

*John M Williams**

FAILING LAW SCHOOLS

by **Brian Z Tamanaha**
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I INTRODUCTION

In early December 1997 Brian Tamanaha, an untenured Faculty member at St John's University Law School in Queens, New York, inadvertently stumbled into a spontaneous celebration with senior colleagues. Whiskey was poured. A toast was made. The Dean had just resigned.¹

The departure of the Dean prompted Tamanaha to write to the President of the University to caution against an immediate replacement. Rather, he argued that the reforms that the now-former Dean had been urging should not be delayed by the search for a replacement.

The following day the author was summoned to the President's office and, after some discussion, was installed within three months as the interim Dean. In addressing the Faculty — after the announcement of his appointment was met with stony silence — Tamanaha outlined his plan for the future. He commenced by declaring what he described as his 'nonnegotiable' points:

First, we all have to work. This is a full-time job. We have an obligation to work at least forty hours a week on matters directly related our responsibilities to the institution ...

The second nonnegotiable point is that we have to serve the students. They are the ones who pay our salaries. Our obligation is not just to teach them in the classroom, but also to answer their questions, to offer help when necessary, to serve as mentors, to write letters of recommendation, and more. To satisfy this obligation we must be here physically, in the building, and we must be welcoming to the students. Our doors must be open to them.

The final nonnegotiable point is that this is an academic institution, which by its nature requires that we are all teachers and scholars. We are in the business of conveying knowledge and teaching people to think ... That does not mean, however, that we cannot discuss different ways of living up to these requirements. We each have strengths in different areas.²

* Dean, Adelaide Law School, The University of Adelaide. The author wishes to thank Matthew Lee for bringing Professor Tamanaha's work to his attention.

¹ Brian Z Tamanaha, *Failing Law Schools* (University of Chicago Press, 2012) 1.

² Ibid 3–4.

These events were, as Tamanaha acknowledges, an extraordinary time in the life of St John's Law School. Confronting change was dramatic and not without pain.

Tamanaha's *Failing Law Schools* offers a searing account of the state of legal education in the United States. Not unlike his experience as interim Dean, Tamanaha provides a full-throated account of what he argues are the structural problems with American law schools. In the end he argues that unless changes are made (either from within, or from without) then there will be a growing cohort of graduates who will have no real likelihood of a financially secure career. They will be indebted and will rightly feel aggrieved by their legal education.

II THE PROBLEM

At its core the book explores

how law schools have arrived at this sorry state and the implications of this sad condition for the present and future. At the root of these problems is the way law schools today are chasing after prestige and revenue without attention to the consequences. The enviable resources law schools enjoy relative to their poor neighbors in economics and English departments are the riches obtained in the chase.³

The book outlines in four parts the factors that have lead to this 'crisis' in legal education. The Parts are headed: 'Temptations of Self-Regulation', 'About Law Professors', 'The *US News* Ranking Effect' and 'The Broken Economic Model'.⁴

In brief, Tamanaha argues that through a process of self-interest, misleading commentary, and a self-defeating economic model, the leading law schools have sown the seeds of a looming crisis. Tamanaha's major arguments are fourfold.

First, the United States law schools have, over time, reduced teaching load to improve research activities and to expand clinical legal education programmes. The need to attract leading scholars (and improve rankings) has meant an expansion in the size of law schools, and an increase in competition for academic talent. The lowering of teaching loads, and the increase in the ratio of tenured staff to students, has been reinforced by the requirements of the American Bar Association, and has been supported by the Association of American Law Schools.

Secondly, the rate of pay increases amongst law professors has been significant over the last three decades. 'Star professors' now command salaries in excess of US\$300 000. The consequence of the top-end salaries has been to pull up the average pay of all professors.⁵

³ Ibid x.

⁴ Ibid pts 1–4.

⁵ Ibid 48–51.

Thirdly, the need to fund the increase in salaries, coupled with the limits on the employment of adjunct or casual staff, has seen an increase in tuition fees. Citing the ‘prime mover’, the Yale Law School, Tamanaha states that the pace in the increase in fees has been ‘stunning’. For instance, in 1987, annual tuition fees were set at US\$12 450. By 1999, tuition fees had risen to US\$26 950, and by 2010, fees had risen to US\$50 750.⁶

Fourthly, the increase in fees may have been palatable for some students during the jump in remuneration during the early 2000s supported by the dotcom boom. Corporate law firms competing for graduates raised starting salaries on average from US\$70 000 to US\$130 000.⁷ This, in turn, increased the number of law school applicants, who took some misguided comfort in the potential salary, despite the increased student debt associated with a legal education.

Tamanaha argued that the equation of increased professorial salaries, increased research support, and increased students and tuition fees, may have been sustainable for as long as students could see the career benefit. Today, however, the arithmetic certainty of the proposition no longer appears to hold true. As Tamanaha states, ‘[t]he most problematic combination is a law school with high average indebtedness among graduates, a low percentage of lawyer jobs, and a low salary on graduation’.⁸ He concludes that students after first year need to make a serious calculation:

Students around the bottom of the class after the first year at a bottom-ranked law school will know that their chance of landing a job as a lawyer after graduation, unless they have connections, is not good. Students in any of these positions should reevaluate. Walking away with \$40 000 debt and no law degree beats leaving after two more years of lost earnings with \$120 000 debt and a job that does not pay the bills.⁹

For Tamanaha, the situation is now in crisis with the certainty of significant debt being coupled with the uncertainty of meaningful employment for students upon graduation.

III WHAT THEN IS TO BE DONE?

In the final chapter of the book, Tamanaha outlines some possible solutions to the situation that legal education finds itself in the United States. Some alternatives involve a structural shift in the way that the ‘market’ for legal jobs and remuneration is calibrated. Though not necessarily subscribing to the market solution, Tamanaha makes it clear that ‘law schools are producing streams of economic casualties,’ and cannot ignore the problem.¹⁰

⁶ Ibid 109.

⁷ Ibid 126–7.

⁸ Ibid 154.

⁹ Ibid 159.

¹⁰ Ibid 172.

Tamanaha puts forward a number of alternatives to deal with the situation. The first is a return to the past: a bifurcation of the system to allow ‘research-orientated law schools to co-exist alongside schools that focus on training good lawyers at a reasonable cost’.¹¹ Standing in the way of such a solution, Tamanaha argues, are the American Bar Association and the Association of American Law Schools, who have composed and enforced the rules regarding the length of the degree and the ratio of tenured staff to cheaper adjunct or casual teachers. If such a change were made, then students could ‘pick the legal education programs they wanted at a price they could afford’.¹²

Similarly, Tamanaha argues that there is a need to break the accreditation stranglehold of the American Bar Association by allowing students from non-accredited schools to sit the Bar exams in their respective states. A further change that is proposed is the reduction and capping of the loans that can be granted by the federal government so as to provide downward pressure on tuition fees.

However, in the end, Tamanaha is pessimistic about whether the ‘warped economic’ arrangements that all schools have created will be changed by the law schools themselves.¹³

Failing Law Schools is a well-written and powerfully argued case against the current model of legal education in the United States. Tamanaha has meticulously gathered together economic analysis and trends to provide a worrying account of the future of legal education in the United States. If his diagnosis proves to be correct, then many law schools and graduates face a grim future.

IV THE AUSTRALIAN EXPERIENCE

So what can an Australian reader take from this account? It would be easy to note the differences between the two systems and take comfort that Australian law schools are not suffering under the same pressures. Clearly there are differences — but little comfort can be had from that fact.

As the 2011 Lomax-Smith *Base Funding Review: Final Report* noted, the current model of funding for legal education in Australia is not adequate. The report states:

The panel was also concerned about the funding for law and humanities (CGS funding clusters 1 and 2), not because there was conclusive evidence in the costing study that costs exceed funding but because it formed the view that the costs for these disciplines reflect the impact of funding constraints that have been accommodated through compromising course delivery.¹⁴

¹¹ Ibid.

¹² Ibid.

¹³ Ibid 182.

¹⁴ Higher Education Base Funding Review Panel, ‘Higher Education Base Funding Review’ (Final Report, October 2011) 55 <www.deewr.gov.au/basefundingreview>.

The Panel further recommended that the Australian Government should ‘consider increasing the funding level for humanities and law’.¹⁵ The Australian Government has rejected the report’s recommendations.¹⁶

Undoubtedly, a legal education remains a popular alternative for students entering the Australian higher education system. Demand and enrolments appear to increase year-on-year. In response, universities have continued to open more law schools to meet the seemingly endless demand.¹⁷

Notwithstanding the great value that a legal qualification offers graduates working in both traditional legal positions and beyond, there remains a concern amongst the profession as to the number of graduates. Moreover, students are rightly voicing their anxiety about obtaining internships, clerkships, and ultimately employment. This is the situation at a time when the Australian economy is in rude health by international standards.

The Australian experience is one of underfunding, rather than law schools setting tuition fees for undergraduate degrees. That said, the undifferentiated demanded system has seen the growth of graduates with significant Higher Education Contribution Scheme (‘HECS’) debts. These graduates face a competitive jobs market like their American cousins.

The future of Australian legal education will remain a hotly debated issue. There is much to be learnt from other jurisdictions — especially if the lessons are delivered in such clear and cautionary tones as Tamanaha’s in *Failing Law Schools*.

¹⁵ Ibid recommendation 4, xix.

¹⁶ Julie Hare, ‘Response to Review Met with Derision’, *The Australian* (online), 30 January 2013 <<http://www.theaustralian.com.au/higher-education/response-to-review-met-with-derision/story-e6frgcjx-1226564553107>>.

¹⁷ Margaret Thornton, ‘The Market Comes to Law School’, *The Australian* (online), 13 September 2011 <<http://www.theaustralian.com.au/higher-education/opinion/the-market-comes-to-law-school/story-e6frgcko-1226134877209>> (observing that Australia has seen an increase from 12 to 32 law schools in just the last two decades). Since this article was written in late 2011, we have seen another three law schools open (at the Australian Catholic University, the Central Queensland University, and Curtin University), with another set to open next year (at the University of the Sunshine Coast), bringing the total to 36.

SUBMISSION OF MANUSCRIPTS

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