

AUSTRALIAN LAW STUDENTS' ASSOCIATION



**SUBMISSION TO THE SENATE EMPLOYMENT,
WORKPLACE RELATIONS, SMALL BUSINESS AND
EDUCATION REFERENCES COMMITTEE**

**THE CAPACITY OF PUBLIC UNIVERSITIES TO MEET
AUSTRALIA'S HIGHER EDUCATION NEEDS**

Table of Contents

Contents	2
Executive Summary	3
1. The Australian Law Students' Association	5
2. The Adequacy of Current Funding Arrangements	7
2.1 Historical background to the funding of Australian law schools	
2.2 Legal education and the public interest	
2.3 Current funding distribution mechanisms	
2.3.1 <i>The Relative Funding Model</i>	
2.3.2 <i>Internal university distribution of block grants</i>	
2.4 Current funding arrangements and increasing demands on law schools	
2.5 Effects of current funding arrangements on law school autonomy and flexibility	
2.6 Quality and diversity of teaching and research	
3. Equity of Access to Legal Education	18
3.1 Under-represented and disadvantaged groups in legal education	
3.2 Differential HECS	
3.3 Participation in comparable nations	
4. Regulation of Higher Education in the Global Environment	22
4.1 Accreditation regimes and quality assurance	
4.2 External reviews	
Appendix – Funding Crisis in Australian Law Schools	25

Executive Summary

There is a crisis in Australian law schools. Public universities in Australia do not provide adequate funding to their law schools to enable those schools to supply quality legal education to their students.

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 20,000. ALSA aims to represent and promote the interests and concerns of all Australian law students.

ALSA's submission concentrates on the direct and indirect impact that current levels of funding of undergraduate law programmes in public universities has on students, touching primarily on items (a), (d) and (g) of the Senate Committee's terms of reference.

2. The Adequacy of Current Funding Arrangements

Current funding arrangements to law schools are inadequate. Neither the government's funding model nor internal distribution of funds by universities to their law schools supplies enough funds to support the provision of quality legal education, taking into account increasing demands on law schools to teach practical skills, integrate technology into learning experiences and provide adequate library resources. Law students are required to fund their own education in a disproportionate manner.

2.1. 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 increased in order to maximise both qualitative and quantitative community benefits from law schools.

2.2 ALSA submits that the quality of legal education is being undermined by the placement of law in the lowest cluster of the Relative Funding Model and that the RFM must be consistent with the need to provide diverse and innovative teaching and the integration of practical skills into the undergraduate law curriculum.

2.3 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.

2.4 ALSA submits that the placement of law in the lowest cluster of the RFM has meant that law schools are unable to cope with increasing government, professional, university and student demands on them to teach skills and to provide adequate library and technology resources.

2.5 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.

3. Equity of Access to Legal Education

Current funding arrangements, when combined with the placement of law in the highest band of differential HECS, promote an elite student profile in the discipline of law. Law schools do not have adequate resources to fund programmes designed to make them more affordable and accessible.

3.1. 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.

3.2. ALSA submits that 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.

3.3. ALSA submits that it is inequitable to fund law at the lowest level under the RFM and place it within the highest band of differential HECS, particularly when it is the only discipline in band 3 which does not qualify a graduate to practice. ALSA submits that this inequity will have a detrimental impact on the future profile of the legal profession in Australia.

3.4. ALSA recommends that additional funds should be made available to support bridging and ongoing support programmes for law students from disadvantaged social groups.

4. Regulation of Higher Education in the Global Environment

Many overseas jurisdictions regulate their legal education sectors using benchmarks and minimum standards. National minimum standards in Australia would represent an appropriate recognition of the existence of the national and international legal services market. Any future standards regimes must recognise the constraints of the current funding environment for legal education.

4.1. ALSA submits that recommendations about any future national body to set benchmarks in relation to university-based legal education should bear in mind the diversity of career destinations of law students and the fundamental intellectual purpose of an undergraduate legal education.

4.2. ALSA submits that it is imperative that requisite professional admissions units are imparted to law students to a uniform national minimum standard. These standards should be flexible enough to safeguard the inherent freedom of institutions to design their own curriculum.

4.3. ALSA submits that the main inhibitor of quality assurance in the legal education sector at the moment is the lack of adequate funding for law schools.

4.4 ALSA recommends that the inadequacy of funding to law schools should be addressed on an urgent basis to ensure that any future accreditation regimes and quality assurance mechanisms do not place a further drain on the amount of law school resources flowing directly to students.

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 20,000. 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 to 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 those from a high socio-economic background.¹

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 fora where law students speak with a united voice.

This submission from ALSA does not attempt to canvas the full range of issues before the Senate Committee. Rather, it concentrates on the direct and indirect impact that current levels of funding of undergraduate law programmes in public universities has on students. As such, the submission touches primarily on items (a) (in section 2), (d) (in section 3) and (g) (in section 4) of the Committee's terms of reference.

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 a 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. The Adequacy of Current Funding Arrangements

Recommendations and Submissions:

2.1. 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 increased in order to maximise both qualitative and quantitative community benefits from law schools.

2.2 ALSA submits that the quality of legal education is being undermined by the placement of law in the lowest cluster of the Relative Funding Model and that the RFM must be consistent with the need to provide diverse and innovative teaching and the integration of practical skills into the undergraduate law curriculum.

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2.4 ALSA submits that the placement of law in the lowest cluster of the RFM has meant that law schools are unable to cope with increasing government, professional, university and student demands on them to teach skills and to provide adequate library and technology resources.

2.5 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.

2.1 Historical background to the funding of Australian law schools

Australian law schools have historically been underfunded, and this situation has worsened dramatically over the last ten years. Despite the recommendations of a prodigious number of reports authored by both government and non-government sources over four decades, it has proved incredibly difficult to alter deep-seated perceptions amongst policy makers that law is a cheap discipline which could just as well be taught “under a gum tree”.

As long ago as 1964 the Martin Report noted law’s inferior funding position as against other disciplines.² According to the 1987 Pearce Report on Australian law schools, law was the most poorly resourced of all university disciplines.³ The Pearce Report was a major review of the then 12 university-based law courses, commissioned by the Commonwealth government and released in 1987. Its recommendations rejected traditional “chalk and talk” teaching methods in law and urged the adoption of innovative

² Martin Report, *Tertiary Education in Australia: Report of the Committee on the Future of Tertiary Education in Australia*, Commonwealth of Australia, Canberra, 1964, para. 11(iv).

³ Pearce, D, Campbell, E and Harding, D, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission*, AGPS, Canberra, 1987 at p. 8.

teaching. This included the introduction of small-group teaching, reducing class sizes generally, greater non-teaching contact with lecturers, continuous assessment of student work, flexible assessment and the introduction of clinical education and practical training. Since then law schools have struggled to implement these recommendations due to the underfunding of law.

The implementation of the Relative Funding Model (RFM) for higher education by the Commonwealth in 1991 only exacerbated this situation. 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.⁴ Law has remained in the lowest cluster of the RFM since it was introduced. At the time of the RFM's introduction, the legal profession expressed its concern about the inadequate funding of law schools and the deleterious implications of this for the quality of legal education. In its 1992 submission to the Higher Education Council, the Law Council of Australia (the profession's peak body), stated that:

a good law degree can no longer be seen as a cheap commodity. Staff need to be attracted, libraries need to be developed, skills inculcated. This cannot be done at an adequate level if law schools continue to be funded on a cluster 1 basis.

The placing of law in cluster 1 is based on historical cost factors associated with outmoded, traditional styles of teaching which proceed from the assumption (which, if it was ever correct, is no longer tenable) that skills can be super added to theory after graduation. It does not recognise that modern teaching methods and needs in the law schools, and the demands of practitioners, require 'small group teaching' as well as more library and computer resources, simulation exercises involving interpersonal skills (negotiation, mediation) and clinical programs.⁵

Law schools' need for dramatically improved resources therefore coincided with economic factors which placed added pressures on law schools, especially those located in new, small and regional universities.

In 1994, what was then DEET released an impact study into the effects of the 1987 Pearce Report. It concluded that the Pearce Report had "failed to achieve a lasting improvement in recurrent resources: law remains significantly underfunded."⁶ This failure was said to be partially due to the negative effects of the RFM on resource allocation to law as a whole.⁷ In 1998, the West Report recommended periodic reviews of the level of public funding to take account of movements in cost of different degree courses.⁸ At that time and since, ALSA has wholeheartedly supported a periodic review

⁴ *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.

⁵ Submission by the Law Council of Australia to the Higher Education Council on the Quality of Higher Education, at p. 6; "Law Schools Need More Money" 27 *Australian Law News*, No 5 (June 1992) at p. 25.

