ARTICLES

LEGAL EDUCATION AND THE "FUNCTIONALISATION" OF THE UNIVERSITY*

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A proposal is current to establish a Western Sydney State University on four campuses west of Parramatta (three already existing).[1] Under-participation of the youth[2] of Sydney's west in the three existing metropolitan universities is widely acknowledged and inaccessibility of their campuses is widely cited as a reason.[3] The proposal for the Western Sydney State University emerged from a

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* The original version of an article previously published in condensed form only. *See*, Kavanagh, *The Future of Legal Education*, 11 LEGAL SERVICE BULLETIN 55-99 (1986). While the facts referred to have been overtaken by subsequent developments in Australian higher education, Kavanagh's method of building his argument from them seemed to the editors to justify publishing the piece as originally written.

1 *See*, report in the Sydney Morning Herald, 3 February 1986.

2 Less concern is usually expressed by governmental institutions for those above the age of about 24, although the Universities themselves try to facilitate "mature age" entry.

3 This widespread view was confirmed by a survey conducted for Blacktown City Council reported in the Sydney Morning Herald, 9 January 1986. Macquarie University is actually close to Parramatta but there is no direct public transport.

committee appointed by the New South Wales Minister for Education, packaged to attract Commonwealth funding. The proposal appeared to rest on an argument that access to University education and qualifications could be part of the solution to the social and economic problems of the Western Sydney metropolitan areas. These problems are usually thought to derive from "technological ignorance" which prevents suitable participation in the modern economic and social systems.

Commonwealth support cannot be assumed. Policy guide lines to the Commonwealth Tertiary Education Commission (C.T.E.C.) direct attention to increasing representation in tertiary education of persons in outer metropolitan areas and a report of a C.T.E.C. working party recommended institutional growth "to serve the western and south western suburbs of Sydney".[4] But C.T.E.C. favours "institute of technology-type facilities rather than an enhancement of the already strong university presence in Sydney".[5] The state government, local M.P.s federal and state, Blacktown Council and a sample of prospective students themselves favour university status for the enlarged facilities on which all parties seem agreed.[6] This difference of view may indicate elitist views of C.T.E.C., both of the status of universities and of the aspirations of the residents of Sydney's west, as suggested by a letter writer to the *Sydney Morning Herald.*[7] The difference of view may also indicate an issue about the role of Universities in solving the modern problem of technological ignorance and so dealing with "the scandalous wastage of talent, so needed by our country".[8] In short, the matter of the enhancement of tertiary education facilities in metropolitan areas west of Sydney may become a case study of the role of the university in social, technological and economic development. This issue is of interest in legal education as law is one of the well established "vocational" or "professional" academic disciplines.

In March 1985 C.T.E.C. announced a series of reviews of teaching and research in specific disciplines in tertiary education. The reviews are not designed to examine and compare the roles of universities and of other tertiary institutions. Obviously such matters may become relevant, but they really do not seem central to the inquiry C.T.E.C. has in mind. C.T.E.C. bases the reviews on a principle of accountability of tertiary institutions, which principle is said to be part of "the justification of appropriate levels of public funding"[9] and this justification seems to suggest a narrower focus. C.T.E.C. is a government body and bound to respond to government policy. A function of government, one might say, is to ensure the fair and efficient

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4 MACQUARIE UNIVERSITY & WESTERN SYDNEY, REPORT OF THE VICE-CHANCELLOR'S WORKING PARTY ON A RESPONSE TO THE COMMONWEALTH GOVERNMENT'S PARTICIPATION & EQUITY PROGRAM 1 (23 August 1984).

5 *See*, the Sydney Morning Herald, 4 February 1986.

6 This conclusion is reached from the material appearing in the Sydney Morning Herald items, *supra* notes 1, 3 and 5.

7 H. E. Hayward of Nepean C.A.E., 12 February 1986.

8 Mr Justice Kirby, Chancellor of Macquarie University, reported in the Sydney Morning Herald, 8 February 1986.

9 *Review of Australian Law Courses*, C.T.E.C. Media Release (March 1985).

distribution of social services such as tertiary education. Thus did C.T.E.C. announce:

> An essential part of this process of accountability is a program of thorough and authoritative assessments of the work of higher education in institutions measured against objectives which are acceptable in academic and social terms.[10]

and

> Through the development by the Commission of a successful system of discipline assessments, governments and the community will be able to judge the needs of higher education and the benefits to be gained from its continued support.[11]

The first discipline to be reviewed is law. The review committee is independent in that its members are not members of C.T.E.C. but are practising legal academics and can, therefore, be expected to be basically "friendly" to the discipline. They are Professor D. C. Pearce (A.N.U.) convener, Professor E. Campbell (Monash) and Professor D. E. Harding (N.S.W.). They are to review the discipline of law in law schools in Universities and at N.S.W.I.T. and Q.I.T., the Department of Legal Studies at La Trobe University, and courses and examinations offered by professional bodies which are in receipt of commonwealth government funding therefore. The terms of reference require the committee to consider, report and recommend on legal education in the sense that it is a service to the community. This will cover the quality of the service itself and the existing utilisation of resources. Included then are: "appropriate aims and objectives for the provision of legal education in contemporary Australian society"; whether existing resources provided by the government could be better distributed; whether legal education is providing the sort of graduates the community needs; whether legal education is available to a broad socio-economic range of prospective students; and the contribution of legal academics "to law reform, the work of government, the profession and the community's welfare generally".[12] The committee has circularised and visited the institutions and is to complete its work by June 1986.

