Report on Special Meeting on Legal Education and Practical Training

A special meeting on legal education and practical training was held on Saturday 17 July 1993. Three members of the Bar were present: Kevin Lindgren QC, Jeremy Gormly and Phillip Greenwood.

The meeting was initiated by the Centre for Legal Education and attended by a range of invited representatives from the Court and admission boards, the Attorney-General, the Law Society and the Bar, law schools, practical training institutes and students. There were also participants and observers from the Department of Employment, Education & Training, professional bodies in other states, and the Law Council of Australia.

An Issues and Options Paper was prepared for participants. This article by Chris Roper, Director of the Centre for Legal Education, sets out the introduction to that paper. It outlines the fundamental issues faced by those considering the proposed changes to practical training in New South Wales.

The issues are of relevance to the Bar, particularly because the Legal Profession Reform Bill (No 2) which envisages common training prior to common admission.

The Challenge

We rapidly approach a new millennium which, it is generally agreed, confronts us with enormous challenges as a nation. We are in the midst of ongoing and rapid change which constantly requires us to readjust and refocus; even at the level of legal education. Perhaps a good recent example is the impact the mutual recognition legislation has had on legal education and training, and admission requirements. It has even forced us to reexamine the very concept of admission to practice.

We know that some of the nation's brightest young people pass through the legal education system. Many of them will go on to play very significant roles in our society, not only at the bar but also in areas such as politics, business and social service. There they will be required to provide the expertise, the skilfulness, the "cleverness", which will enable us as a nation to enter the new millennium with a proper standard of living, with social institutions that are appropriate and fundamentally just, and with an economic and intellectual competitiveness which will ensure our national security.

In addition, we have the challenge of overcoming the persistent criticism that the legal system, including the court system, is inaccessible to many members of the community. This translates itself into a widely-held expectation that the legal establishment must overcome the inequities which cost and delay bring. We need to be able to produce barristers who can do this.

At the same time, from another perspective, we need to compete in an increasingly difficult global market for goods and services, and so we need lawyers with extremely sophisticated skills and knowledge.

Is legal education up to these challenges? Are we structuring legal education and training in such a way as to enable us to meet these challenges? Do we have the resources and a system to meet these challenges?

But more than this, with so much hinging on the quality of the legal education and training, even more "challenges" are upon us which complicate the issue yet further.

Some of those further challenges are:

- the enormous pressure on the legal profession itself from government, and government initiated activities such as the Trade Practices Commission Inquiry and the Senate Inquiry into the Cost of Legal Services, the media, and other elements of society. These may well lead to a restructuring and even a reconceptualising of what being a profession is, and what forms the provision of legal services might take;
- the dramatic increase in law student numbers and thus presumably those seeking admission to both branches of the profession;
- the implications of the pressure, initiated by the mutual recognition regime, to move rapidly towards national standards (and maybe even national institutions) for legal education, practical training, admission and for the regulation of practice;
- the implications for practical training of barristers of the proposed changes to the structure of the legal profession in New South Wales, particularly so-called common admission.

In focussing on these three immediate challenges, we need to consider them in the context of the wider challenges outlined above.

Our underlying goal is to ensure that:

- the system of legal education and training; and
- the regulatory system for admission to and certification for practice,

are ones which meet the challenges and opportunities of the immediate and longer term future.

Every choice we make about the future involves a balancing of three dimensions. They relate to quality or standards, resources, and access and equity. A fourth dimension intersects with these; it is the implications on every choice of the mutual recognition regime.

The Four Dimensions

The Quality Dimension

The legal profession is entitled, indeed bound, to ensure that appropriate standards are maintained throughout all aspects of its life. This includes the maintenance of standards in regard to those who enter it. Standards are inherently discriminatory: that is exactly what they are meant to do - discriminate against what is not of a sufficient standard. It is very easy to portray

the profession's concern with standards as simply a "front" for restricting entry to the profession, either to a certain number or to certain types of people. Sometimes professional groups may in fact use the maintenance-of-standards issue to protect their members.