⁶ McInnis, C, and Marginson, S, *Australian Law Schools After the 1987 Pearce Report*, Centre for the Study of Higher Education, AGPS, Canberra, 1994 at p. vii.

⁷ *Ibid*, p. 213.

⁸ *Learning for Life: Final Report*, Review of Higher Education Financing and Policy, DEETYA 1998: Recommendation 16.

of funding models in order to equate funding with the actual cost of providing quality higher education.⁹

Concerns over the last decade that the ability of Australian law schools to offer quality law degrees at an internationally competitive standard is constrained by inadequate funding levels have been comprehensively confirmed. These concerns are shared by ALSA, the Council of Australian Law Deans (CALD)¹⁰ and the Law Council of Australia. In recent years, emphasis has been placed upon surviving in the face of wave upon wave of funding reductions, over-enrolment of students by cash-strapped central administrations, and increased reliance on part-time and casual staff.¹¹ The undoubted casualty of these historical developments has been the quality of legal education.

2.2 Legal Education and the public interest

The pervasive idea that it is both possible and desirable to teach law “on the cheap” has meant that the case for law as a desirable university discipline, offering something more to students, to the university and to the community than just a high prestige course at a low cost, is rarely argued. ALSA believes that there is an inherent public value in legal education. Without adequate levels of public funding of law courses, however, this public value cannot be fully realised. There are three main reasons for this:

1. Legally educated people add value to the community. It has been suggested that a legal education develops the unique ability in individuals to engineer consensus around practicable social projects. Lawyers work at achieving consensus around workable policy outcomes in a variety of contexts including government, commerce and civil society. They also understand and reinforce the value of rules and procedures, enhancing respect for the rule of law. Their legal knowledge therefore plays both a protective and a facilitative role.¹²

Lawyers are unable to perform these functions as effectively as possible in all sectors of the community unless the profession *itself* is representative of all sectors of the community. The historical developments in funding of law schools noted above have promoted an elite student profile to the detriment of students from disadvantaged socio-economic groups including rural students, indigenous students, students from a non-English speaking background and female students. Law schools have frequently not had the funds to resource proper equity and access schemes which not only attract but retain and support students from disadvantaged groups throughout four to five years of law studies.

⁹ Australian Law Students’ Association, *Higher Education Funding Policy*, September 1998, at p. 13. Available at www.alsa.asn.au.

¹⁰ See, for example, Stewart, A, *Review of Higher Education Financing and Policy*, CALD Submission to Higher Education Review, April 1997, at p. 3.

¹¹ Brand, V, “Decline in the Reform of Law Teaching? The impact of policy reforms in tertiary education”, (1999) 10 *Legal Education Review* 109 at 122.

¹² Goldsmith, A, “Legal Education and the Public Interest”, (1998) 9 *Legal Education Review* 143.

A broad professional profile is imperative if all sectors of the community are to have access to quality legal advice, but the public value of a broad professional profile is unattainable unless public funding to law schools is increased.

2. Law schools add value to the community:
 - (a) Law libraries are often the only places where members of the community can access adequate information about their legal rights. Public libraries hold inadequate materials, and Supreme Court libraries restrict access, so that regional university libraries in particular are used extensively by members of the local community and the local and visiting profession (including judges and magistrates). Law libraries are very aware of the need to satisfy these demands as well as the immediate claims of teaching and research.¹³
 - (b) Increasing volumes of legislation mean there are more and more areas of legal regulation in which no expertise exists amongst the practising legal profession, or in which expertise is developing very slowly. In periods of rapid technological change such as the present, law schools are particularly necessary repositories of expertise.
 - (c) Commercial pressures in professional practice mean that law schools are one of the few remaining resources available to the community articulating a vision of proper ethical behaviour amongst lawyers, educating new lawyers to behave ethically, and monitoring ethical behaviour amongst lawyers through research.

Without adequate public funding, these activities cannot reach their full potential. The impact of funding cuts upon law libraries has been particularly harsh.¹⁴ Inadequate public funding of law schools also creates geographical discrepancy and discrimination. Without adequate public funding, smaller law schools and those located in regional areas are unable to compete with larger, longer established metropolitan universities and therefore less able to provide these vital community benefits at a regional level.