In Australia legal education is heavily concentrated in Universities and similar institutions (i.e., high profile C.A.E.s such as N.S.W.I.T. and Q.I.T.). It raises questions then not only specific to itself but which relate generally to the role of modern Universities. As already indicated, such issues seem to be about to enter public discussion. This piece will now go on to a short review of the "state of the art" and will indicate the sort of issues that should, but may not, appear on the agenda. As details vary among the states, discussion will concentrate on the New South Wales experience.

As is so often the case, the local experience is best understood in the light of English precedents. In England, education in the law of the land was historically

10 *Id.*
11 *Id.*
12 *Id.*

the role of the profession itself. This was because England developed at an early stage an indigenous legal system and maintained it through the expert discourse of those trained in its principles (Coke's "artificial reason"):

> Next to Roman law and canon law the English "common law" in the shape of the *lex terrae* appeared as the third great European system of law. It was neither a populist nor a theocratic law, but a law *sui generis*.[13]

The law taught in the Universities, both in Continental Europe and at Oxford and Cambridge was the Civil Law or Roman Law. The common law was taught in the Inns of Court. In Tudor and Stuart times the Inns were vigorous places and attracted many students, not all of whom intended to practice law. By the time of the Hanoverian Succession in the early 18th Century however, they had declined. The Vinerian Chair in the Common Law was endowed at Oxford in the middle of that century, but the first modern university law school was established at University College, London, in 1826.[14] The tradition of professional responsibility for legal education and admission to practice continued into the 20th Century. The tradition was connected both to the character of the common law and to the division of the profession. Articled clerks and attorneys were excluded from the Inns about the beginning of the 19th Century[15] and each branch of the profession later had its own requirements for education, training and admission to practice. If University law schools took over responsibility for admission to practice this could encourage fusion of the profession. But there was no danger of this development as the English Universities simply did not have the tradition of scholarship to enable them to grasp the common law in its character as a body of professional discourse in the way that the Inns, in their heyday, had grasped it.[16] "The province of the University" then was "to teach the philosophy of the science" of law.[17]

Within New South Wales, it is convenient to begin with the establishment of the present Supreme Court of New South Wales which began sitting in 1824. The Charter of Justice issued under the New South Wales Act 1823 (U.K.) provided that barristers and attorneys of Great Britain and Ireland be admitted to act in both capacities.[18] In 1829 a rule of court, taking advantage of an ambiguous provision in the Australian Courts Act 1828 (U.K.), provided for the profession to be divided.[19] Admission to practice in either branch was taken over by the Court. Intending

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13 W. ULLMAN, PRINCIPLES OF GOVERNMENT & POLITICS IN THE MIDDLE AGES 167 (Methuen 1961).
14 REPORT OF THE COMMITTEE ON LEGAL EDUCATION, para 12, Cmnd 4595 (H.M.S.O. 1971) [hereinafter ORMROD REPORT].
15 *Id.* at para 11.
16 The real threat to continuing separation of the profession then was the proposal to establish a "legal university" based on the Inns, which first appeared in 1855 (ORMROD REPORT, *supra* note 14, at para 22).
17 Quoted in the ORMROD REPORT, *supra* note 14, at para 17, from REPORT FROM THE SELECT COMMITTEE ON LEGAL EDUCATION, H of C 686, p. xlvii (25 August 1846).
18 L. MARTIN, FROM APPRENTICESHIP TO UNIVERSITY LAW SCHOOL : LEGAL EDUCATION AND THE NEW SOUTH WALES LEGAL PROFESSION 1815-1890, 35 (unpublished Legal Research Project, deposited in Macquarie University Library).
19 *Id.*; *see also* REPORT OF A COMMITTEE OF INQUIRY INTO LEGAL EDUCATION IN NEW SOUTH WALES, para 2.3.4 (NSW Government Printer 1979). [hereinafter, BOWEN REPORT.]

solicitors were required to undertake no formal education but were to serve five years articles or five years as clerk in the Supreme Court Offices (unless already admitted in Britain or Ireland). From 1834 intending articled clerks were to be introduced to the judges and provide evidence of educational achievements at that time. There was no local training for barristers. Barristers already admitted in Britain or Ireland could be admitted as such in New South Wales. The Barristers Admission Board was established by local statute in 1848 and empowered to make rules for the examination and admission of barristers. The first rules (in 1849) required the candidate first be admitted as a student-at-law which required passing the so-called "literary" examinations. The rules then provided for examinations in classics, mathematics, history and law. There was no provision for skills training although a candidate was to read with a leading junior for six months after admission.[20]