The nature of a profession is that it has special knowledge and skill which it offers to the community (for a fee). We would not use professionals if we could do it ourselves. So, as members of the community, we rely on the various professions to maintain their standards, otherwise the trust which underlies our use of them would be destroyed. The patient under the scalpel of the surgeon is delighted that it is hard to become a surgeon, and that only the best do so. The argument equally applies to the legal profession.

The most recent example of the profession reexamining the question of standards or quality is seen in the Law Society's recent proposals for practical training for would-be solicitors.[1] The Law Society Council, after an extensive review of practical legal training, came to the firm opinion, supported by many of its members, and by others, that the quality of the process of preparation for practice as a solicitor must be improved, and therefore changed. This has been expressed in various concerns about the practical training course at the College of Law, and in a belief that a person should not commence practice as a solicitor unless he/she has had *both* institutional-based practical training and on-the-job practical experience.

As admission to practice as a solicitor (a court-controlled process) and commencement of practice as a solicitor (a profession-controlled process) are interlinked in the existing system, the only apparent way to achieve this was seen to be to require both of these components prior to admission.

Whilst there has been no sustained argument against this on educational (or quality) grounds, there is strong opposition on access and equity grounds. Students, academics and some members of the profession consider this is unfair because it inevitably requires a graduate to find a job in order to enter the profession. (The profession is not in a position to provide that job for the person, unlike the medical profession where publicly funded teaching hospitals offer the venue for the practical experience.)

Arguments are put and accusations made that the effect, and some even say the purpose, of this is to limit the numbers entering the profession (and thus protect those already within it). This, it is said, effectively limits entry to the lucky and those from privileged backgrounds who are more likely to find jobs. Increasing numbers of law graduates, coupled with a stagnant economy, mean that those jobs are going to be very hard to get for many law graduates.

The unfairness of the proposal (real or imagined) means that politically it faces strong opposition.

There is another quality dimension, which relates to undergraduate legal education. It has recently been expressed as, "given the large number of law schools, there is legitimate concern about the variable quality of graduates emerging and the consequences this will have in the future for professional standards and consumer protection". This is taken up later in this paper.

The Numbers Dimension:
Effect on Resources and Expectations

The numbers graduating from law schools and the Barristers and Solicitors Admission Boards course are increasing significantly. This may not matter if the only effect were increased competition within the legal profession. There is no suggestion that lawyers are advancing an argument that numbers are a problem because of their impact on competition.

The majority of those graduates will want to be admitted as solicitors, even if some of them do not wish to practise. To be admitted they have to undertake practical legal training (PLT). PLT is very expensive. There is not enough money from current sources to provide PLT to all the existing graduates as they graduate, let alone the future greater numbers. PLT can be funded by government, the profession or by users. There is no likelihood of increasing funding from the former two sources. There is no way of providing PLT cheaper without reducing quality.

So the lack of funding for PLT is a real source of concern, as there is insufficient money to fund the necessary places to accommodate the numbers coming through the university and BSAB system.

Furthermore, if this happens, a large number of law graduates will be disappointed in their career expectations. We have an impending political problem when lots of law graduates find themselves unable to be admitted as solicitors because they cannot get PLT training and be admitted (as distinct from the question whether or not they then get employment). Their frustration will be turned against the universities, the profession and the government. This is not confined to law. Frustration is, of course, a predictable side effect of recession and changing society. There are many graduates in other disciplines whose hopes have not been realised.

The Access and Equity Dimension

There is a strong and widespread view that no insurmountable barrier should be placed in the path of a law graduate which would prevent him/her obtaining entrance to the legal profession, ie. admission by the Supreme Court. Anything which does do that is seen as inequitable.

In a recent article, Matthew Johnston, the Education Officer of the Australasian Law Students Association (ALSA), whilst acknowledging that many students now see law as a "valuable string in the bow" for other careers, says:

> "Whatever the desired field of employment for the future, there is still no doubt that many students studying law in Australia expect to be able to gain admission to the profession. ... [The] professional qualification ... is a marketable commodity which represents the culmination of their years of study. ... The real prize is admission."

