

AAL PAPER**THE PAST IS A DIFFERENT COUNTRY****EMERITUS PROFESSOR DENNIS PEARCE AO FAAL**

As you may know I spend much of my time on issues relating to statutory interpretation. We are now told that we are to have regard on all occasions to the context in which legislation has been made, which includes its history. So too with legal education. We need to know the past to determine the future. The most fundamental element of this context for legal education is that, for over 150 years, the award to a person of a degree of Bachelor of Laws has been accepted by the various authorities as qualifying the holder for admission to the practice of law.

Professor Clark's paper took me back to those days when we were both at Adelaide Law School in the late 1950s. 30 students started in my year – 1957 - and there were slightly more in his following year. There were a little over 100 students in the Law School altogether. We first years were told by the senior students that there were so many of us starting that there was no chance that we would get jobs. They meant in the legal profession because it was assumed that no one with a law degree would look elsewhere.

As Professor Clark has noted, the teaching was largely undertaken by members of the profession. It was a very hit and miss affair. Lecturers often did not turn up because there were demands in their practice that had to be met. Lectures were read from the same notes as had been read to the previous year's (and the many years before that's) class. In one case the notes read were those prepared by a previous practitioner lecturer who had gone on to the Bench. However, a previous student had (by means never disclosed) managed to secure a copy of these notes and they could be covertly obtained by the students in later successive years - at some cost as they had to be copy typed to order. So at lectures, lecturer and students read through the notes together.

It was the sort of pedagogical experience that led Sir David Derham writing the material on law teaching in the Martin Report on Universities in 1964 to observe that¹:

Law, it has been said 'can be taught under a gum tree' and for much of Australia's history it might as well have been so taught.

Nevertheless, teaching by legal practitioners was at least a direct contribution by the profession to legal education and I will return to this.

In the early years many students were undertaking their course part-time because it was common for it to be undertaken concurrently with service in articles. This was made possible by the fact that the Law Schools were in buildings in or close to the inner city. Some of the premises were appalling. Early in its life a student described Sydney Law School as being housed 'in a garret with acoustic

¹ *Tertiary education in Australia* [Martin report], 1964, AGPS, para 11.37.

properties perfect in themselves but monopolised by passing trams, and [with] floors devoid of covering and unscrubbed because the washerwoman was on leave of absence for a trip to England’.

This pattern of law being taught somewhat haphazardly and certainly cheaply continued through to the last quarter of the 20th century. By 1936 six Law Schools had been established, one in each of the State capital city Universities. In the 1960s and 1970s a further six started – 3 in Sydney and one in each of Melbourne, Brisbane and Canberra. These institutions were largely self-administering within the university context but answerable to the profession in terms of the subjects comprised in the degree offered.

In the 1980s the Commonwealth government began to assert greater control over universities generally through a body called the Commonwealth Tertiary Education Commission (CTEC). In 1985 CTEC issued a statement that indicated that ‘the justification of appropriate levels of public funding for higher education carries with it an obligation on higher education institutions to demonstrate that their teaching and research is being carried out at suitable standards’. To this end, it proposed to establish what it termed ‘discipline assessments’. It said that through these, ‘governments and the community will be able to judge the needs of higher education and the benefits to be gained from its continued support’².

In 1985 CTEC established a discipline assessment of law to be undertaken by Professor Enid Campbell, Professor Don Harding and Professor Dennis Pearce. The Report of the assessment was provided to CTEC in March 1987³.

To say that this idea of a group reviewing their activities was not greeted with enthusiasm by Law Schools or indeed the universities would be something of an understatement. Information was provided reluctantly. Initially Queensland under the dictatorship of Premier Joh Bjelke-Peterson refused to allow us to cross the State boundary. However, the need for Commonwealth funding influenced people’s approach to us eventually and we were provided with a large quantity of detailed information about legal education that we were able to draw on and share between the various institutions for the first time.

The information revealed was astonishing and, in some cases, disturbing. The general attitude of the original 6 law schools could best be summarised as complacently self-satisfied. A visitor from overseas to one law school told us that it should be preserved as a heritage model of an historical institution.

These Law Schools had enjoyed a monopoly on law teaching in their respective jurisdictions and no-one had challenged what they taught and how they went about it. Except occasionally the members of the profession but they were nearly all graduates of the institution and had little other experience on which to draw.

² Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission, 1987, AGPS (Pearce Report), page li.

³ Op cit.

The profession's influence was primarily to be seen in the nature of the subjects taught in the Law Schools. We were assured in 2-3 States that it was necessary for the Law School to teach all the law that a practitioner might need to know in his or her practising career as their period at Law School was the only time in the practitioner's life that they would look at the content of the law. This line of thinking was also reflected in the way in which law was taught and the content of the subjects.

The standard pattern was of the delivery of information to large classes through set piece lectures with some lip service being paid to tutorials. The content was very much black letter rule directed. The absorption of the rules by the students was tested by an end of year closed book written examination. All graduates were expected to join the legal profession and the role of the law school was to equip them with a knowledge of the law that they would apply in their practice.

Little regard was paid to the notion that a legal education might equip a person for a career outside the law. Nor was it contemplated that being able to think more broadly beyond what was said by the Judges to be law might be of value in a legal career.

It was a principal aim of the CTEC Review to persuade law schools (and the profession) to think beyond the parroting of a set of rules. As we saw it, the teaching of law should embrace critical consideration of the aims of the legal system and its theoretical underpinning as well as the content of the law. It should be taught by a diversity of approaches adapted to the content of the subject matter and the capabilities of the teacher. There should not be a uniform approach. Every effort should be made to stimulate the student's interest in the law as a part of our society.