New rules for the admission of solicitors were introduced in 1877. Intending articled clerks were to have passed the matriculation examination of the University of Sydney (including from 1894, passes in Latin, mathematical subjects and a modern language) or its equivalent and be articled for five years, reduced to three if one was a B.A. or a M.A. of the University of Sydney. In 1887 this facility was extended to a graduate of any Faculty of the University. From 1877 articled clerks were required to pass examinations conducted by a Board of Examiners which came to be known as the Solicitors Admission Board.[21]

The University of Sydney was established by local statute in 1850. It has been said that the mid 19th Century in England was an "age when great faith was beginning to be placed in examinations as a means of protecting the public from unqualified or incompetent professional men, and the age which saw the professions emerging into their present form, which has depended to a considerable extent on the principle of qualifying examinations".[22] It did not necessarily follow, either in England or in New South Wales, that the Universities would be part of this process of professional accreditation. And in England and New South Wales the branches of the profession set up their own examining bodies. The act of incorporation authorised the University of Sydney to grant degrees in law[23] but this could have referred to the English model where the "law faculties concentrated on teaching law as one of the liberal arts ... At no time did they regard it as their only function to prepare students for the legal profession".[24]

In 1859 John Fletcher Hargrave, then Solicitor-General and later judge of the Supreme Court, began a course of lectures at the University of Sydney.[25] He was

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20 MARTIN, *supra* note 18, at 53; BOWEN REPORT, *supra* note 19, at para 2.4.2.
21 BOWEN REPORT, *supra* note 19, at paras 2.7.1-2.7.5.
22 ORMROD REPORT, *supra* note 14, at para 27.
23 MARTIN, *supra* note 18, at 57.
24 ORMROD REPORT, *supra* note 14, at para 21.
25 MARTIN, *supra* note 18, at 59.

expressly instructed that his subject matter was "jurisprudence" and not "law lectures", which latter term implied "not only book learning but also the intricacies of professional practice".[26] Hargrave himself understood the distinction in terms similar to that between legal education in the Universities and in the Inns of Court in England.[27] This was just as well as the Barristers Admission Board refused to recognise the results of Hargrave's examining at the end of his first year of teaching although the Board was at the same time "prepared to exempt university graduates from the preliminary humanities section of the bar exams".[28] Like John Austin, first Professor of Jurisprudence at University College London, Hargrave had difficulty interesting students in his scholarship and he resigned in 1865. The lectures themselves were discontinued in 1869, although the Faculty of Law continued as an examining body.[29]

In 1878 Sir William Manning, judge of the Supreme Court and new Chancellor of the University of Sydney, addressed the University. He believed that the University should provide not only liberal education for intending members of either branch of the legal profession "but that the University should take a prominent part in direct legal training".[30] In this and in later addresses Manning consistently pressed a useful role for a modern university such as the University of Sydney, which would weave the University into the general drive of social progress: "What had previously been an indispensable education for a gentleman was now regarded as 'better suited to a leisured class than to such a busy working world as ours'".[31]

However, support for law teaching in the University in the style advocated by Manning was not general, either in the University or in the legal profession. The Faculty of Law did not begin teaching a 5-year Arts/Law course until 1890, and then still without its being accepted for professional accreditation.[32] However, by 1891 the Barristers Admission Board had exempted University graduates in law from all its examinations provided the subjects in the final University examination were the same as those for the Board's final examination and provided examination fees were paid to the Board. [33]

From 1894 graduates were exempted from all examinations for solicitors' admission, except those dealing with practice and jurisdiction of the courts, again subject to the payment of fees.[34] The Law School, meanwhile, was located in the

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26 *Id.* at 69.
27 *Id.*
28 *Id.* at 68.
29 *Id.* at 71-72.
30 *Id.* at 78.
31 *Id.* at 80.
32 *Id.* at 97.
33 BOWEN REPORT, *supra* note 19, at para 2.4.3.; *and see* MARTIN, *supra* note 18, at 99.
34 BOWEN REPORT, *id.* at para 2.7.5.; *and see* MARTIN, *id.* at 99-100.

"heart of professional and commercial Sydney"[35] away from the campus, a factor that had long been identified as necessary if the School were to attract students.

While it is so that "(f)rom this time onwards then, the University might have become the primary site for legal training" in New South Wales,[36] it was not the only site. The examinations offered by the Admission Boards continued as alternatives. Furthermore, the University was not recognised as the professional accrediting authority. Professional accreditation was achieved by satisfying the examiners of the Admission Boards. An aspirant could do this directly; ie by sitting for their exams. For graduates the process was merely facilitated by the Admission Boards, by a process of recognition and exemption.