3. Increasingly, law schools provide legal services directly to the community. Cuts to legal aid funding mean that clinical programmes¹⁵ in law schools are increasingly filling the breach, and government grants have been provided for this purpose to some law schools. Clinical programs have the additional benefit of encouraging a pro bono ethos amongst law students, an ethos which, if effectively fostered, will have community benefits throughout a student's career in practice.¹⁶ Law schools are keen to offer and expand these programmes. However, only

¹³ See Committee of Australian Law Deans, *Australian Law School Libraries: A Position Statement and Standards*, Centre for Legal Education, Sydney, June 1995, p. 3.

¹⁴ See Appendix, "Funding Crisis in Australian Law Schools".

¹⁵ Such programmes include "real-client" clinics, involvement with community legal centres and legal externships.

¹⁶ 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.

sixteen law schools have implemented clinical programs, and the majority of these offer only a limited number of places each year. The primary reason for this is clearly inadequate resources.¹⁷

Law schools already offer the community significant public benefits. However, it is ALSA's submission that the public will only be able to derive significant community benefits for both disadvantaged potential students and disadvantaged communities (extending potential community benefits on an equal footing) if government funding to law schools is increased beyond its current levels.

Interestingly, the argument that increased government funding of higher education provides higher levels of community (social) than private benefit is supported by recent economic research into the quantifiable social benefits of higher education investment. While the only previous Australian study found that individuals were getting more from government investment in higher education than society, evidence which provided a rationale for cutting expenditure per student in higher education, the social rate of return to higher education now outstrips the private rate of return by 1.5%.¹⁸

Taking a "balance sheet approach", the average rate of return to government from their investment in higher education is about 11% as a result of increased tax receipts from the higher incomes of graduates due to their extra education.¹⁹ This is a very high rate of return. In addition, the value of extra tax earnings from higher graduate income has exceeded the cost of higher education to government in all of the last twenty years, and the net real benefit to the government has been steadily increasing. By 2010-11, increased revenue is likely to be nearly double the cost of higher education.²⁰ Law graduates contribute to these returns in the same measure as other graduates, and ALSA submits that funding to law schools should take into account both quantifiable and non-quantifiable community benefits derived from their existence.

2.3 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).

¹⁷ Australian Law Reform Commission, Report Number 89, *Managing Justice: A Review of the Federal Civil Justice System*, January 2000, at para. 2.19.

¹⁸ Borland, G, Dawkins, P, Johnson, D and Williams, R, *Returns to Investment in Higher Education, The Melbourne Economics of Higher Education Research Program Report No 1*, Report to the Vice Chancellor, the University of Melbourne, 2000, at p. 2: the social rate of return found was 16.5% compared to the private rate of return of 15%. In the previous 1982 study, the private rate of return was 21%, compared to the social rate of return of 16.3%. See also pp. 12-15 for discussion of methodology.

¹⁹ *Ibid*, at pp. 4 and 40.

²⁰ *Ibid*, Table 5.5: Estimated Real net benefit of higher education to government, at p. 39.

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.

2.3.1 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”²¹ 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,²² 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.²³ This is so *even if* law schools do not place a primary emphasis on the skills teaching which is increasingly demanded of them (see section 2.4 below), but merely seek to produce an adequately qualified law graduate.

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 identified²⁴ as inadequate for the purposes of teaching the elements noted above.

²¹ 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.

²² 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.

²³ 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.

²⁴ For analysis of the inadequacy of these methods, see the *Pearce Report*, McInnis, C, and Marginson, S,

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.²⁵

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 1.²⁶

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 2000,²⁷ 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.

2.3.2 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 1.3 [the level of funding for cluster 2 in the RFM]...and a significant number of them are funded at a lower multiple.”²⁸

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

Australian Law Schools After the 1987 Pearce Report, op. cit., and the *The Cost of Legal Education in Australia*, op. cit.

²⁵ 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.

²⁶ Council of Australian Law Deans, *The Funding of Law Schools*, Draft of 22 December 2000, at p. 30.

²⁷ Letter, Mr Jim Barron, op. cit.

²⁸ Council of Australian Law Deans, *The Funding of Law Schools*, op. cit., at p. 30.

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.²⁹

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 recent 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.”³⁰

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.

