to limit the prices that can be charged by universities. This

⁴⁶ Warner, A, *The New Zealand Student Loans Scheme Analysis and Options for Reform*, An independent study commissioned by the Student Assistance Task Force University of Auckland, July 1999, p4.

⁴⁷ Universities UK, *New directions for higher education funding*, Funding options review group, final report, 2001, p at 28.

would have the effect of equalising the playing field amongst new and old law schools. Secondly, merit-based entry must still be the primary consideration for admission to law schools. Thirdly, the government must prove students who are unable to afford the gap between voucher funding and actual fee levels with loans options to encourage students to consider higher education.

5.2.2 Mission Oriented Funding

As noted within Chapter 4, ALSA favours mission-oriented funding. ALSA submits that the Commonwealth should actively encourage and reward universities who are engaging in community activity, such as the provision of legal advice through clinical legal education programs. ALSA is also of the opinion that such rewards can and should be extended to pre-law programs and other initiatives of law schools designed specifically to redress the unrepresentative nature of the legal education sector.⁴⁸

Mission oriented funding should be in addition to current funding arrangements; universities without such programs should not be penalised. The model adopted for mission oriented funding should not be one that merely promotes the interests of the older and more established universities.

The funding should recognise the important roles of universities in their communities particularly those located in regional areas. This is particularly important in any deregulated environment, as these universities possess fewer resources, are unable to access the majority of the profession and large commercial law firms (generally centred in capital cities) and have smaller catchment areas for potential students.

6.3.3 Allocation and Number of places

ALSA is opposed to the government prescribing limits on the number of students who can enrol in any given discipline. Australian students should have the ability to determine their own course of study if they qualify for entry. Market forces regulate oversupply and undersupply of any profession; government funding may provide a means of encouraging students into particular high need professions.

5.2.3 Capping tuition costs

ALSA maintains that tuition caps are unlikely to counter the detrimental effects of deregulation on smaller universities, students from low SES backgrounds and the diversity of the legal profession.

The West committee recommended only that preliminary caps be set for tuition fees. If such caps are removed, any control over accessibility of course will effectively be removed from the government and placed in the hands of higher education institutions.

⁴⁸ Refer part 3.1

It is essential in a deregulated environment that caps exist to ensure that two classes of university degrees do not emerge or that pricing structures create unfair elitism for specific disciplines with traditional “prestige value” attached to their qualifications.

5.2.4 Setting time limits on the availability of public subsidies

ALSA submits that time limits on the availability of public subsidies for higher education, would limit the opportunities for individuals to gain access to legal education. This is because it is precisely those students from disadvantaged backgrounds and mature-aged students who are likely to study law part-time, or to take advantage of slower, more flexible mechanisms to complete their degree requirements.

Placing time limits on the availability of public subsidies may also act as a disincentive to students completing honours qualifications in law, as well as in combined law degree programmes, because honours qualifications require up to a year’s additional study. Since an honours degree is an essential prerequisite to most postgraduate study in law, ALSA submits that time limits on the availability of public subsidies should take this into account.

Therefore, ALSA submits that any future time limit on tuition subsidies or cap on student loans must be sufficient to allow law students who are studying a combined degree programme to complete the requirements for an honours degree in both disciplines. Thus six years’ full time study should be the minimum time limit under consideration. Any time limit should also take into account the specific needs of part-time and mature-aged law students (many of whom come from disadvantaged groups), who require up to ten years to complete a combined law degree.

5.3 Safeguards in the event of the introduction of the deregulation of tuition fees and student centred funding

ALSA recognises that in order to introduce more funds to the higher education sector, some degree of further deregulation may be required. ALSA submits that in this event, a number of safeguards are required in order to maintain and improve diversity amongst the legal profession, provide access for lower socio-economic groups and maintain high quality legal education.

These safeguards should include:

- The establishment of a national regulatory body, in order to ensure that the higher education sector operates fairly and effectively. This would be an initiative in line with national competition policy and other deregulated industries;
- Caps on the tuition fees that may be charged by higher education providers;
- The learning entitlement or cash limited tuition subsidy for students should be set at a level sufficient for students to complete an undergraduate law degree and any required professional qualifications with minimum personal contribution;
- Full disclosure of information about courses and institutions and active dissemination of such information by an independent body, in order to channel accurate information and comparisons of law courses to the market; and

- The establishment of a student ombudsman to monitor students' interests within the higher education system, as recommended by both the West Committee and the Senate Employment, workplace relations, small business and education references committee's inquiry into the capacity of public universities to meet Australia's higher education needs, *Universities in Crisis*.