The fact that this essentially educative role, distinct from a professional accreditation function, remained for the University law schools is important. The distinction continued in both England and in Australia, although less marked in the latter than in the former.[37] The University law schools then were obliged to identify law as subject matter in such a way that it was suitable for "scientific" or "philosophical" study. As John Austin told his hearers at University College, London ... such was the task of jurisprudence. The general tendency was to shift academic attention to the common law, perceived as a body of historically evolving doctrine united by a set of constant principles and policies.[38] This, in turn, would tend to produce a legal education characterised by formalism and objectivism[39] and with a distinct private law bias. The last would be seen in the fact that the categories of the private law are used not only to solve legal problems but to identify in the first place what is the problem requiring solution.[40]

In 1974 the New South Wales Attorney-General appointed a committee to inquire into legal education and professional qualification in New South Wales. In

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35 MARTIN, *id.* at 100. The mercantile "heart" at this time was closer to the campus, around Central Railway.

36 *Id.* In support of this statement MARTIN cites also the penetration of the Faculty board by judges and barristers.

37 The English accrediting bodies never allowed as extensive a range of exemptions as was allowed in Australia. Also, while English law schools had been staffed by "Blackstonesque" scholars, Australian law schools drew heavily on practising lawyers for part time teaching staff. *See* MARTIN, *supra* note 18, at 104.

38 ORMROD REPORT, *supra* note 14, at 21. This view of the common law is rampant in Dicey. See especially his lecture XI in A.V. DICEY, LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY (2nd ed. issued with a Preface by E.C.S. Wade, Macmillan1963).

39 I am using the terms in the sense Roberto Unger uses them in *The Critical Legal Studies Movement*, 97 HARV. L. REV. 563 (1983).

40 The technique can be seen in the *Engineers' Case* (1920) 28 C.L.R. 129 where Australian "constitutional law" is reduced to a subset of statutory interpretation.

1976 the chair of this committee passed to Sir Nigel Bowen. In its report[41] the committee said:

> It is now fairly generally accepted that questions about the purposes of a legal education which is part of training for the legal profession should be answered by examining what sort of lawyers are needed by the community. Few now deny that tertiary institutions should accept as a principal objective the training of students for these vocational roles.[42]

In view of the historical background just summarised, one may be surprised at this remark which implies such a radically different view of the role of university law schools and similar institutions in legal education. In understanding this it must be borne in mind that the Committee did not envisage simply handing over legal education to autonomous law schools. Thus, while the Committee recommended the gradual shedding by the Admission Boards of their educational and accrediting functions,[43] it also recommended the establishment of a Council of Legal Education to "determine the educational qualifications for admission to practice"[44] and to establish an accreditation system for law school curriculums.[45] While the Council would have some academic membership, it was designed to maintain "communication" between the profession and the law schools with the object of achieving "consensus" on needs-oriented legal education.[46]

However, the committee's preference for university law schools must still be significant. The committee considered but rejected a high powered institution based on the Admission Boards' existing educational structure because it would be "mono-disciplinary" and unable to encourage in students "an awareness of the total non-legal environment" of the law.[47] The committee's vision then was for a university based and needs-oriented legal education. One suspects that the inspiration for it lay in a perceived change in the role of law in society and a consequently perceived need for change in the preparation of intending lawyers for practice. One might hypothesise along the following lines.

In *Law in Modern Society*[48] Roberto Unger describes modern western societies as "postliberal" societies. Such societies are characterised by welfarism and corporatism. Welfarism indicates that the state becomes involved in redistribution, regulation and planning. In Unger' words "the state's pretence to being a neutral

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41 For critical comment on the BOWEN REPORT, *see* Editorial, 5 LEGAL SERVICE BULLETIN 37 (1980), *see also* FRASER, *Planning for the Past*, 5 LEGAL SERVICE BULLETIN 38 (1980).
42 BOWEN REPORT, *supra* note 19, at para 3.2.1.
43 BOWEN REPORT, *supra* note 19, at para 7.10.3 Except for determination of moral fitness: *id.* at para 11.4.5.
44 *Id.* at para 11.4.3.
45 *Id.*
46 *Id.* at paras 11.4.1 to 11.5.7. *See* the criticism by FRASER, *supra* note 41.
47 BOWEN REPORT, *supra* note 19, at paras 7.6.6 and 7.10.2.
48 R. M. UNGER, LAW IN MODERN SOCIETY : TOWARD A CRITICISM OF SOCIAL THEORY (The Free Press 1977).

guardian of the social order is abandoned".[49] Corporatism involves a blurring of the distinction between the public and private spheres. In Unger's words again:

> private organisations are increasingly recognised and treated as entities with the kind of power that traditional doctrine viewed as the prerogative of government.[50]

And

> Society consists of a constellation of governments, rather than an association of individuals held together by a single government. The state that has lost both the reality and the consciousness of its separation from society is a corporate state.[51]