2.4 Current funding arrangements and increasing demands on law schools

The face of legal education is changing. Law schools are increasingly exhorted to teach their students real legal skills. The legal profession recognises the need for these skills.³¹ The Australian Law Reform Commission (ALRC) has called for greater attention to be paid to broad professional skills development in its recent *Managing Justice* Report.³² Teaching students skills enables them to transfer their learning experiences into new situations, and to become flexible, life long learners.³³

The vital nature of skills development for law students has been recognised by education authorities in the UK, the US and Canada.³⁴ In the US, the American Bar Association Standards for Approval of Law Schools go so far as to require approved law schools to offer instruction in practical skills.³⁵ The ALRC has urged that Australian law schools should learn from these examples.

²⁹ 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.

³⁰ Media Release, “University of Western Sydney not Under-Funded”, Minister for Education, Training and Youth Affairs, K60, 21st March 2001.

³¹ See 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.”

³² See ALRC 89, *Managing Justice*, op.cit., 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.”

³³ Anker, K, Dauvergne, C, Findlay, M and Millbank, J, “Evaluating a Change to Seminar Style Teaching”, (2000) 11 *Legal Education Review* 97 at 101.

³⁴ See discussion in ALRC 89, *Managing Justice*, op. cit., at paras 2.18-2.24, referring to the *MacCrate Report* in the US in 1992, the Lord Chancellor’s Advisory Committee on Legal Education and Conduct *First Report on Legal Education* in the UK in 1996, and the *Committee Responding to Recommendation 49 of the Systems of Civil Justice Task Force Report* in Canada in 1999.

³⁵ ABA Standards for Approval of Law Schools, Standard 302.

Teaching these skills requires investment in intensive tuition (and therefore low staff/student ratios) and the increased provision of technology. There can be no doubt that seminar-style presentation of legal material in small groups is a far more effective method for teaching than lectures with 300 students and one lecturer.³⁶ However, attempts to move to more effective teaching methods have been hampered by the Commonwealth and universities adhering to the RFM when allocating funds.

Due to these budgetary constraints law schools have been unable to hire extra teachers to take small group classes and teach the relevant practical components, nor afford the extra resources required to teach practical skills or offer clinical “real client” programmes. The practical effects of funding cuts on law schools are outlined in the Appendix to this submission.

Another area of increasing demand which cannot be met because of current funding arrangements is demand on law libraries. Law students do not need labs, chemicals or other expensive equipment. However, they do depend heavily on their law library and require access to the most up to date legal information and databases throughout their law degree. Legal text books, legal periodicals and legislation are among the most expensive publications purchased by university libraries. The level of funding provided by universities to law libraries is not sufficient to maintain a minimum standard for legal education.³⁷

The cost of maintaining a law library is increasing due to more and more rapid changes in common law and statute. Globalisation means that well trained law graduates need to be aware of the law of other jurisdictions as well as of Australia, however many law libraries, particularly in smaller universities with less well-established collections, simply cannot afford subscriptions to expensive foreign journals and monographs.

The inability of law schools to cope with increasing demands on them provides further evidence for the inadequacy of the current funding arrangements discussed above. In order for law schools to meet the increasing demands for skills teaching in particular, there must be funds provided to update present resources and to enable the acquisition of new technology.

2.5 Effects of current funding arrangements on law school autonomy and flexibility

The funding discrepancy which affects law is even more accentuated as a result of the introduction of differential HECS in 1996. Law is placed in the highest category of differential HECS while remaining in the lowest cluster of the RFM. By placing law in band 3 of the differential HECS model, DETYA figures reveal that law students are now paying 88% of their course costs, by far the highest proportion of costs payable by students in any discipline.³⁸

³⁶ See ALRC 89, *Managing Justice*, op. cit., at para. 2.79.

³⁷ See McInnis, C, and Marginson, S, *Australian Law Schools after the 1987 Pearce Report*, op. cit., at p. 503, and the *Pearce Report* more generally.

³⁸ Department of Education, Training and Youth Affairs, *Overview of Student Costs and Government*

Of the four courses in the highest HECS bracket, the LLB course is funded at the lowest level on the assumption that its costs of course delivery are the lowest. In terms of the RFM, law is placed in cluster 1 with a relative weight of 1.0 while the other courses in the highest HECS bracket: medicine, dentistry and veterinary science, are placed at the top of the scale in cluster 5 with a relative weight of 2.7. Students in medicine, dentistry and veterinary science contribute an average of 33% of their course costs. Students in all but three discipline groups apart from law “contribute between 33 and 55 per cent of the full cost of a place”.³⁹ No students in any other discipline are required to fund their own course in such a disproportionate manner.

