Legal Education in the 21st Century

Launch of Griffith University's full law degree program

Gold Coast Campus, 22 July 2000

It is an honour to be a part of the launch of a new era in legal education in Queensland with the expansion of the Gold Coast campus's law degree to a full law degree program. It is apt that the topic for this address is *Legal Education in the 21st Century*. The question for legal educators in this century is the dilemma which faces all lawyers: the tension created by the need to combine cool, analytical, precise thinking with lateral, creative thinking which considers the important questions of justice, human rights, equality before the law and the rule of law in a democracy. Educators need to develop, challenge and encourage both forms of thinking in their students.

In recent times, Australian law schools have been criticised by the profession for not providing a sufficiently practical education for law students, adequately preparing them for life as a solicitor or barrister. But what is a practical education? It is certainly not force feeding students with the content of rules for technical or unthinking application to a problem in these days of rapidly changing law whether statutory, constitutional or common law. As William Douglas, US Supreme Court justice who had been law professor at Columbia and Yale, sagely observed in his iconoclastic autobiography, *Go East, Young Man*.

> "The body of 'knowledge' pounded into the heads of law students does not survive long after Bar examinations are passed. Law, like engineering, changes fast. The so called 'practical' facts soon become obsolete. The only knowledge of permanent value – in law as elsewhere – is theoretical knowledge. Theoretical knowledge, critical judgment, and the discipline of learning are the only enduring aspects of legal education which make the individual readily adaptable to changing situations and problems."

The sign of education is learning beyond the black letter of the law, beyond the practical outcome. It is about expanding the student's knowledge of the world of people and ideas through

study not only of law but of, for example, history, literature, psychology, music, social sciences,[1] environmental studies, economics, science, anthropology or politics.

This is the challenge for legal education in the 21st century: how to combine training in analytical and "body of knowledge" based thinking with creative, lateral, theoretical thinking often more highly regarded in disciplines other than law, and a sense of how the policy decisions embedded in the law affect ordinary people. Lawyers can hardly be expected to be unthinking, syllogistic technocrats in a world where even washing machines now use fuzzy logic to wash clothes better.

Let me give an example from my own experience as a barrister of the use of cool, analytical, precise thinking from a discipline outside the law which demonstrates the practical need for lawyers to draw from a variety of disciplines. I studied English in my first undergraduate degree, gaining an honours degree in English Language and Literature. I found that my knowledge of language and precision of meaning and grammar, was essential to submissions made to the High Court in the *Incorporation Case*[2] where the Court considered placitum (xx) of s 51 of the Constitution which provides that the Commonwealth Parliament has power to make laws with respect to "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth", and had to decide whether it included power in the Commonwealth to legislate for the incorporation of companies; that is, whether the Commonwealth could form

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1 Epstein, Lee, "Social science, the courts, and the law" (2000) 83 *Judicature* 224.

2 *New South Wales v The Commonwealth* (1990) 169 CLR 482.

corporations. The submissions by the plaintiff referred to the grammatical structure of the phrase to determine its true meaning by arguing that:

> "The word 'formed' in the phrase is a past participle meaning 'that are or have been formed' or 'in existence', and the phrase 'formed within the limits of the Commonwealth' is a past participial phrase used adjectivally. The corporation must be formed before the power given by s 51 (xx) arises and it becomes the object of legislative power."

The majority judgment accepted that submission holding at 498:

> "The word 'formed' is a past participle used adjectivally, and participial phrase 'formed within the limits of the Commonwealth' is used to describe corporations which have been or shall have been created in Australia . . . The power is one with respect to 'formed corporations'."

The decision was criticised in some quarters as a return to black letter law by the High Court but was in fact an example of the precise use of language and grammatical structure.