What might that mean for the practice of the law? Unger argues that firstly it means a progressive closing of the gap between legal and political discourse. Laws will be a tool of the modern state in pursuing its policies. Thus, there will be pressure for statutory interpretation to be policy oriented. Recent amendments to the *Acts Interpretation Act* 1901-84 (Cth)[52] seem to have in view precisely this change in the judicial interpretation of statutes. Statutes will turn on open ended standards precisely to enable the substance of individual cases to be taken into account. Counsel could find themselves presenting and judges could find themselves considering arguments redolent with considerations of policy and drawing on economic and political theory as much as on formal rules of law.[53] In this sense lawyers can be involved in actually formulating and implementing social policy. Traditional concepts such as the rule of law, equality, rights and property will be undermined and their meanings will have to be re-thought. Re-thinking will probably move those concepts in the direction of a guaranteed share for all in social goods. Corporatism specifically will move lawyers into areas where the traditional distinction between law making and law applying is blurred; e.g., conciliation and arbitration.

What will all that mean for legal education? If it does not adapt, legal education will enter a state of crisis. Formalism and objectivism, which once appeared perfectly sensible and desirable, will appear muddleheaded, off the point and irrelevant. The way forward will appear to be into a legal education that treats legal practice not as a technical skill to be mastered through the techniques of analysis and deduction, but as a far more amorphous expertise needing to base itself in more general intellectual skills; skills which encourage a courageous use of one's intellect and a readiness to move intellectually not only in the intricacies of the law itself, but

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49 *Id.* at 193.
50 *Id.*
51 *Id.*
52 In section 15AA inserted in 1981, and section 15AB inserted in 1984.
53 See the different approaches among the justices in *Hematite Petroleum v Victoria* (1983) 151 C.L.R. 599 for an excellent illustration. The case demonstrates too that what is at issue is not the law but the correct approach to its interpretation. All the justices understood the conflicting approaches perfectly well and, with the possible exception of Brennan J, were agreed on what the approaches involved. What the justices lacked was authoritative direction as to which approach to choose.

in related fields such as economics, sociology, policy making, etc. A knowledge of such related fields may be built into lawyers' training not so much to teach economics or whatever as to get across subtly and implicitly the message that lawyers must assume a professional responsibility for a wider range of matters than mere technical law and must be prepared, when necessary, to turn their professional minds to such a wider range of matters.[54]

The appointment of the Bowen Committee could be seen as a response to a sense of crisis as mentioned earlier, not crisis in the sense of impending disaster but crisis in the sense of being aware of having entered a stage of fairly constant tension needing diagnosis and treatment. The committee thought the role of lawyers was in a process of change and not all the change could be predicted.[55] The committee recognised, however, that lawyers of the future would likely find themselves involved in some sort of social engineering - through uncovering and representing interests not commonly articulated (e.g., those of the poor), assisting clients in areas increasingly regulated more through enlightened management than through protection of rights (e.g., family law), developing social policy before quasi judicial tribunals (e.g., in welfare law), etc. According to the committee

> [I]t is in the community's interest that [intending lawyers] have the kind of general education [which will] make them sensitive to the values and interests affected [by legal development] and to be aware of bodies of learning in other fields.[56]

If this were not so lawyers "may in fact frustrate the purposes of bodies of legal regulation or law".[57] The committee believed law should be recognised as a "learned profession" preparation for which is "said to involve 'considerable preoccupation with systematic theory'".[58] Furthermore, the changing nature of legal practice and the new relation of theory to practice required that the historical gap between the academic and professional stages of legal education be closed:

> [I]t is wrong to conceive of education in the law schools as confined to the study of theory and the period in skills courses or the qualifying period as solely concerned with the development of skills and (perhaps) the professionalisation process. Training for the legal profession is a continuous process in which the study of theory and principles is combined with the development of skills and "professionalisation" ... it has not perhaps been sufficiently recognised that law school education is an important part of the professionalisation process.[59]

The committee thus believed that legal training actually required an increased role for the University or cognate institution. Therefore, the committee recommended "that admission to the legal profession should become conditional on

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54 *Compare* BOWEN REPORT, *supra* note 19, at para 3.5.7.
55 *Id.* at paras 3.4.1 - 3.4.14.
56 *Id.* at para 3.4.7.
57 *Id.*
58 *Id.* at para 3.5.3.
59 *Id.* at para 3.5.9.

completion of an appropriate law degree at a tertiary educational institution."[60] At about the same time the Ormrod Committee in England had made a similar recommendation.[61]

What does this mean in practice? How would a law school organised on such principles actually go about its business? There could be various ways of course, but we have a case study. The Law School at Macquarie University was founded in 1974 and enrolled its first students in 1975. The founders of the School, therefore, were required to consider the needs of modern legal education at the same time as this was being considered by the Bowen Committee. The School has always seen itself as innovative and therefore indicates what a group of legal academics would find it necessary to be innovative about and how to go about being so. Furthermore, the two foundation professors, P E Nygh (now a judge of the Family Court) and the late J R Peden, had a view of the state of legal education and a vision for the future similar to that which later emerged from the Bowen Committee.

In 1972 Professor Peden published a booklet which was mainly concerned with outlining a skills training programme for intending lawyers but in which he asserted "the primary aim of legal education (in a university law school or cognate institution) is to train lawyers for practice".[62] Peden allowed subsidiary aims of "training policy makers and training for service in the public interest"[63] and "scholarship directed towards law reform"[64] but, more importantly, recommended that the primary aim be interpreted liberally.[65] This was important because of Peden's view of "tomorrow's lawyers". Here Peden emphasised not only "the traditional roles of advocate and adviser" but the likelihood of "tomorrow's lawyers" influencing in various ways the formation and development of social policy.[66] Peden argued that a university law degree or its equivalent should be a prerequisite to practice and that degree should be preceded by or integrated with a degree in Arts, Jurisprudence or Commerce. The profession itself should mount a professional skills training course and take a major responsibility for developing in aspiring lawyers professional consciousness and inculcating ethical standards.

Shortly after Macquarie Law School opened its doors Professor P E Nygh, then Head of School, delivered a public lecture on the topic "The Role of the Law School in Modern Society".[67] He noted that students then in Macquarie Law School would not be at their most influential until the year 2000[68] and indicated this was a

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60 *Id.* at para 3.6.2.
61 ORMROD REPORT, *supra* note 14, at para 103.
62 J.R. PEDEN, PROFESSIONAL LEGAL EDUCATION AND SKILLS TRAINING FOR AUSTRALIAN LAWYERS (Law Book Co. 1972). The statement quoted appears at several points in the booklet.
63 *Id.* at 30.
64 *Id.* at 14.
65 *Id.* at 30.
66 *Id.* at 2.
67 On 14 March 1975, a mere eleven days after the first classes were held in the School.
68 Which nicely characterised Macquarie as the forward looking law school of the future. "Existing" legal education took place elsewhere in institutions that belonged to a passing era.

significant fact to take into account when considering the topic of his lecture. Nygh also indicated that existing legal education failed to inculcate an awareness of the social character and impact of law, and also failed to train students in the weighing of policy alternatives. Here we see a similar set of assumptions as those that moved the Bowen Committee about the type of lawyers needed for modern lawyering. Nygh also indicated that forward looking legal education should be critical. "Internal legal criticism ("pointing out that decision A was inconsistent with decision B") was well established but what was needed was "testing the rules against the 'real world'"[69] which basically inquired if the rule achieved its social objective. In practical educational terms what did this require? Firstly, it required a closing of the gap between the academic and practical stages of legal education. This would ground the theory of law in its actual practice. Secondly, the model required "encouraging law students to undertake major studies in other disciplines, particularly behavioural sciences and economics" and "teach(ing) them to relate these disciplines to the law".[70] This would locate the new legal education and training securely in the scholarly atmosphere of the university law school. Professor Nygh's diagnosis and solution then pick up themes that would later characterise the Bowen Report. On the research side, Nygh argued the university law schools should act "not merely as ivory towers ... but directly to serve the public interest in the challenging topics of today".[71]

Professors Nygh and Peden designed the core of the Macquarie Law School curriculum in 1974. There are several notable features.[72] Firstly, there was no provision for the L.L.B. degree to be awarded on its own. The L.L.B. could be awarded only as part of a conjoint B.A., L.L.B. degree. Next, lectures, while not forbidden, were not encouraged. Only rarely have lectures been a significant part of any course at Macquarie Law School; in most courses lectures have not been used at all. Teaching was to take place in tutorial groups on the basis of materials which attempted to pose issues for discussion. The object of this was to discourage students from seeing themselves as passive recipients of information and to encourage in them the intellectual strength needed to form and defend views. The materials meanwhile included a significant contextual element. Next, subject matter was organized not in the usual legal categories (e.g., torts, criminal law) but on a model which attempted to base the scholarly examination of law in its actual practice. Thus, Macquarie was to have no courses in torts or in criminal law, but the law on those matters could be found in courses such as Standards of Legal Responsibility, Personal Injury and Notion of Property. The curriculum model appeared to draw both on American legal realism and on sociological jurisprudence of the Roscoe

69 *See Lawyers for the Year 2000*, 78 MACQUARIE UNIVERSITY NEWS 3 (April 1975) a report of Nygh's public lecture.
70 *Id.*
71 *Id.*
72 The commentary here is confined to the full time program. Macquarie also has an external program in law which in structure differs, but in substance is similar.