When the internal distribution of funds to law schools is considered, this situation becomes even more unfair. ALSA’s own work, along with data supplied by a number of law schools to the Council of Australian Law Deans suggests that even in relatively well funded law schools, the amount allocated per undergraduate full time law student (EFTSU) in law is no more than approximately 88% of the HECS amount attributable to that EFTSU.⁴⁰ For medicine, this percentage is 168%. Law students alone of all students in other disciplines are asked to pay more than is spent by their universities to educate them.

ALSA submits that this is clearly inequitable given the current funding crisis in law schools. It has significant effects on law school autonomy and flexibility by engendering perceptions of students as consumers. There is anecdotal evidence that such perceptions encourage students to enroll in elective subjects with a commercial focus, to resist innovation in curriculum and to dictate subjects offered by their law school.⁴¹ Such behaviour is not surprising given that other law student attempts to claim an entitlement to adequate standards of legal education (such as through requests for increases in government funding) have been unsuccessful so far. The large levels of HECS debt incurred by law students may also lead to a desire to find commercial employment to service this debt, a situation which could have a significant impact on the future profile of the legal profession, as well as on the subjects offered by law schools.

2.6 Quality and diversity of teaching and research

Current funding arrangements for law schools are inhibiting the quality and diversity of teaching and research pursued. As discussed above, law in general and particularly the professional skills which are increasingly emphasised in law degrees are best taught in a small-group scenario. Many law schools are unable to offer this learning environment to their students on any regular basis because of budgetary limitations.

The quality of teaching and learning suffers especially when law schools try hard to pursue innovative teaching methods with insufficient resources, for example by

Funding in Post-Compulsory Education and Training, October 1999, Table 18 at p. 44.

³⁹ Ibid.

⁴⁰ Council of Australian Law Deans, *The Funding of Law Schools*, op. cit., at p. 29.

⁴¹ Brand, V, “Decline in the Reform of Law Teaching?”, op. cit., at pp. 123-124.

attempting to provide interactive seminars to “small groups” of sixty students. Such outcomes are disadvantageous to both students and teachers.

Problems of teaching quality are compounded by recent attempts by some universities to link internal faculty funding allocations to industry performance-based criteria such as teaching quality, progression rates and completion rates. By adopting such an approach, universities assume that all faculties have an equal ability to deliver high quality teaching services.⁴² ALSA fears that such approaches to the internal distribution of university funds will punish law schools for their inability to implement pedagogically sound teaching practices due to the severe funding constraints under which they operate. This is unjust.

⁴² See ALSA Press Release, “Market-Place Assumptions Compromise Quality Tertiary Education”, 30 March 2000, referring to changes in funding schemes at the University of Melbourne.

3. Equity of Access to Legal Education

Recommendations and Submissions:

3.1. 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.

3.2. ALSA submits that 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.

3.3. ALSA submits that it is inequitable to fund law at the lowest level under the RFM and place it within the highest band of differential HECS, particularly when it is the only discipline in band 3 which does not qualify a graduate to practice. ALSA submits that this inequity will have a detrimental impact on the future profile of the legal profession in Australia.

3.4. ALSA recommends that additional funds should be made available to support bridging and ongoing support programmes for law students from disadvantaged social groups.

3.1 Under-represented and disadvantaged groups in legal education

As noted above, a broad professional profile is imperative if all sectors of the community are to have access to quality legal advice. As Justice Michael Kirby has pointed out:

If the cast of the legal drama is confined to a relatively small group of self-selecting and repeatedly renewed candidates, the result will be that a professional group with a remarkable influence on the way in which our country is governed will not only be unelected, it will come from a rather unrepresentative section of the community...If this dominant and highly influential employment group – lawyers – were to remain a mere reflection of an elite section of society, that would not only be bad for the legal profession, it would not be very good for the laws devised, applied and elaborated by them for the rest of the community.⁴³

University law schools do not represent the socio-economic class or ethnic composition of society at large. Empirical research supports this conclusion, revealing that a large majority of law students have parents who have either completed or attended university or other post-secondary school qualifications.⁴⁴ A series of studies conducted at ten-year

⁴³ The Hon Justice Michael Kirby, "Foreward" in Barker, D and Maloney, A, *Access to Legal Education*, Centre for Legal Education, Sydney, 1996, at pp. iii-iv.