6. Appendix A

6.1 Results of Funding Cuts on the Quality of Legal Education

an extract from the ALSA Higher Education Funding Policy

The main factor inhibiting the ability of Australian law schools to deliver high quality legal education is a lack of funding. Law, as a discipline, is currently funded at the lowest level of the Relative Funding Model (RFM). Cuts to the funding of the Higher Education sector, combined with the placement of law in the lowest cluster of the RFM have resulted in law schools being underfunded to the extent that the quality of legal education has been crippled. The ability of Australian law schools to provide comprehensive and effective legal education is under threat. Resources for teaching, research and administrative support are at extremely low levels.

The detrimental effects of funding cuts are patent across all areas of legal education. Any proposed reform of undergraduate legal education must take account of this. Each of our Law Students' Societies provides ALSA with a triennial report pertaining to the effects of funding cuts in their law school. The following list details some of the effects in certain areas that funding cuts have had on Australian law schools since 1996:

Class Sizes

- Institutions have been forced to increase tutorial class sizes, some by as much as double;
- tutorials at some institutions have been abolished; and
- tutorials at some institutions are no longer available after first year.

Contact Hours

- Full year courses have been reduced into semester-long courses to accommodate resource shortages; and
- the range and number of optional subjects have been drastically reduced.

Innovative and Small Group Teaching

- Institutions established with a focus on the provision of student-centred learning and small group teaching have been forced to replace small group teaching systems with large lectures;
- some institutions have delayed or abandoned proposed moves to small group teaching because of insufficient funding to employ the necessary teaching staff;
- skills courses have been reduced, and in some cases abolished;
- research and learning centres related to the study of law have been closed or scaled down; and
- funding cuts have stifled innovative attempts to incorporate such courses within the undergraduate law degree.

Course Content and Structure

- The number of subjects required to gain a Bachelor of Laws have been reduced; and
- restructuring of the law degree (with retrospective effect) to accommodate budgetary pressures.

Lecturers and Staffing

- General and specialist teaching staff has been cut, offered voluntary redundancy or not replaced after positions are vacated;
- new appointment of teaching staff have been frozen has been slowed or frozen entirely, pending the availability of further resources;
- institutions have been forced to employ less qualified teaching staff as a cost-cutting measure; and
- legal practitioners are being used in place of lecturers to teach certain courses.

Quality of Assessment

- Budget cuts have resulted in shifting the focus of assessment from the individual to group tasks which reduces the accuracy and equity of the assessment process;
- reduction or loss of essay options; and
- some institutions have been forced to move to less resource intensive, more inflexible forms of assessment, such as 100% examination.

Student Support Resources

- Law students' societies who traditionally receive faculty funding are receiving less and some none at all;
- some institutions have no computing facilities available for use by law students; others have limited or minimal access to computing facilities;
- law students' societies are losing office spaces formerly provided by the law faculty; and
- student common rooms are no longer available at some institutions.

Libraries

- Book budgets have been frozen or reduced;
- specialist law libraries are being absorbed within general library facilities. This has led to loss of specialist law library staff, access to legal information technology resources, group meeting tables and rooms;
- the number of journals and serials subscribed to by most libraries is declining every year. This is due to a combination of rising costs of such literature and a reduction in funding available; and
- reduced library opening hours.

Administrative Support

- Administrative duties are being transferred to academics as support staff are removed from law faculties. Quality of research is suffering as a result;
- law schools are being absorbed into other large departments, having serious implications for diversity, innovation, curriculum development, identity and student participation within the faculty;
- some faculties are being forced to use other faculties resources;
- faculty office hours are being reduced;
- reduction in the number of hours that students can collect exams; and

restructuring of the law degree to include fewer subjects (with retrospective effect) to accommodate budgetary pressures.

7. Appendix B

7.1 Complete list of Clinical Legal Education Programs Nationally

extract from Kingsfords Legal Centre (UNSW), Clinical Legal Education Guide

Deakin University
Griffith University
James Cook University
La Trobe University
Monash University
Murdoch University
Northern Territory University
Queensland University of Technology
University of Adelaide
University of Newcastle
University of New South Wales
University of Notre Dame, Australia
University of Queensland
University of Sydney
University of Technology, Sydney
University of Western Australia
University of Wollongong