Pound variety. The model appeared to answer to a theory that the law could be best understood through an intellectual examination of it as a social phenomenon. The approach could be broadly described as law-in-context or law-in-society. Finally, there were no formal courses in jurisprudence or in legal history.[73] The animosity to such formal courses was never clearly explained, perhaps because it was held not only by the Professors but by all the sub-Professorial staff in the early years of the School. The basis of the animosity was probably a fear that if jurisprudence and legal history were located in specific courses they would become mere subject matter. The ideals of the School rather required that jurisprudence and legal history should be seen as intellectual tools, used to base critical insight and to give that insight intellectual credibility. There were no formal courses in jurisprudence and in legal history then in order to force course designers to locate those matters in each separate course as needed; and this was intended as a guarantee that each separate course would be part of the School's overall commitment to critical study and make a suitable contribution to achieving the objectives of the curriculum. There was a subsidiary reason for the animosity to a formal jurisprudence course. It was feared that such a course would be dominated by legal positivism. Legal positivism, insofar as it can base any criticism at all, can base only the "internal legal criticism" of which Professor Nygh spoke in his lecture. On this count also a formal jurisprudence course would deflect the curriculum's scholarly impulse.

To this point we have been considering apparent tendencies in modern legal education. Throughout the various views at least one factor has been constant : the assumption that the modern law school, like the modern university as a whole, must find its place within the general process of technological and social development. This view seems to be shared by Nygh, Peden and the Bowen Committee, who seem concerned only to work out its implications. The view seems also to motivate the C.T.E.C. inquiry and to galvanise the supporters of the Western Sydney State University. At one level the view can hardly be called unreasonable. Universities are publicly funded and can be expected to demonstrate their usefulness. Universities are a reservoir of intellectualism and of technical expertise. The society can legitimately claim that some of the fruits of this be delivered to the society to meet the society's needs. Thus Habermas comments:

> Universities must not only transmit technically exploitable knowledge, but also produce it. This includes both information flowing from research into the channels of industrial utilisation, armament, and social welfare, and advisory knowledge that enters into strategies of administration, government, and other decision-making powers, such as private enterprises. Thus, through instruction and research the university is immediately connected with functions of the economic process.[74]

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73 There was an early proposal that optional seminar type courses of "Topics in ..." be offered in the students' third year.

74 *See* J. HABERMAS, *The University in a Democracy - Democratization of the University,* in TOWARDS A RATIONAL SOCIETY 1, 2 (Beacon Press 1970) J.J. Shapiro trans..

But, he argues, this is not the sum of the University's role and function. Amongst some academics there is caution about the unreflective weaving of the university into the general process of economic and technological development. And amongst some legal academics, at Macquarie in particular, there is concern over the assumed connection between university legal education and the role of the new socially oriented lawyer. Such caution and concern are expressed in two main ways. Firstly, there is the fear that the independence of the university is under threat. Secondly, there is the fear that the universities are educating people who will become professionals without giving them the intellectual base from which they can develop a crucial and reflective view of their own professional practice.

In his public lecture, Professor Nygh seemed not only to contemplate but actually to advocate that the university uncritically hitch its scholarship to the cause of social change.[75] Mr Justice Kirby, Chancellor of Macquarie University and commentator on a range of views, appears to have a similar view.[76] The underlying assumption seems to be that this alliance will necessarily produce social change that is enlightened. Some would challenge that assumption on the basis it does not allow for sufficient critical examination of the tendency of social change itself. Furthermore, if the above-mentioned alliance is assumed, might it not be that institutions outside the university will claim a direct role in its functioning because of a common interest in enlightened social change? At the University of Sydney there are already three "sponsored" chairs and two more have been approved.[77] At the University of Melbourne, C.C.H. has not only sponsored a chair but nominated its holder. In every case statements have been made to reassure those who fear the university's independence will be compromised. Whether one is actually reassured or not, the mere fact the statements were made shows there is legitimate cause for concern. Surely it is not too much to ask that the tendency to sponsored chairs in Australian universities be halted while its implications are examined. The second cause for concern, mentioned above, is whether the universities are providing intending professionals with a suitable base from which to develop a critical and reflective view of their own professional practice. In the essay quoted from earlier, Jurgen Habermas recognises modern universities are concerned with the transmission and production of "technically exploitable knowledge" but argues that they must also discharge the traditional university function of "cultivation of the personality".[78] Habermas argues that in the modern technically oriented university this cultivation of the personality is itself in danger of being seen as an object of knowledge and therefore able to be located in specific courses and "taught" as if it were a skill. Thus if universities have traditionally sought to inculcate in students of the law a sense of justice, a modern law school may seek to discharge this function by instructing

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75 *See* Nygh, *supra* note 69.
76 Implicit in a range of recent speeches, *see, e.g.*, one reported in the Sydney Morning Herald, 8 February 1986.
77 *See* the Sydney Morning Herald, 19 February 1986. The "sponsors" are Bowater, I.C.I., Reckitt & Colman, Arthur Young (Chartered Accountants) and Westpac.
78 HABERMAS, *supra* note 74, at 1, 2.

students in the idea of justice. If universities have traditionally sought to raise the political consciousness of their students, a modern university may seek to discharge this function by locating the idea of politics in a political science course. Of course, the idea of justice and the idea of politics are suitable objects of study. But we will not believe the study of those matters will inculcate the corresponding virtues unless we make the mistake of believing that all expertise can be reduced to technically exploitable knowledge. In the proper discharge of his/her professional functions the lawyer needs not only intelligence (to be able to view situations in light of the law it is his/her professional function to understand) but also wisdom, a love of justice and sense of judgment, an awareness of suitable practice. The university, argues Habermas, must be aware of and plan for both parts of "expertise".

