Abstract

From 2005, the typical law student will be paying 84 per cent of the cost of their legal education in Australian public universities, a dramatic change from the free higher education of 30 years ago. This presentation will consider the ramifications for social justice of the contemporary imperative to commodify legal education. It will be argued that the market mindset is beginning to affect the character of what is taught and how it is taught. First, it is inducing law students to focus on the credentialism associated with their law degree rather than the substance of their legal education; secondly, it is encouraging law students to seek work in well paid corporate law practice in preference to public interest employment. The presentation will draw on research presently being undertaken as part of an ARC-funded project, ‘The Neo-liberal Legal Academy’.

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This 30-year stocktake of the legal profession is salutary, for exactly 30 years ago – in 1974 – the Whitlam Government introduced free higher education. Since the Higher Education Contribution Scheme (HECS) was introduced in 1988, more and more of the cost of legal education has been passed on to students so that they are now paying most of the cost of their legal education. Both Labor and Liberal Governments have played a role in effecting what has amounted to the privatisation of higher education.

The Dawkins Reforms brought about the end of the binary system, which resulted in former Colleges of Advanced Education becoming universities, as well as instituting HECS. All students were to pay $1,800 pa, to be recouped through the tax system when they reached a certain earning threshold. This fee, euphemistically termed a ‘contribution’, has crept up by stealth over the years. A differential scale according to disciplinary cluster has also emerged, with Law in the top band.

From 2005, the ‘user pays’ philosophy will become even more stark under the
reforms of Dr Nelson. HECS for law students has been set at $6,427, while the per capita Government contribution has been set at $1,509, the lowest on a 10-point scale. If you include the 25% HECS levy, favoured by most universities, law students would be paying $8,034. Whichever way one looks at it, law students in public universities will be paying at least 84 per cent of the cost of their legal education.

Other law students could be paying 100 per cent, 200 per cent, or even as much as 500 per cent, through full fee-paying schemes. While only a few universities have opted to go down the full-fee route for undergraduate domestic students, and those that do are presently limited to 25 per cent (35 per cent from 2005), there is no cap on what may be charged. It is a question of what the market will bear. Full fees are supported by the Coalition through the new loan scheme (FEE-HELP) which allows up to $50,000 to be borrowed and repaid through the tax system in the same way as FEE-HECS.

While Labor proposes to abolish full fees for domestic undergraduates, some universities are offering law courses to graduates of other disciplines and calling them either a Masters or a JD (Juris Doctor), the American nomenclature. This allows such courses to pass muster as postgraduate, despite the fact that the same basic areas of knowledge included in an LLB are necessary to secure accreditation for admission to legal practice (The ‘Priestley 11’ takes up at least two-thirds of most law curricula). Circumventing the restrictions on undergraduate enrolment enables full fees to be charged. As much as $76,000 is already being charged for an intensive 2-year JD at the University of Melbourne.

What all this clearly indicates is that higher education has become a commodity and students have become consumers, customers or even clients of a university. I suggest that the change from public to private good is dramatically skewing the nature of legal education. How could it be otherwise? Through the payment of substantial fees, students are purchasing a product. They are interested in the credentialism and ‘brand name’ associated with the degree rather than the process of education itself.

Commodification has followed from the ending of the binary system, the massification of higher education and the neoliberal turn in politics. It is somewhat paradoxical that while the aim of the state is to make Australia more competitive on the world stage, there has been a per capita reduction in government funding for higher education and the introduction of a ‘user pays’ philosophy. The privatisation of the public good of legal education is linked to the idea that the market is now the measure of all things and it is the role of government to support private rather than public goods.

The effect on students is to make them want to complete in minimum time and work in well paid corporate law rather than low paid public interest law. A huge cultural shift means that many of them are already in paid working, often full-time, partly to live and pay off mounting educational debts, but also to quick-start their careers, by occupying jobs such as paralegals in law firms. They no longer have time to attend classes, write reflective essays or think critically about what they are doing.

Within this new marketised culture, it is applied knowledge that is valued. Areas of law that are believed to facilitate market interests, such as corporations, business,
trade practices, competition, international trade, intellectual property and taxation law, taught from a technocratic and applied perspective, are currently favoured. Although we are told, somewhat apologetically, that there is no longer time or space for critical or even contextual knowledge, the technocratic and applied approach operates to induce a kind of intellectual myopia, or what Derber calls ‘ideological desensitisation’.

It is a somewhat sinister coincidence that the critical space has contracted at the very moment that big business has become more ruthless and ethically questionable. It would also seem that the voices of women, Aboriginal people and Others, which have only recently disturbed the benchmark masculinity associated with dominant social interests, and formerly occluded by legal positivist knowledge, are being silenced once more. The applied focus effectively sloughs off discomforting knowledge unless it promotes market interests.