Recently I sat on a Court of Appeal which considered the question of dismissal of an action for want of prosecution.[3] When considering the tendency of unnecessary delay to bring the legal system into disrepute I could think of no finer example than that of the fictional case of *Jarndyce v Jarndyce* in Charles Dickens' *Bleak House*:

> "Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. The parties to it understand it least; but it has been observed that no two Chancery lawyers can talk about it for five minutes without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce, without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant, who was promised a new rocking-horse when Jarndyce and Jarndyce should be settled, has grown up, possessed himself of a real horse, and trotted away into the other world. Fair wards of court have faded into mothers and grandmothers; a long procession of Chancellors has come in and gone out; the legion of bills in the suit have been transformed into mere bills of mortality; there are not three Jarndyces left upon the earth perhaps, since old Tom

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3 *Tyler v Custom Credit Corp Ltd* [2000] QCA 178.

> Jarndyce in despair blew his brains out at a coffee-house in Chancery Lane; but Jarndyce and Jarndyce still drags its dreary length before the Court, perennially hopeless.
>
> Jarndyce and Jarndyce has passed into a joke."

That description of the derision in which intricate court processes were held has probably done more to encourage reform of court procedures to discourage unnecessary formality and delay than any number of carefully written treatises.

In Australia, the relationship between the arts and legal institutions has long been inescapably intertwined. Henry Bournes Higgins was appointed to the High Court in 1906 and was the first President of the Commonwealth Court of Conciliation and Arbitration. His only child, a son, Mervyn, was killed in the first World War, but he was close to his niece, Nettie, who became better known as Nettie Palmer on her marriage to Vance Palmer. She was a writer and critic and introduced Mr Justice Higgins to the work of Australian writers of the early 20th century such as Katherine Susannah Pritchard and Henry Handel Richardson. Their writings deal with the social and economic hardships faced by Australians at that time and no doubt influenced the compassion and insight he displayed in his judgments. Higgins left Nettie Palmer an annuity which gave her the independent means to write and to support other Australian writers. She in turn wrote a biography of him which gave us a great insight into the workings of the High Court, the arbitration system and the federation debates in which he played a significant role.[4]

Sir Mark Oliphant, who died during the week, said he was fortunate to have lived at a time before the 2nd World War, when it was possible to know everything. We now live in a time where

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[4] Palmer, N, Henry Bournes Higgins: a memoir, London, Harrap, 1931.

technology has made it possible to find out everything but we can only know the significance of what we find out if we can understand ideas rather that instances and have minds that are open rather than narrowed by our education.

There is no doubt that this need for a broader education has now been recognised by many universities. The first major wave of change in legal education occurred in the 1980s when the number of law schools expanded to 18 by 1990. Such a boom can be explained cynically as a result of entrepreneurial recognition that law degrees are inexpensive to run, or more generously because large numbers of students want to enter a profession which does not require previous study at secondary school, and which offers the possibility of a future career which has both financial rewards and access to financial, political and social power within society.

The second wave of change occurred with the establishment of another 10 law schools in the 1990s. It was in this era that Griffith University's law school began.

The law school at Griffith University was commenced at a time when many saw a need for an overhaul in legal education. It was perceived that the traditional law schools did not necessarily provide the highest quality of education, nor did they cater for the vast array of students who now had access to a tertiary education. Griffith law school, under the guiding hand of Sir Zelman Cowen, has been a pioneer in the development of a more liberal legal education.

This University, along with several other academies,[5] has rejected the view, as do I, that a dichotomy necessarily exists between academic learning and practical training. In 1992 the Griffith curriculum stated explicitly:

> "There should be no tension between the two- indeed each is essential for the other. Understanding the social, historical and cultural context of legal rules is not merely an academic pursuit but vital for professional practice. Lawyers do not practise law in the abstract or deal with legal rules as disembodied theoretical constructs. They practise law and use legal rules in the context of their client's problems and needs. Similarly, being able to exercise legal skills is not merely of concern for those who intend to practise. No one can have an academic understanding of law without knowing the way lawyers reason, argue and operate".[6]

A successful tool for putting abstract rules into context is the use of real examples[7] and the practical application of principles in real life scenarios.[8] For example, I discovered on a recent visit to New York that the Law School at Columbia University offers the subject "Contracts and Deals". The students are given the actual documents which were used in the negotiation of a major deal such as the contract to construct a massive dam in China and are invited to reconstruct the deal. This is no doubt a better introduction to law in a commercial context than the intricacies of the postal rule which I studied in the first few weeks of my law degree. But this practical approach is insufficient if it is viewed as only raising legal issues. Students would not genuinely be able to understand such a negotiation unless they can also evaluate the economic, political, environmental, cultural, historical and social considerations inherent in the situation. Students

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5 Clark, E (1994) "Preparing UK Legal Education for the 21st Century: 'Reviewing Legal Education' Seminar-A Conference Report and Review", 12(1) *Journal of Professional Legal Education* and Sampford, C and Condlln, S "Educating Lawyers for Changing Process", in Sampford, Blencowe & Condlln (ed), *Educating Lawyers for a Less Adversarial System*. Annandale: The Federation Press, 1999.

6 "Griffith Law Curriculum" (1992) 1(1) *Griffith Law Review* at ix.

7 Nathanson, S (1997) "Bridging the divide between traditional and professional legal education", 15(1) *Journal of Professional Legal Education* at 21.

8 Buckley, R (2000) "Role of the profession in legal education in the United States", 74 *Australian Law Journal* at 357.

must have the kind of broader education which enables them to understand all of those matters preferably, in my view, before they commence their law degrees whether they will be in traditional private practice or not.

A law degree cannot solely be regarded as training to become a lawyer. Too great a focus on practical training also ignores the diversity of career paths followed by law graduates. A liberal law degree that includes a range of interdisciplinary subjects is essential to cater for the wide range of careers undertaken by law graduates.[9] As long ago as 1987 the Pearce Report[10] estimated that three to five years after graduation only 60% of law graduates were still in private law practice. Reports since suggest that even fewer graduates, only 55%, worked in the private legal profession after 2 years and only 48% after 6 years.[11]

The integration of other disciplines into a law degree also has the advantage of providing a curriculum that makes sense to a more diverse group of students particularly indigenous students, whom the law schools should be trying to attract and retain.[12]

The future of legal education also has to address the issue of technology. Computer- assisted learning, including the use of interactive workbooks to aid study, provides variety in teaching

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9 Richardson, Sir I (2000) "Law and the Law School in the Twenty-First Century", 31 *Victoria University of Wellington Law Review* at 60.

10 Pearce, D et al (1987) *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission*, Australian Government Publishing Service at p 74 in vol 4.

11 Vignaendra, S (1998) *Australian Law Graduates' Career Destinations*, Department of Employment, Education, Training and Youth Affairs, at p xii.

12 Douglas, H (1996) "Indigenous Australians and Legal Education: Looking to the Future", 7 *Legal Education Review* 225 at 232.

techniques.[13] Lectures to large numbers of students may be replaced by this form of dissemination of information. It provides an opportunity for teacher - student contact to be focussed on tutorials, small group interaction and practical exercises and simulations.

However, such progressive methods of teaching, and even the other suggested curriculum changes, require resources. The cut back in funding of universities is a significant barrier to the reformation of legal education in the 21st century. Law students pay the highest level of HECS contributions. Gone, probably forever, are the days of free education.[14] Despite this, throughout Australia, law schools continue, with some exceptions, to be funded at the lowest level of all university disciplines.[15] Law schools seem to have difficulty in challenging the old attitude that they require little funding because law is a cheap degree to run or the crude over-simplification that law students should pay the highest level of HECS as they will benefit from a high income in their lifetime. Both assumptions ignore the need for legal education to be funded and developed to keep up with the pressures of the 21st century, and the high proportion of law graduates not in private legal careers.

Conclusion

These are some of the challenges that legal education faces in the new century. Legal educators have an important role in research and as commentators; but they have an equally important role in producing lawyers of ability and integrity. After all, lawyers in the 21st century,

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13 Nield, S (1997) "Computer Assisted Learning Coming of Age", 15(1) *Journal of Professional Legal Education.*

14 Scotland has, however, managed to maintain free University education.

15 Buckley (supra) at 358.

probably to an even greater extent than in the 20th century, will continue to exercise real power in society. It will be a true measure of the value of their legal education if they exercise that power responsibly, intelligently, compassionately and with imagination.