⁴⁴ Goldring, J and Vignaendra, 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.

intervals reveals that the high socio-economic status of law students has not changed much in twenty years. Over the same period, metropolitan and older law schools have in fact been absorbing a lesser proportion of students from lower socio-economic backgrounds than previously.⁴⁵

Despite strong expressions of the government's commitment to enable access to higher education by those from disadvantaged backgrounds,⁴⁶ government funding has not matched these statements. Law schools, which are already poorly-resourced, have neither the funds nor the capacity to employ specialist staff necessary to mount pre-law bridging courses essential for preparing disadvantaged students for tertiary studies.⁴⁷ In particular, they lack the ability to provide ongoing support for such disadvantaged students during the course of their degrees, a factor which inhibits completion rates, particularly for indigenous students.⁴⁸ ALSA believes that additional resources are required to provide ongoing support for disadvantaged students throughout their law studies.

3.2 Differential HECS

In 1996, the Higher Education Council suggested that differential HECS may have an effect on equity of access and profile of enrolments in entry-level professional education courses.⁴⁹ It pointed out that under the differential HECS system, students from poorer backgrounds are less likely to commit to debt and fewer will be able to take advantage of the discount for paying up front. It indicated that as a result, the profile of students enrolled in undergraduate level professional courses such as law, placed in the highest HECS band, are likely to change because of the differential charges.⁵⁰

DETYA accepts that students from low socio-economic status (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.⁵¹ While it is true that this under-representation of low SES groups in law does predate the introduction of HECS, ALSA believes that differential HECS has had serious consequences.

⁴⁵ Ibid, at p. 12.

⁴⁶ For example, commitment to equity was one of the six major elements of policy announced in the 1996 Higher Education Budget Statement.

⁴⁷ Weisbrot, D, "Access to Legal Education in Australia", in Dhanan, R, Kibble, N and Twining, B, (eds), *Access to Legal Education and the Legal Profession*, Butterworths, London, 1989, at p. 102. 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 – see "The Participation of Indigenous Australians in Legal Education 1991-2000", forthcoming.

⁴⁸ See Lavery, D, "The Participation of Indigenous Australians in Legal Education", (1994) 4 *Legal Education Review* 177, which found a 75% attrition rate was common amongst indigenous students.

⁴⁹ Higher Education Council, *Professional Education and Credentialism*, National Board of Employment, Education and Training, December 1996, at p. 58.

⁵⁰ Ibid.

⁵¹ 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.

ALSA agrees with DETYA's conclusion that the nature of aversion to incurring a HECS debt relates *specifically* to the nature of that debt in that it is necessarily tied to the purchase of educational services.⁵² Research that questions the debt aversion of low SES groups by testing their willingness to apply for new mortgages or personal loans should not be used to support arguments that low SES groups are willing to take on high levels of HECS debt. ALSA submits that the attitude of disadvantaged groups to legal education is shaped to a large extent by the level of HECS debt which law students must incur.

ALSA submits that the placement of law in band 3 of differential HECS has serious implications for the equality of opportunity to participate in legal education, which is now less affordable as well as less accessible to those from disadvantaged backgrounds because of inadequate funds for bridging and support programmes. Placing law in the highest HECS band emphasises the exclusivity and privilege associated with being a law student. ALSA supports HECS in principal, as a progressive tax upon future earnings, but believes that it is most unfortunate that differential HECS reinforces the distinctiveness of law students and is likely to strengthen the already-strong claims of corporate and commercial law practice over the vocational imagination and commitments of law students.⁵³ This effect is heightened when the impact of full up-front fees which must be paid for compulsory practical legal education (a prerequisite to admission as a lawyer) in most states and territories is taken into consideration.

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 Advisory Committee on Legal Education and Conduct 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".⁵⁴ A survey conducted by the UK Law Society found that "progress along the pathway of legal training does not simply depend upon academic performance. Financial pressures prevent some aspiring lawyers from pursuing their legal training".⁵⁵

The Lord Chancellor's Committee also found that "successive surveys have illustrated the pressures of indebtedness on students as they progress through their legal education and training."⁵⁶ It recommended that funds should 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.⁵⁷

⁵² Ibid, at p. 25.

⁵³ Goldsmith, A, "Legal Education and the Public Interest", (1998) 9 *Legal Education Review* 143 at 162.

⁵⁴ The Lord Chancellor's Advisory Committee on Legal Education and Conduct, *First Report on Legal Education and Training*, April 1996, at p. 41.