The proliferation of nutshells and cribs supports the minimalist approach to illiberal legal knowledge. Reversion to ‘straight’ LLBs for school leavers, rather than combined degrees, an important development in the history of Australian legal education, illustrates the turning away from the idea of a liberal legal education that demands questioning and critique of what is taught. The narrowing of the law curriculum is underscored by changes in pedagogy and assessment.

A striking illustration of the way law schools are responding to the demands of their time-poor student/customers can be seen by the example of ‘block’ or ‘intensive’ teaching. This concentrated mode of delivery entails offering a subject over one or two weeks, usually in the summer or winter break, both to allow students to accelerate their programme and to attract full-fee students from other institutions. Visiting academics, including overseas ‘stars’, may be engaged to enhance the marketability of subjects. Although originally designed for coursework Masters students in full-time employment (as Johnstone & Vignaendra note), such modules may now be ‘double-badged’ to serve LLB students – in the name of efficiency. It is perhaps unsurprising that undergraduates complain that after having completed a block module of six to eight hours of classes per day for four or five days, their minds are in a whirl. They have little time to read anything for class, but say that they are nevertheless glad to be able to do these courses because it means they will be able to graduate and earn a high income sooner.

The ultimate in efficient delivery, euphemistically dubbed ‘flexible learning’, entails replacing lecturers with computers. While we may not have yet moved to accepting one on-line Torts lecturer for the entire common law world – preferably from a North American Ivy League university – such a possibility may not be far off. Furthermore, while ticking a box or pressing a computer button in response to a multiple choice question can provide ‘right’ answers, the technology tends to glide over the multifaceted and conflictual ethical problems posed by the market turn.

All law schools are doing similar things, for the market and competition policy induce sameness, or what Marginson & Considine refer to as ‘isomorphism’, in which the limited diversity in the system is played out against a background of engineered and self-selecting standardisation. The diversity that one might think would be logical, in light of the proliferation of law schools (eleven to 28 in 15 years, with more in the
wings) is contracting or has largely disappeared. As suggested, the market tends to privilege business-related subjects over human rights and social justice. The more critical and reflective subjects are contracting everywhere, while the optional subjects derivative of the Priestley 11, which have become quasi-compulsory in a market context, are flourishing. Students are opting for the market-oriented subjects, which they believe will assist them obtain the well paid jobs that their expensive legal education justifies. If the demand is not there, it is no longer deemed to be efficient for law schools to run social justice options. They wither and die, especially if a minimum enrolment (eg 50) is needed for a subject to run.

Large lectures which purvey orthodox knowledge that can be regurgitated in exams are deemed to be the most efficient manner of teaching and assessing students, despite the extensive educational literature critiquing the passive learning involving the ‘sage on the stage’ approach. Lecturing can be innovative, but massification inevitably favours a lowest common denominator approach because of the increasing number of less engaged and well prepared students. What is more, the expectations of student/consumers have changed. They want ‘right answers’ to be provided for them, which is inducing a reversion to positivism. They expect law schools to provide pre-packaged knowledge that can be easily digested and regurgitated in exams. Pedagogical practices now in vogue operate to legitimise the technocratic approach to the curriculum and the evisceration of a critical space that comports with the market message. Pressure to include more skills and absorb PLT also has the effect of displacing critique.

The emergence of a socio-legal and critical legal pedagogy in the 1970s coincided with the flowering of social liberalism and a concern for remedying social injustice. Although by no means universally accepted, there was a consensus that law should at least be taught in its social context. The teaching of an arid doctrinalism no longer sufficed as adequate training for lawyers in an era of social reform. There was a proliferation of subjects that necessarily challenged orthodox legal knowledge, such as those dealing with Poverty, Discrimination, Gender, Race, Sexuality, and so on.

Given the propensity of law to mirror social liberal trends, it is perhaps unsurprising that a depoliticised and positivistic legal pedagogy is once again viewed as desirable. With neoliberalism in the ascendancy, we are informed that the economy is ‘booming’, so it is best not to dwell upon the effect of ruthless corporate interests on individuals and communities, especially in the Third World. Perhaps, it is no coincidence that the critical, theoretical and social justice perspectives, which have destabilised orthodoxy, are contracting within law schools everywhere. Market-based knowledge, in its applied and facilitative sense, is depicted as voguish and desirable.

Undeniably, the fear of unemployment faced by young people today was unknown in the post-War boom years. Technological displacement and economic instability have produced a sense of permanent insecurity. Bauman refers to the way we now occupy ‘a political economy of uncertainty’. Universities play upon such fears through their advertising, which promises a secure future through credentialism in a professional programme. The promise of marketable qualifications is underpinned by a glib assurance of mastery of a field, even though it may be minimalist applied knowledge, available at high cost. It is the ‘use value’ of the knowledge that is all important – that is, the applied dimension; thinking critically or reflexively about that knowledge is
deemed to be a waste of time.

I have suggested that the market socialises students in a particular way—not for humane and ethical legal practice, but for a future in corporate law firms where they service the needs of corporate clients as good technocratic lawyers.

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**NB:** I have elaborated on the themes of this presentation elsewhere: