Australasian Law Teachers' Association Conference

Legal Education in Australia – A Never Ending Story

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Introduction

The objectives and content of legal education and how it should be undertaken have been much discussed in Australia and in other countries with which we share our legal heritage. A lot of that discussion in recent times has focussed upon the relative emphasis to be given to such elements as the contents of the positive law, its social and historical context, the dynamics of its change, the skills and ethical sensitivities needed for legal practice, and the role of the lawyer in society as agent of the rule of law and social justice. Related to that discussion are concerns about the effect of legal education upon law students. An incidental and important question is the extent to which the diversity of law jobs makes generalisations about the desirable outcomes of legal education more difficult.

Dicey wrote in 1883 that nothing 'can be taught to students of greater value, either intellectually or for the purposes of legal practice than the habit of looking on the law as a series of rules'.[1] Another view was expressed by Max Radin 50 years later, writing in the *California Law Review* that 'the lawyer's task is ultimately concerned with justice and … any legal teaching that ignores justice has missed most

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1 AV Dicey, *Can English Law be Taught at Universities?* (1883) cited by D Sugerman, 'Legal Theory, the Common Law Mind and the Making of the Textbook Tradition' in W Twining (ed) *Legal Theory and Common Law* (1986) 26 at 30.

of its point'.[2] Each of these statements should be read as a statement of a necessary condition of a legal education. If either were read as a sufficient condition, it would claim too much. The law is not just about rules, nor is it only about justice. Nor is it only about both – the ongoing debates in universities and the profession about what legal education should be seeking to achieve in transferable skills, ethical sensitivity and awareness of the role of lawyers in society generally, are testimony to that.

It is useful to say something immediately about rules and justice. The rules of law which establish government and its legislative, executive and judicial branches, and which define the extent and limits of their powers inter se and, with respect to the governed, are to be found in the Constitution and the common law which informs its interpretation. Under the Constitution are to be found the statutes made according to its processes by Parliament and the delegated legislation made by ministers or other officials or official bodies in the exercise of statutory authority. Those laws are to be interpreted according to common law rules of interpretation and those which the Parliament itself has enacted. Then there are the judge-made rules of law which we call the common law and which have emerged from a long process of decision-making in England and in Australia.

Any legal education must give to the student an understanding of the content of legal rules, their relationship to each other and the inescapably creative process of their interpretation and application. Each of these things interacts with the others. Courses in contract, tort and equity are incomplete without attention to the statutes that affect them such as the Australian Consumer Law, the Civil Liability Acts, the trustees and property law legislation and the many regulatory regimes which affect particular classes of commercial and other human activity. Any course that fails to introduce students to the principles and techniques of statutory interpretation fails to equip them with tools that are essential in legal practice and indeed in most other law jobs.

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[2] M Radin, 'The Education of a Lawyer' (1937) 25 *California Law Review* 676 at 688.

The nature of statutory interpretation repays extended reflection. Recently in *Lacey v Attorney-General (Qld)*,[3] six Justices of the High Court, in a joint judgment, described what is meant by determining legislative intention:

> The objective of statutory construction was defined in *Project Blue Sky Inc v Australian Broadcasting Authority* as giving to the words of a statutory provision the meaning which the legislature is taken to have intended them to have … The legislative intention there referred to is not an objective collective mental state. Such a state is a fiction which serves no useful purpose. Ascertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts.[4] (footnotes omitted)

Rules of law are not everything, but their identification and interpretation are fundamental. An awareness of the content and history of the common law, the range, pervasiveness and changeability of statute law, and the ways in which statute law is interpreted should be a core objective of any legal education.

As to justice – to say that the lawyer should be concerned with justice is to say something with which everybody will agree but according to their own conceptions of justice. There are common elements in many of those conceptions. They include the notions of equality before the law, redress for wrongs, protection of rights and freedoms, fairness and rationality and, more broadly, equality of opportunity. There are however differences of view on important questions. Despite the common elements, justice can mean different things to different people. The complexities of the question – 'what is justice?' – are illustrated by the simple example of the infamous dinner party inquiry – 'How can you lawyers represent somebody you know is guilty?' Any answer to that question requires explanation of competing principles at work in the administration of criminal justice: that the guilty

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[3] (2011) 85 ALJR 508.

[4] (2011) 85 ALJR 508 at [43].

should not go unpunished; that nobody should be found guilty on the basis of an official assertion of guilt expressed in the laying of a charge: that the lawyer is engaged to represent and not to judge. The explanations rarely satisfy the interrogator, particularly if the respondent lawyer is representing somebody obnoxious. Any legal education worthy of its name should prepare the law student to answer that inquiry – not just to deal with the tedious interrogatories at dinner parties, but also to enable him or her to have a better understanding of law in society.

The inquiry becomes more complex for the lawyer representing interests which are inimical to his or her own concepts of social justice. Then there are those laws which a lawyer may have to invoke or apply in the client's interest which he or she regards as entrenching disadvantage or inequality between different sections of the community. And what does justice have to do with the vast field of transactional lawyering – the formation or acquisition of enterprises, the buying and selling of property, the drafting of wills, leases and contracts of sale? Sometimes it is not possible to do more than to appeal to a concept of the rule of law as a framework within which rights and freedoms are to be enjoyed and justice, according to a variety of concepts, pursued.

A law graduate without a sense of the different conceptions of justice and its relationship to the rule of law goes into the world with a patch over one eye. A law graduate with a keen sense of justice, whose knowledge of the law and legal skills are inadequate, is a danger to the public.

Against that somewhat polemical background, let me turn to some of the polemics of the legal education debate.

The polemics of legal education

Differing points of view have continued to be expressed throughout the 20th century and into the 21st century about the proper objectives of legal education. Sometimes they have been framed at high levels of abstraction in terms of its malign effects upon the law student's psyche. The first female to teach at Harvard, Soya Mentschikoff, advised wives of first year law students in the 1960s that their

husband's personalities would become 'more aggressive, more hostile, more precise, more impatient'.[5] A paper published in the *Legal Education Review* in 2007 included a summary of comments about legal education in Australia in the following terms:

> … students are taught to view the law as 'something separate and apart from the rest of the goings on in society'. They are trained in the art of 'studied detachment', forced to 'leave their sense of compassion at the door' and have their 'curiosity and genuine intellectual interest' inhibited. They eventually emerge … with a 'deadened' sense of social consciousness, and in its place is one which is 'properly professional' and 'largely apolitical'.[6] (footnotes omitted)

The comments extracted in that passage are rather broad brush. They may point to a problem, but the problem requires definition. Nobody with experience of the profession would claim that they reflect a universal truth. However they are narrowed down, there are too many obvious exceptions to them. The involvement of Australian lawyers in pro bono activity is one of those exceptions.

Six years before the quoted passage was written, an array of leading lawyers, acting on behalf of asylum seekers whom they had never met or spoken to, came to the Federal Court in Melbourne to seek a writ of habeas corpus for the removal of the asylum seekers from the Norwegian ship, *The Tampa*, which had been interdicted by the Federal Government. They sought the landing of the asylum seekers on the Australian mainland. As a member of the majority on the Full Court of the Federal Court that found against them, I was nevertheless greatly impressed by the immense commitment that those legal teams demonstrated, coupled with the high quality of the advocacy which they presented to the Court. It was no mere sop to the losing side which led me to write in a postscript to the reasons for judgment:

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[5] M Mayer, *The Lawyers* (1966) at 76-77.

[6] T Walsh, 'Putting Justice Back into Legal Education' (2008) 17 (1 & 2) *Legal Education Review* 119 at 119-120.

> The counsel and solicitors acting in the interests of the rescuees in this case have evidently done so pro bono. They have acted according to the highest ideals of the law. They have sought to give voices to those who are perforce voiceless and, on their behalf, to hold the executive accountable for the lawfulness of its actions. In so doing, even if ultimately unsuccessful in the litigation they have served the rule of law and so the whole community.[7]

As a Federal Court Judge, I sat on many cases, including many involving asylum seekers, where representation was provided by a range of lawyers acting without charge. There were pro bono programs in relation to migration matters in every State.

Polemical generalities about legal education have come from more than one direction. There are those who have expressed fears of a dumbing down of legal education where broader objectives are pursued than a knowledge of the law and the techniques of legal reasoning. A leading example of polemics in this context is found in the words, written in 1983, of the learned and prolific judge and legal writer the late Roddy Meagher QC, formerly a Judge of the New South Wales Court of Appeal:

> There are, to be sure, multitudes of academic homunculi who scribble and prattle relentlessly about such non-subjects as criminology, bail, poverty, consumerism, computers and racism. These may be dismissed from calculation: they possess neither practical skills nor legal learning. They are failed sociologists.[8]

That polemic, typically entertaining as it is, can be put to one side. There is much serious work which has been undertaken and which continues about the objectives and modes of delivery of legal education in Australia today. In any event, the

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[7] *Ruddock v Vadarlis* (2001) 183 ALR 1 at 58.

[8] R Meagher, 'Now can you learn practice in theory' (Paper delivered at the 7th Commonwealth Law Conference, Hong Kong, 20 September 1983) at 175.

Empire claims to have struck back. Christine Parker and Andrew Goldsmith wrote in the *Journal of Law and Society* in 1998:

> [By] the late 1980s … the 'failed sociologists' of the law faculty helped create the climate for social movements of law graduates that have assisted in transforming the legal profession through a variety of specific contributions – community legal centres, clinical legal education, feminist legal scholarship, and new and innovative law faculties.[9]

The work that has been done and which continues has to be appreciated with a sense of the history of legal education in Australia and the history of legal education in England which has influenced it. Like most things to do with the law, it is an untidy and organic history.

Historical overview – legal education in England

The history of legal education in England has been described as a complex story capable of construction in a number of ways, but on almost any interpretation, one that makes depressing reading.[10] The legal profession, as we understand it, developed in England during the 13th century.[11] It appears to have resulted from the establishment in the 12th century of centralised Royal Courts. The exercise by those courts of jurisdiction with respect to suits concerning land led to the development of a common law of real property for all of England. Pleaders to assist litigants and attorneys to represent them emerged at the beginning of the 13th century.

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[9] C Parker and A Goldsmith, '"Failed Sociologists" in the Market Place: Law Schools in Australia' (1998) 25 (1) *Journal of Law and Society* 33 at 39.

[10] W Twining, 'Laws' in FML Thomson (ed) *The University of London and the World of Learning 1836-1986* (1990) at 81.

[11] JH Baker, *An Introduction to English Legal History* (4th ed, 2002) at 156.

A Royal initiative for a system of education for practitioners in the courts was reflected in an edict issued by Edward I in 1292 to the judges of the Common Bench to find and select 'apt and eager' students to learn the business of the courts.[12]

The students recruited pursuant to the decree of Edward I organised themselves in dwelling places and hired experienced litigators to teach them the law. They attended at court and discussed the cases heard there. Groups of practitioners, known as benchers because of their seat on the Bench during their students' moots, later became affiliated. They evolved into the four main Inns of Court: Grays, Lincoln, Middle Temple and Inner Temple.[13]

The education of a student admitted to one of the Inns of Court extended over seven years during which time the student would attend courts, participate in moots and attend lectures. Experienced students, known as 'readers', would give lectures and conduct special moots known as 'bolts'. The only formal requirement of the Inns was attendance at a specified number of meals. Admission was in the hands of the Benchers and the Readers.

Maitland described the instructors under the Inns' system as 'the most unlearned kind of most learned men'.[14] They were 'rigorous logicians, afraid of no conclusion that was implicit in their premises'.[15] Nevertheless, as he conceded, they were not altogether unmindful of the social changes that were going on around them.

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12 RM Stein 'The Path of Legal Education from Edward I to Langdel: A History of Insular Reaction' (1981) 57 *Chicago Kent Law Review* 429 at 430; E Jenks 'English Legal Education' (1935) 51 *Law Quarterly Review* 162 at 164; F Pollock and FW Maitland, *The History of English Law before the Time of Edward I* (2nd ed, 1968) at 215.

13 Baker, above n 11 at 160: Inns of Chancery also emerged ostensibly catering to those who were not admitted to the Inns of Court and younger students wishing to learn the rudiments of procedure. By 1500 there were nine Inns of Chancery.

14 FW Maitland, 'Growth of Statute and Common Law and Rise of the Court of Chancery 1307-1600' in FW Maitland and FC Monteque, (JF Colby ed) *A Sketch of Legal English History* (1915) 103 at 111

15 Ibid.

There were great judges of the 15th century who accommodated the old law to the new times. They developed the law of contract and loosened the bonds of family settlements by which land had been tied up.[16] But their innovations had to be introduced 'evasively and by means of circumventive fictions'. Antique garb was necessary to disguise novel principles.[17] Max Weber expressed a similar view of the 'occult science' practiced at the Inns.[18] The legal training offered at the Inns produced a 'formalistic treatment of the law bound by precedent and analogies drawn from precedent'.[19]

Despite this formalistic and precedent-bound legal training, the Inns of Court did bring some coherence to English law. By the Tudor period, it has been said that their stature had risen 'to that of a third university after Oxford and Cambridge'.[20] The Inns taught students English law. Legal education at Oxford and Cambridge was underpinned by civil law and Canon law.

As to the solicitors, by the 17th century they had become a separate branch of the profession growing alongside the Court of Chancery. Their training became increasingly mercantile as they obtained their legal education through contractual apprenticeships with more senior practitioners. This evolution was reflected in the *Attorneys and Solicitors Act 1728*, by which attorneys and solicitors were required to serve five years as clerks under articles, take the prescribed oath and have their names entered on a Roll.

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16 Ibid at 112.

17 Ibid.

18 M Weber, 'The Legal Honoratiores and the Types of Legal Thought' in M Rheinstein (ed) *Max Weber on Law in Economy and Society* (1954) 199 at 201.

19 Ibid.

20 Stein, above n 12 at 432, Baker, above n 11 at 161.

By the middle of the 18th century, the importance of the Inns of Court as providers of legal education had begun to decline. Readings and moots were fewer and students were largely left to their own devices.[21]

In 1753, William Blackstone inaugurated the study of English municipal common law at Oxford University. He was appointed Inaugural Vinerian Professor of English Law in 1758. His lectures, delivered between 1753 and 1765, formed the basis for his Commentaries on the Laws of England. Cambridge also began to provide such lectures from 1800.[22]

The University of London established the First Chair of English Law occupied by barrister Andrew Amos in 1828. Amos provided English classes for Bar students and articled clerks which combined practical observation with academic discussion. In 1839, that University awarded the first academic degrees in the common law. Oxford and Cambridge introduced combined BA courses in jurisprudence in 1849 and 1850 and in 1858 Cambridge established a separate law tripos.

By the middle of the 19th century, the Inns of Court had established the Council of Legal Education to take over their educational functions.[23] Lectures were voluntary and examinations were not compulsory until 1872. From 1877, intending solicitors were required to study and pass an examination controlled by the Incorporated Law Society. The Society established a School of Law in 1903, which later became the Independent College of Law. By 1922, a compulsory academic year was required for admission.

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[21] Stein, above n 12 at 434.

[22] Baker, above n 11 at 171.

[23] J Disney et al, *Lawyers* (2nd ed, 1986) at 22.

Many of the leading English lawyers between 1850 and 1950 had read subjects other than law or were not university graduates. The serious involvement of English universities in legal education developed with the appointment at Oxford and Cambridge of men such as Maitland, Dicey and Pollock.

Professor David Derham, formerly Dean of Monash University Law School and later Vice Chancellor of Melbourne University, reflecting upon the history of legal education in England, took, like other commentators, a rather jaundiced view of this history:

> In the history of the common law of England there was a time when the profession looked to the education of its recruits with care. The thirteenth century began a long tradition of professionally organised legal education. The education provided was, to some extent, a response to the earlier introduction of studies in the civil law by the universities. The legal education provided in the Inns of Court in London, which remained strong through four centuries until its decline in the seventeenth century, served to develop the indigenous common law and to preserve it against the Latin and continental influences of laws which stemmed from the Roman System. From the seventeenth century onwards, however, the requirements of the Inns became little more than the satisfaction of forms. The universities offered no teaching and no facilities for would-be common lawyers.[24]

Detailed consideration was given to the role of university law teaching in legal education in England by the Ormrod Committee on Legal Education, which reported in 1971. The Committee favoured a substantial proportion of legal training being provided at a university or equivalent. It recognised the need for the lawyer to be equipped with a broad education that could confer adaptability to new and difficult situations. It also pointed to the need for:

- an adequate knowledge of the more important branches of the law and their principles;

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[24] D Derham, 'Legal Education in Australia' in P Ayres (ed), *David Derham: Talks on Universities, History and the Law* (2009) 51 at 51-52.

- the ability to handle facts, both analytically and synthetically, and to apply the law to situations of fact;
- the capacity to work not only with clients, but also with experts in different disciplines;
- the professional skills and techniques which are essential to practice and a grasp of the ethos of the profession;
- a critical approach to existing law and an appreciation of its social consequences; and
- an interest in, and positive attitude to, appropriate development and change.[25]

The Ormrod Committee visualised legal training as taking place in three stages: academic, professional and continuing education. It recommended that the academic stage occur at university and precede admission to practice and involve the teaching of constitutional law, contract law, torts, land law and criminal law. Its objectives were to instil a basic knowledge of the law, the intellectual training necessary to apply abstract concepts to the facts of particular cases, and an understanding 'of the relationship of the law to the social and economic environment in which it operates'.[26] The objectives of the professional stage were to enable students to adapt their legal knowledge and intellectual skills to the problems of practice.

It is interesting to compare the Ormrod Committee's requirements with the Threshold Learning Outcomes developed for law schools in Australia for the Bachelor of Law programs by Professors Sally Kift and Mark Israel. There is, at least at the conceptual level, some overlap. They are organised under the following headings:

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[25] Committee on Legal Education, *Report of the Committee on Legal Education* (1971) at [100].

[26] Ibid at [185(5)(ii)].

- Knowledge
- Ethics and professional responsibility
- Thinking skills
- Research skills
- Communication and collaboration; and
- Self-management.

Current requirements for recognition as a lawyer in England, Wales and Northern Ireland depend on whether the applicant for recognition intends to practice as a solicitor or barrister or enter a non-practising field of law. All persons seeking admission as lawyers must possess a qualifying law degree which will provide the foundation for further steps required for practice as a solicitor or barrister. Qualifying law degrees in the United Kingdom must cover Public Law, European Union Law, Criminal Law, the Law of Obligations, Property Law and Trusts and Equity. The Law Society and the Bar Council also require that students acquire knowledge and general transferable skills. These were defined in broad categories in a joint statement issued by the Society and the Council in 1999.

Law graduates follow divergent paths to qualify as solicitors or barristers. Prospective solicitors must enrol with the Law Society of England and Wales as a student member and take a one year legal practice course. This is usually followed by a two year apprenticeship, known as a Training Contract.

Prospective barristers must apply to join one of the four Inns of Court and then complete a one year Bar Professional Training Course, which involves study of a number of areas of practical skills, together with civil litigation and remedies, criminal litigation and sentencing, evidence, professional ethics and two optional subjects. The Bar Professional Training Course is followed by a year's pupillage in a set of barristers' chambers.

Against that background consideration can be given to the development of legal education in Australia.

Legal education in Australia – institutional history

New South Wales and the other colonies, as they emerged in the 18th and 19th centuries, broadly adopted the English system of legal education with rules for admission to practice and the examination of candidates. Nickolas James, in an article in the *Melbourne University Law Review* in 2000, described it thus:

> Until the latter half of the 19th century aspiring lawyers in Australia were trained by more experienced practitioners in accordance with the apprenticeship model imported from England. Colonial legal education was limited to on-the-job training, with the consequence that legal knowledge was relatively narrow, and primarily practical, theoretical development of the discipline was minimal.[27]

As in England, the history of legal education in Australia needs to be considered against the background of the history of the legal profession.

From about 1815, following the establishment of the Supreme Court of New South Wales, qualified practitioners began to be admitted to that Court as solicitors in accordance with the practice established under the *Attorneys and Solicitors Act 1728* (UK). Applicants were required to have been admitted as solicitors in England, Scotland or Ireland and to have qualified by serving a clerkship of five years with a New South Wales practitioner.

After the enactment of the *New South Wales Act 1823*, the *Third Charter of Justice for New South Wales* authorised the establishment of the present Supreme Court of New South Wales and stipulated its practical and procedural arrangements.

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[27] N James, 'A Brief History of Critique in Australian Legal Education' (2000) 24 *Melbourne University Law Review* 965 at 966.

It empowered the Court to admit persons to act as barristers as well as proctors, attorneys and solicitors.[28]

The *Barristers Admission Act 1848* (NSW) provided for the education of local aspiring barristers and for examinations in Greek, Latin, mathematics and law. A Barristers Admission Board was established, comprising the three judges of the Supreme Court, the Attorney-General and two barristers of the Supreme Court. No candidate could be admitted unless the Board was satisfied that he was of good fame and character. The history of the profession and of legal education in New South Wales also applied, up to the middle of the 19th century, to Victoria and Queensland, for they were a part of New South Wales until 1851 and 1859, respectively.

The history of the legal profession in each of the Australian colonies from their establishments differed in the details of institutional arrangements and evolution. New South Wales and Queensland divided the profession between barristers and solicitors in a formal way. In the other States and Territories the profession remain formally fused – practitioners are admitted as both barristers and solicitors, although there are separate voluntary Bars. In Victoria, a person admitted as a barrister or solicitor of the Supreme Court of Victoria must elect whether to be inscribed on the Roll of Counsel or the Roll of Solicitors.

Reciprocal admission between jurisdictions in Australia has been in place for many years. Mutual recognition arrangements have allowed admission in one State or Territory to support admission in another. The profession is now increasingly national in its character – even without the universal application of the proposed National Scheme.

The University of Sydney, which is Australia's oldest University, was established by the *University of Sydney Act 1850* (NSW). Initially there was no law

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[28] *Third Charter of Justice for New South Wales*, Letters Patent, 13 October 1823, cl 10.

faculty. The first Principal of the University, John Woolley, once said that 'the soundest lawyers come forth from schools in which law is never taught'.[29] This, however, was not a view which won general assent. That is just as well, as if it had there would have been no occasion for this conference. The Faculty of Law came into existence in 1855, but did not commence operation as a teaching institution until 1890. Lectures in jurisprudence were given by a barrister from 1859 to 1869. In 1887, three barristers were appointed to give evening lectures. The first Professor of Law and Dean of the Faculty was Pitt Cobbett. Students were required to complete two years in arts and one year in the Law School to be followed by an intermediate examination in jurisprudence, Roman law, constitutional law and international law. A final examination in the professional subjects followed a further two years. However, a student who had graduated in arts before entering the LLB course was permitted to complete that course in two years.[30] From 1890 onwards graduates in law from the University of Sydney were entitled to admission to the Bar without further examination.

Melbourne University's Law School was established in 1857. A four year LLB course was set up in 1860 which was, in effect, an equivalent to the five year combined arts/law degree that up until recently was offered at that University.

The University of Adelaide established its Law School in 1883. For the first 67 years of its existence it was maintained as a cooperative enterprise between one fulltime teacher and practitioners. By the 1980s this had changed dramatically. The Law School had evolved to 30 fulltime staff with 750 students. The University of Tasmania was founded in 1889 and in 1892 its Council approved the establishment of a position of lecturer in law. The University of Western Australia established its

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[29] J Martin, 'From Apprenticeship to Law School: A Social History of Legal Education in Nineteenth Century New South Wales' (1986) 9(2) *University of New South Wales Law Journal* 111 at 122.

[30] Sir John Peden, 'The Law School' in Sir Thomas Bavin (ed) *The Jubilee Book of the Law School of the University of Sydney 1890-1940* (1940) 5 at 5.

Law School in 1927. Its foundation Dean and Professor was FR Beasley. It commenced teaching in 1928 with 48 students.

The Faculty of Law at the University of Queensland was established in 1936, although law had been taught in Queensland from 1926 following the establishment of the Garrick Chair in Law in 1923. Law subjects were taught as part of a Bachelor of Arts degree and students were able to qualify initially for the BA and the intermediate Bar examination.

Of the period of university legal education up until the 1960s, Chesterman and Weisbrot wrote:

> The law faculties, although situated in universities, were generally viewed as adjuncts to the legal profession rather than truly academic institutions dedicated to liberal educational aims. They had few full-time academic members: instead, law teaching was chiefly a part-time activity for practitioners. They suffered from limited recurrent funding, low staff ceilings, small libraries, scant research funds and assistance, and poor infrastructural facilities. Little legal research was done and the general approach in the courses taught was fairly uniform.[31]

The Australian National University ('ANU') took its first enrolment of law students in 1961, following the amalgamation of the Canberra University College with ANU in 1960. Dr John Fleming was its first Dean. Monash University followed ANU in 1964 and by the 1980s was one of Australia's largest Law Schools with over 1,600 students and a fulltime academic staff of over 60. A second Law School was established in New South Wales at the University of New South Wales in 1971 with Professor Hal Wootten as its Foundation Dean. It celebrates its 40th anniversary later this year.

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[31] M Chesterman and D Weisbrot, 'Legal Scholarship in Australia' (1987) 50 *Modern Law Review* 709 at 711.

In the last 20 years or so there has been, relatively speaking, an explosion of law schools around Australia and there are currently 32 of them. Universities are meeting a significant level of demand for legal education from wider geographical, academic and socio-economic catchment areas than in previous times. The number of law graduates they are turning out and the ongoing demand for places are indicative of the diversity of occupations for which a law degree is thought to be appropriate.

Shaping legal education in Australia

Legal education in Australia up until 1970 was very much subject to the influence, if not the control, of the legal profession. Parker and Goldsmith, writing in 1998, referred to the profession's 'monopoly, between 1900 and 1970, on the definition of legal knowledge and expertise as well as on the supply of legal practitioners'.[32] The 1964 Martin Report on the Future of Tertiary Education in Australia considered that an over self-regulated profession was not producing 'the "volume and form" of lawyers necessary for national economic growth'.[33] It recommended that Australia 'culturally re-engineer the profession through a publicly-funded expansion of places and of subjects studied in the law schools'.[34]

In 1976, a national conference on legal education endorsed a recommendation from the Chancellor of Flinders University, Justice Bright, that an Australian Legal Education Council be established. The Council, with Justice Gordon Samuels as chairman, set out, like the Ormrod Committee in the United Kingdom, to identify a set of compulsory core subjects which should be taught in all Australian law schools. This led to the publication of the Report on Core Subjects in 1981 and the subsequent recommendation to the Law Council of Australia of

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[32] Parker and Goldsmith, above n 9 at 34.

[33] Ibid at 34 citing *Report on the Future of Tertiary Education in Australia to the Australian Universities Commission* (1964).

[34] Ibid.

defined core subjects that Australian applicants for admission ought to have studied. A similar inquiry in New South Wales, 'Legal Education in New South Wales', led to the 'Bowen Report'. It also adopted the approach of the Ormrod Committee and recommended a tripartite educational structure consisting of three essential components: theoretical knowledge, skills and practical knowledge and 'professionalisation'.

In 1978, the Victorian Council of Legal Education established an Academic Course Appraisal Committee chaired by Justice McGarvie. It proposed amendments to the Victorian Admission Rules to accredit subjects in a law course that provided students with a basic competence in most areas comprising the 'core' of university legal education as well as subjects dealing with statutory interpretation, case analysis, legal research, legal writing and concepts of proper law and amenability to jurisdiction. Law schools had reservations about the Report and there was a further report published in 1982 under Justice McGarvie which recommended that for admission purposes Australian law schools should include the following 12 subjects in their law degrees: legal process, criminal law and procedure, torts, contracts, property, trusts, administrative law, Federal and State constitutional law, civil procedure, evidence, professional conduct and accounting. The last four courses listed could be taken either at law school or by way of a professional practice course.

In 1985, the Commonwealth Tertiary Education Committee ('CTEC') appointed Professors Dennis Pearce, Enid Campbell and Don Harding to assess and report on the practices and performance of Australian law schools. What became known as the 'Pearce Report' was presented to CTEC in 1987. The Pearce Report noted a number of features of legal education which had emerged in the period since 1960:

- Five year combined degree courses and three year graduate LLB courses.
- A substantial number of elective subjects.
- The use of smaller student groups with case books and materials and continuous assessment.

- Attempts to develop legal skills, eg, through clinical legal education.
- Postgraduate study by course work.
- The effort in teaching and research to focus on specific subjects and, where relevant, non-legal materials.

The Pearce Report observed that law schools had evolved from origins involving a very poor resource base and a heavy reliance on the profession, which exercised strong influence over the courses. Those origins still influenced the pattern of legal education. Law schools as a whole remained the most poorly resourced of all disciplines. The low level of funding and fulltime staffing meant that the ability of Australian law schools to undertake substantive research and scholarship was very limited. The Pearce Report recommended, inter alia:

- that law schools examine the adequacy of their attention to theoretical and critical perspectives;
- that law schools should not permit entrants coming directly from secondary school to undertake a straight LLB program;
- a standing curriculum committee should be part of the management structure of all law schools;
- class sizes should be monitored and each law school should adopt a policy ensuring teaching resources are directed to areas of most need;
- law schools with Masters programs should review them to ensure that the subjects are fit for purpose;
- law schools should consider whether provision can be made for the grant of release time to staff with a demonstrated commitment to research; and
- law schools should more clearly enunciate what is expected of academic staff and adopt procedures for an equitable distribution of work.

The effect of the Pearce Report was reviewed in 1992 by Craig Mcinnes and Simon Marginson of the Centre for the Study of Higher Education. They found that

the impact of the Pearce Report was considerable. Some of its proposals had directly contributed to improvements. There was a discernible and mostly strong response in those schools where the Committee had identified major weaknesses. Its emphasis on library standards had influenced law library development and it had generated critical reflection on the nature and content of law courses and a commitment to skills development and quality teaching.

Areas in which the outcomes of the Pearce Report were assessed as less successful were in its opposition to new law schools and proposed limitations to Masters Degree courses, and its proposals for improvement in recurrent resources. Legal education remained significantly under-funded. Importantly, however, the Pearce Report generated a climate of debate, discussion, critical thinking, self-evaluation and continuous improvement which had served law schools well since 1987, especially since such an approach had become mandatory throughout higher education.[35] That process of debate, discussion and review continued.

In the early 1990s, problems generated by differing admission rules in the States and Territories led to the establishment of a Consultative Committee of State and Territory Law Admitting Authorities, chaired by Justice LJ Priestley. That Committee released a Discussion Paper on Uniform Admission Requirements in 1992. It did not seek to dictate curriculum requirements or compulsory subjects to universities. Rather, it favoured the specification of broad areas of knowledge in which applicants for admission would need to demonstrate basic knowledge and competence. There were 11 such areas, which have become known as the Priestley Eleven. They comprise:

- Criminal Law and Procedure
- Torts

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[35] G Mcinnes and S Marginson assisted by Alison Morris, 'Australian Law Schools after the 1987 Pearce Report' (1994) at vii-viii.

- Contract
- Property (including Torrens System Land)
- Equity (including Trusts)
- Administrative Law
- Federal and State Constitutional Law
- Civil Procedure
- Evidence
- Company Law
- Professional Conduct (including basic Trust Accounting).

Admitting authorities in Australia subsequently adopted the Priestley Eleven as the basis of the academic component of the legal education required for admission.

In 1998, the Law Admissions Consultative Committee ('LACC'), which reports to the Australian and New Zealand Council of Chief Justices, asked law schools, admitting authorities, the Law Council of Australia and its constituent bodies, for their views on whether the Priestley Eleven required review. Their response was unanimously negative. A minor modification was made in 2008 to remove the requirement that Trust Accounting be studied as part of an academic (as opposed to practical) course and the present description for Ethics and Professional Responsibility was inserted. Despite 'criticism that the present Academic Requirements stultify law curricula by discouraging innovation, limiting student choice and leaving little teaching time available for developing lawyering skills and professional values'[36] the Priestley Eleven remain the core academic requirements of each admitting authority for admission.

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[36] Law Admission Consultative Committee, *Rethinking Academic Requirements for Admission* (26 February 2010) at 20.

The approach reflected in the Priestley Eleven has been compared unfavourably with the approach taken by the MacCrate Report, commissioned by the American Bar Association in 1992. That Report focussed on fundamental lawyering skills – problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counselling clients, negotiation, understanding litigation and alternative dispute resolution processes, organisation and management of legal work and recognising and resolving ethical dilemmas. The Australian Law Reform Commission ('ALRC') in its Discussion Paper Number 92, characterised the MacCrate approach as oriented around what lawyers need to do, while the Australian position was said to be anchored around outmoded notions of what lawyers need to know. Nevertheless, in 2007, a Carnegie Foundation Report referred to a 'severely unbalanced' law school experience in the United States. There was said to be a relentless focus on the procedural and formal qualities of legal thinking, sometimes to the deliberate exclusion of the moral and social dimensions.

In 2009, the Council of Australian Law Deans ('CALD') adopted a set of Standards of Australian Law Schools ('CALD Standards'), noting that the mission of the law schools encompassed 'teaching, research and community engagement'[37] and a 'commitment to the rule of law, and the promotion of the highest standards of ethical conduct, professional responsibility and community service.' [38]

The CALD Standards require knowledge and understanding of fundamental doctrines, concepts and values of Australian law, fundamental areas of substantive law, the sources of law, how it is made and developed and the institutions within which law is administered and the theory, philosophy and role of law. They require knowledge and understanding of the broader context in which legal issues arise,

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[37] Council of Australian Law Deans, *The CALD Standards for Australian Law Schools* (2009) at 2 [1.3.2].

[38] Ibid at 2 [1.3.3].

international and comparative perspectives on Australian law and international legal development, and the principles of ethical conduct and the role and responsibilities of lawyers, including pro bono obligations. The CALD Standards refer to skills, including the intellectual and practical skills needed to research and analyse the law from primary sources and to apply the findings of such work to the solution of legal problems. The ability to communicate such findings, in oral and in written form, is included. Awareness and sensitivity to the values underpinning the principles of ethical conduct, professional responsibility and community service are specifically mentioned.[39]

The CALD Standards do not prescribe the core subjects that a student undertaking a law degree must complete, but a course is not considered a 'law course' according to those Standards unless the degree is recognised by the admitting authority in the relevant jurisdiction as meeting the academic requirements for the purposes of admission to practice as a legal practitioner.

The CALD Standards also make reference to the importance of the library in a law school, along with the requirements of course and subject evaluation and the importance of research to law schools and fostering 'the relationship between research and teaching'.[40] They provide for the establishment of the Australian Law Schools Standards Committee to certify law schools as compliant with the standards and to propose amendments to the Standards as and when appropriate.[41]

In 2010, the LACC released a paper entitled 'Rethinking Academic Requirements for Admission' in which it referred to the sustained criticism of the Priestley Eleven for at least the past 10 years. It drew attention to the ALRC's Report, 'Managing Justice: A Review of the Federal Civil Justice System', in which

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[39] Ibid at 3-4 [2.3.3].

[40] Ibid at 9 [7.2].

[41] Ibid at 11-13 [12-14].

the ALRC criticised Australian legal education as 'still anchored around outmoded notions of what lawyers need to know' rather than 'the high level professional skills and values they will need to operate in a dynamic work environment'.[42] The ALRC had recommended that:

1. 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.

2. All university law schools should engage in an ongoing quality assurance auditing process.

3. The Commonwealth Department of Education, Training and Youth Affairs should give serious consideration to commissioning another national discipline review of legal education in Australia commencing as soon as practicable.

In spite of criticisms of the continuing requirements of admitting authorities, the LACC has noted, quoting the words of the Dean of Sydney Law School, that 'much change is taking place under the surprisingly light hand of the Priestley Eleven'.[43] According to the LACC, there has been a noticeable shift towards 'an outcome-measures' approach which requires law schools to enunciate their objectives and be assessed with reference to those objectives.

The most recent development in the evolution of university legal education has been the commitment by the Federal Government to establishment of a new

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[42] Australian Law Reform Commission, '*Managing Justice: A Review of the Federal Civil Justice System*', Report No 89 (2000) [2.21].

[43] Law Admissions Consultative Committee, above n 36 at 21.

Higher Education Quality and Regulatory Framework. This includes the establishment of the Tertiary Education Quality and Standards Agency ('TEQSA').[44] TEQSA will be a national body overseeing the regulation and quality assurance of tertiary education against agreed standards. As part of the process of establishing the new quality assurance regime in Australian higher education, the Commonwealth Government commissioned the Australian Learning and Teaching Council to undertake the Learning and Teaching Academic Standards Project. A key aspect of the Project was the definition of learning outcomes to guide curriculum development and for the design of assessment mechanisms ensuring graduates achieve threshold levels of competence in their chosen discipline.

The Law Discipline Group, guided by Professors Sally Kift and Mark Israel, released its Academic Standards Statement in December 2010, outlining six Threshold Learning Outcomes for the Bachelor of Laws Degree, which have been mentioned earlier in this paper by way of comparison with the areas recommended by the Ormrod Committee.

The Law Discipline Group worked with the LACC to explore how the Threshold Learning Outcomes for Law ('TLO for Law') might relate to, and interact with the Priestley Eleven. In October 2010, the LACC endorsed a proposal to integrate the present academic requirements with the TLOs for Law and has referred the proposal to the State and Territory admitting authorities, the CALD and the Council of Chief Justices.

The Juris Doctor

The recent developments described above have focussed on the Bachelor of Laws degree offered by most Australian law schools. A number of law schools, however, have introduced the Juris Doctor or 'JD' – a postgraduate degree, first

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[44] Enacting Recommendation 19 of the *Review of Australian Higher Education*, (2008), led by Emeritus Professor D Bradley.

awarded by Harvard University in the late 19th century as a (then) modern version of the older European Doctor of Law degree. Those universities which have introduced the JD in Australia have abolished the graduate LLB course. Melbourne University has also abolished undergraduate programs leading to the LLB. The structure of the JD programs resembles that of graduate LLB programs.

There are implications arising from the emergence of the JD for the TLOs for Law which, it appears, may be required to meet a higher standard for that degree. It does not seem that this will be a straightforward exercise.

Clinical legal education

The importance of including clinical legal education ('CLE') as an element of degree courses in law cannot be underestimated. It can have a significant effect in motivating students in their law studies by offering them opportunities, under supervision, to help in resolving legal problems for real people.

CLE has been defined as a 'legal practice-based method of legal education in which students assume the role of a lawyer and are required to take on the responsibility, under supervision, for providing legal services to real clients.'[45] In Australia, CLE includes community legal centre based university programs, field placements or externships and programs in which students are involved in legal policy or campaign work.

CLE has a long and distinguished history in the United States, where it was developed in the late 19th and early 20th centuries by law students at universities including George Washington, Harvard, Northwestern and Yale, who wished to learn and practice lawyering skills and analysis whilst serving a social justice function by providing pro bono legal assistance to impecunious persons. In 1917,

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[45] J Dickson, 'The Role of Clinic in Linking Law and Justice' (Address to the Australian Clinical Legal Education Conference, Caloundra, Queensland, 11 July 2003) at [23].

William Rowe published an article in the *Illinois Law Review* in which he advocated CLE as the best method of training law students and argued for a form of CLE where '[t]he clinic thus becomes a "case book" – not, however, of dead letters descriptive of past controversies, but always of living issues in the throbbing life of the day, the life the student is now living'.[46]

Many Australian law schools now provide CLE programs.[47] Kieran Tranter has written:

> The ideal type of Australian CLE has been law students working at a community legal centre providing legal services to the 'disadvantaged' in the practice areas of minor crime, family, housing, social security, neighbourhood issues and consumer credit law.[48]

Similarly, Evans and Hyams suggest that 'the best programs may be progressively humanising Australian legal education by reducing its positivist emphasis and remoteness from justice'.[49]

In addition to the opportunity for students to apply their legal knowledge, CLE programs also expose students to ethical questions relating to such matters as legal professional privilege, conflicts of interest and confidentiality.

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[46] W Rowe, 'Legal Clinics and Better Trained Lawyers a Necessity' (1916-17 11 *Illinois Law Review* 591 at 607.

[47] Kingsford Legal Centre, *Clinical Legal Education Guide 2009-10*.

[48] K Tranter, 'The Different Side of Society: Street Practice and Australian Clinical Legal Education' (2006) 15 *Griffith Law Review* 1 at 3.

[49] A Evans and R Hyams, 'Independent Evaluations of Clinical Legal Education Programs: Appropriate Objectives and Processes in an Australian Setting' (2008) 17 *Griffith Law Review* 52 at 53.

A concluding personal perspective

I will conclude by setting out what I would like to see as some of the attributes of the law graduate today. Like all lists in legal papers, this is not exhaustive. The law graduate, in my opinion, should have at least:

- Basic knowledge of the principles and doctrines of important areas of the law.
- Basic knowledge of the ways in which law is made and interpreted and applied.
- Basic skills, transferable across subject areas, which enable the graduate to identify, define and analyse legal problems, to formulate options for their resolution, to advise clients, and to use negotiation, alternative dispute resolution or litigation, if necessary, for their resolution.
- Awareness of and sensitivity to ethical issues and the ability to respond ethically to them.
- A commitment to legal practice as a species of public service.
- An awareness of the ongoing need for reform of the law and a readiness and ability to contribute to reform.

Those are among my desiderata for legal education. They are necessarily aspirational. No curriculum plan can be expected to produce perfectly formed, deeply knowledgeable and competent ethical lawyers with a highly developed sense of social justice. Many influences converge to yield such people. They include the influences of family, community and the wider university environment, together with continuing legal education and practical experience.

The ongoing efforts of the legal academy to shape and improve legal education are impressive. It is a great endeavour you all undertake and I take this opportunity to wish you well with it.