It was earlier suggested that the designers of the Macquarie Law School curriculum were opposed to a formal jurisprudence course because its mere existence could blunt the critical perception needed in all courses. The sentiment seems laudable but one must ask if the solution was adequate. By simply fragmenting what might have been found in a jurisprudence course and re-locating the material in the other courses the designers did not solve the problem. One might say they had not addressed the issue of whether the critical perception could be reduced to subject matter able to be transmitted didactically. If this point is accepted then, for lovers of irony, it must be added that if the material continues to be treated as subject matter of knowledge it is better located in a formal jurisprudence course where its study can be monitored and endless repetition of essentially similar material avoided.

Habermas argues that "should the university today restrict itself to what appears to be the only socially necessary function and at best institutionalize what remains of the traditional cultivation of personality as a separate educational subject"[79] it will nonetheless and by that very process "exert an influence on cultural self-understanding and on the norms of social actors indirectly and without being conscious of its own role in doing so."[80] In that case the university

> could pay for its unreflected relation to practice by stabilizing implicit professional standards, cultural traditions, and forms of political consciousness, whose power expands in an uncontrolled manner precisely when they are not chosen but result instead from the ongoing character of existing institutions.[81]

If then a legal academic accepts an analysis of this sort and believes apparent trends in modern legal education do not seem adequate to provide students with a suitable base from which to form a critically reflective view of their own professional practice, for what should that legal academic strive? It is suggested he/she should strive for at least four things.

Firstly, he/she should strive for a discarding of the notion that the theory of law must be grounded in its practice. As theory is the stuff of scholarship, critical scholarship is simply not possible while this notion is adhered to. However, if, as

79 *Id.* at 4.
80 *Id.*
81 *Id.*

argued earlier in this piece, this notion is at the very heart of the thinking of decision making persons on legal scholarship, challenging it will not be easy. The way to challenge this notion, it is suggested, is to unmask its pretensions to be mere representation of fact. The notion must be shown to be what it is: the sediment of an unargued and unarticulated theoretical position. The precise theoretical position may vary among proponents but they are all likely to be descended from the American realist movement.

Secondly, one should strive for a law school truly and properly autonomous of such bodies as the Admission Boards and the Bowen Committee's Council of Legal Education. This is crucial if the law schools are to locate themselves within the wider intellectual community of academia. Unless that location occurs the law schools have little hope of developing a body of truly independent and genuinely critical legal scholarship.[82]

Thirdly, the legal academic should strive for a re-assessment of the nature and function of interdisciplinary study. Interdisciplinary study is usually accepted as a good thing on instrumental grounds. A student hoping to specialise in commercial law could usefully study economics; a student hoping to specialise in family law could usefully study psychology or sociology etc. Clearly, such instrumental justifications do not identify interdisciplinary study as the basis of critical study in the sense adumbrated above. In that sense interdisciplinary study is needed in order to introduce the aspiring lawyer to the intellectual tools he/she will need to reflect on his/her own professional practice. The study of philosophy should awaken a law student to the fact that law itself has a philosophy which he/she can uncover and critically examine. The study of history should awaken a law student to the fact that law has an historical tradition within which he/she as a practitioner will be located.[83] The study of history and philosophy in this way may also encourage students to assess critically some theories of the nature of law with which they might come into contact.[84] The approach to interdisciplinary study suggested will involve a rejection of the Nygh proposition that law and non-law studies be integrated, at least in the sense that he meant it.

Fourthly, the legal academic should argue for the law school and the university as a whole to develop suitable institutional practices which respect justice and fair play and demonstrate the important values of our political tradition. The environment must be created within which the student will learn through observation and experience that such values and administrative needs are not inconsistent; that administration is not suitable simply because it defers to its own values of efficiency and speed. Students, while at university, should *live in* such a world.[85]

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82 *See* earlier discussion of the Council of Legal Education and the criticism by FRASER, *supra* note 41.

83 *Compare* HABERMAS, *supra* note 74, at 6 *et seq*.

84 For example., explanations centering on the power of the state and descending from 19th century views such as that law is the command of the sovereign (Austin), legislation the result of "opinion" (Dicey) or that law is an expression of class domination through the state (Marx).

85 *Compare* HABERMAS, *supra* note 74, at 11-12.