He goes on to say, referring to the proposed Professional Program, outlined in the Blueprint:

"This practical experience requirement [ie. pre-admission] makes admission to become a solicitor job-contingent. The insidious part of its operation is that only those employers fulfilling the necessary criteria can offer this training, and thus the profession becomes self-selecting. It is in this context I would submit the proposed Blueprint is a restrictive practice - an effective, though arguably unintentional, method of controlling numbers and the scope of the profession. This problem is exacerbated by such factors as the present economic climate and burgeoning numbers of law students."

Later he says:
"[We must] distinguish between admission and employment. Both are barriers. Ultimately, both must be cleared in order to work in the legal profession. The latter we can do nothing about, the harsh economic reality of market forces continues to dictate the supply of jobs. However, admission is not, nor should it be, beyond our control. Admission is merely a procedural step. It is the culmination of our training. Its denial will prevent law graduates moving any further. It has become the necessary springboard to employment as a solicitor in New South Wales, but also increasingly in other states, overseas, and in other professions. If there are no jobs, too bad, at least give us a chance to compete."

The question is whether this expectation is proper. Has it grown up without any valid foundation? Whatever foundation it may have, should it be challenged? The question can be asked why a law graduate also needs a designation accorded by the Supreme Court. Other professional and business groups do not have a similar ceremony. Surely, it can be argued, the Courts, when admitting people, see this as a ceremony to mark a beginning within the legal profession, not to mark an ending of an educational process. Maybe this expectation, amongst students, employers (if it does exist) and others, needs to change.

Another element of this dimension is that any proposed action can be examined in the light of whether it will assist the already privileged and disadvantage those less privileged.

The Mutual Recognition Dimension

Mutual recognition is not a problem in itself. But it does mean that we cannot look at any solution simply from the perspectives of quality, numbers and access and equity and in state-centred isolation. Many of the options, related as they are to admission to practice, are about "registration" for a profession within the concepts of the mutual recognition legislation. The effect is that so long as requirements in the various states differ, the possibility of "forum shopping" exists and it is therefore possible for a NSW law graduate to bypass our local requirements and achieve the right to practise as a solicitor in NSW by obtaining "registration" in another state.

Furthermore, in response to the mutual recognition legislation, the profession is rapidly moving towards common standards for both undergraduate education and practical training. Any option therefore must also be examined in the light of how it fits in with, or lives alongside, the common standards.

Conclusion

The Legal Profession Reform Bill (which is likely to lead to common admission and thus common practical training), the rapidly increasing numbers of law graduates, the limited or reducing resources available for legal education and practical training, the effects of the mutual recognition legislation, and the changing and restricted opportunities for employment for people with legal qualifications all combine to produce a time fraught with dangers and yet filled with opportunities.

For the Bar, these issues are also important as in the new post-reform bill era the education and training of those seeking admission as barristers will be the same as that required of would-be solicitors. The Bar will therefore have a stake in the focus and content of pre-admission practical training.

The special meeting on legal education and practical training, initiated by the Centre for Legal Education, brought together representatives of all the major stakeholders in legal education. It is likely to lead to a more informed consideration of these issues, and a more cooperative climate for change. ❑

1. The Solicitors Admission Board has recently not accepted the Law Society recommendation that this new program be implemented. It is not clear at this stage what steps will now be taken, but the Law Society is engaged in discussions with the Bar.

Digging Deep

Mr Biscoe: I would respectfully concur in that approach, Mr Referee. You have affirmed the principle that somebody may be qualified by training or experience or both. Rather than plough our way laboriously through each one of these objections which, as you pointed out, are mainly based upon lack of qualifications —

The Referee: Strange that you should use the term "ploughed", Mr Biscoe, because the first reported use of an expert in the common law in England is reported in "One ploughed, one ate", in 1554, as Ploughman's Reports. Thank you, proceed. ❑

Multicon Engineering Pty Ltd v Federal Airports Corporation Day No 124 (Transcript)