⁵⁵ "Entry into the Legal Profession: The Law Student Cohort Study Year 3", UK Law Society, 1995, quoted in *ibid*, at p. 43.

⁵⁶ Ibid, at p. 47.

⁵⁷ Ibid, at pp. 45 and 50.

ALSA submits that similar recommendations are appropriate and necessary in Australia in order to enhance equality of opportunity to participate in legal education. However, ALSA believes that without increased resources it will be very difficult for law schools to meet such objectives. Government action is required to remediate the detrimental effects of the placement of law in band 3 of differential HECS.

4. Regulation of Higher Education in the Global Environment

Recommendations and Submissions:

4.1. ALSA submits that recommendations about any future national body to set benchmarks in relation to university-based legal education should bear in mind the diversity of career destinations of law students and the fundamental intellectual purpose of an undergraduate legal education.

4.2. ALSA submits that it is imperative that requisite professional admissions units are imparted to law students to a uniform national minimum standard. These standards should be flexible enough to safeguard the inherent freedom of institutions to design their own curriculum.

4.3. ALSA submits that the main inhibitor of quality assurance in the legal education sector at the moment is the lack of adequate funding for law schools.

4.4 ALSA recommends that the inadequacy of funding to law schools should be addressed on an urgent basis to ensure that any future accreditation regimes and quality assurance mechanisms do not place a further drain on the amount of law school resources flowing directly to students.

4.1 Accreditation regimes and quality assurance

Legal education, along with the rest of the Australian higher education sector, increasingly functions in the global environment, and it is appropriate that its regulation should reflect this. International regulatory regimes rely increasingly upon statements of benchmark standards for quality assurance. In both the US⁵⁸ and the UK, statements of standards exist to guide law schools on minimum levels of performance required to pass a law degree at any institution.

In England, 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 competences identified in each area of performance. The standards include:

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

⁵⁸ 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.

There is a very extensive and ongoing debate in Australia as to the appropriateness of some sort of accreditation regime for law schools.⁵⁹ 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 noted its belief that the public interest would be served in the medium to long term by the establishment of a body which sets appropriately high national minimum standards for legal education.⁶⁰ For the purposes of quality assurance, ALSA supports this conclusion.

ALSA supports the wide ranging diversity amongst law schools in Australia. Throughout its cross-institutional research exercises, ALSA has become aware of the considerable diversity amongst undergraduate law courses throughout Australia. This not only pertains to the organisation of their courses, but also in the range of subjects which are offered within the institutions. Even where institutions offer similar subjects, the course content can vary considerably.

ALSA does not view this phenomenon as overly problematic. However, ALSA is concerned that there should not be wide-ranging disparity in course content in areas of expert knowledge which are required to obtain accreditation to practise.⁶¹ This is especially the case as the legal services market is increasingly attaining a national and international character. It is therefore imperative that requisite professional admissions 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.

ALSA submits that should the Senate References Committee wish to make recommendations about any future national body to set benchmarks in relation to university-based legal education, the diversity of career destinations of law students and the fundamental intellectual purpose of an undergraduate legal education should be borne in mind. This is in order that institutions will not be forced to provide a bachelor of laws course which is specifically and narrowly geared towards a career in private legal practice. Further, given the vested interests of law students in legal education, ALSA submits that it would be appropriate for any future national body to include student representation.

The Australian Law Reform Commission recommended that all university law schools should engage in an ongoing quality-assurance auditing process, which includes an independent review of academic programmes at least once every five years.⁶² This recommendation is important. However, ALSA submits that the main inhibitor of quality assurance in the legal education sector at the moment is the lack of adequate funding for law schools. This issue must be addressed on an urgent basis to ensure that any future

⁵⁹ For extensive coverage of this debate see ALRC 89, *Managing Justice*, op.cit., at paras 2.25-2.77.

⁶⁰ Ibid, para. 2.76.

⁶¹ This concern was alluded to in the ALRC's Discussion Paper 62, *Review of the Federal Civil Justice System*, August 1999, at para. 3.23.

⁶² ALRC 89, *Managing Justice*, op.cit., recommendation 3.

accreditation regimes and quality assurance mechanisms do not place a further drain on the amount of law school resources flowing directly to students.

APPENDIX

FUNDING CRISIS IN AUSTRALIAN LAW SCHOOLS

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.