However, there was another aspect of the Review which had to be addressed. Law Schools are a part of a university and universities are the primary bodies engaged in research in Australia. It was essential that any review of Law Schools examine their research contribution. This in turn demanded consideration of what is meant by research in law and who should undertake it.

As Dean of the ANU Law School in the 1980s I was once seeking financial support from the University to establish a centre for research into international and public law. I was met by an objection from a senior external member on the Finance Committee that he had been told by a Supreme Court judge that Law Schools should not undertake research. That was the province of law reform commissions and the judiciary.

The CTEC Committee did not accept this categorisation of the role of academic lawyers. However, it recognised that there could be different forms of research in law. Some staff would feel more comfortable with doctrinally based research that could result in the publication of text books (of which there were very few Australian oriented at the time). Others would emphasise more theoretical and interdisciplinary aspects. As with teaching, there should be no standard model. But research should be seen as a significant part of every academic's duty, if for no other reason than it would influence the content of the person's teaching.

Through its description in the Report of the role and obligations of legal academics the Committee attempted to influence the future of the Law Schools and legal education. However, it noted major issues confronting Law Schools.

Lack of resources, including capital funding for buildings and libraries, was identified as the primary problem for all Law Schools. Law had been considered a discipline that was cheap to provide and which had the advantage of attracting quality enrolments to other Faculties, particularly where double degrees were available.

The Committee recognised the ongoing tension that existed between the Law Schools and the legal profession as to the content of law courses. It commented on the relatively new phenomenon of Practical Legal Training courses and the issue of teaching legal skills in an academic course. It acknowledged the discomfort sometimes felt by universities in relation to education for the professions.

So what flowed from the Report?

It came as a rude shock to some institutions that an outside body would dare to question what it was doing and always had done. Accountability was an unknown concept. The more intelligent Law Schools used the Report as a means to indicate to their universities that they needed to be viewed differently, particularly in regard to the allocation of resources. The less perspicacious tried to reject the Report out of hand. However, even they were faced with a mass of comparative data and the collected opinions of their graduates ascertained by a survey that the Committee included in its Report. They did not always emerge well from this material and gradually its content came to influence their decisions.

It is fair to say that the law courses taught today are very different from what they were in the 1980s in terms of content and approach to consideration of the law. The Committee's aim that courses should embrace critical thinking of the content of law and the legal system has, I think and hope, been realised – but how do we know? I return to this below.

There were two major developments that the Committee did not foresee and which have had a significant impact on legal education in Australia.

First we made the Canuteish recommendation that no further law schools be established. This was wrong. Competition between Law Schools and choice for students was desirable. However, to have 40 plus bodies teaching a course that qualifies a student for admission to legal practice is, to say the least, questionable.

Regrettably, I do not think that the many new law schools have always been established for altruistic or even sound educational reasons. The opportunity for a university to obtain quality students in return for minimal outlay has been as influential as any reason. Whether this has devalued the status of an LL B and what, if anything, should be done about it is an issue that arises from Professor Clark's excellent paper. In my view, there was on occasions too little heed paid by the recognition authorities to the need for some of the Law Schools and their ability to offer an appropriate course. However, that horse has bolted and the issue now is how to maintain appropriate levels of performance in the approved Law Schools.

I think that with all approved courses too little attention is paid by the recognition authorities to the content and quality of courses after their initial acceptance as credentialing persons for admission to

practice. I fear that there is a grave danger that law courses will become just that – credentialing processes with diminishing attention being paid to their content and mode of delivery.

The substantial increase in the number of Law Schools seems certain to result in fewer law graduates joining the practising profession. What this means for the subject content of law degrees and the relationship between the law schools and the legal profession is also dealt with in Professor Clark's paper and is an important issue for exploration in the Conference. Of particular relevance are the changes to which Professor Clark refers that are occurring in England where entry to practice will be conditioned on successful completion of examinations set by the profession and for which the completion of a law degree is not a prerequisite. Is this the direction in which we wish to go in Australia?

The second major development was the advent of the internet. The CTEC Committee could be forgiven for not anticipating this when writing the Report in the mid-1980s. However, its impact on our recommendations for the future of Law Schools has been dramatic.

We devoted a chapter of some 135 pages to the need for and holdings of Law Libraries. The significance of such libraries ought not be underestimated even today but the ability to be able to access material on line has changed the basis and form of law libraries.

The internet has also had a significant impact on courses offered and teaching methods. The case for small group interactive classes for which we argued so forcefully has much still to support it pedagogically but it was made at a time when students were not only expected to attend classes but they themselves expected that it would be the manner in which they were taught. Learning through discussion was accepted as the ideal manner of learning much of the law. However, students then were not faced with high fee burdens for tuition and accommodation. Now attendance in class often has to be fitted in with other commitments and the availability of lectures on-line makes a form of self-education very attractive.

Many of the issues raised in the Report are still germane today. The past can tell us that reviews of courses and teaching methods need to be undertaken regularly if Law Schools are not to fall into complacency. Most Law Schools conduct internally inspired reviews regularly. However, these are often primarily directed to research performance.

Recognition authorities usually require re-accreditation of approved Law Schools at some intervals. I fear that this is usually done on the papers. It is the content of what is actually taught and how it is taught that needs to be encompassed in the review not just the statement of what is on the formal syllabus.

Reviews should include properly conducted surveys of graduates to ascertain their appreciation of their degree after they have joined the workforce. The survey that the CTEC review undertook and which is reproduced in volume 4 of its report was most enlightening. It served to identify many of the shortcomings that afflicted the Law Schools that were being reviewed.

Law Schools can learn from each other. One of the significant side effects of the CTEC Review was to bring about the establishment of the Committee of Australian Law Deans. The ability of Law Schools

through this body to present common views and reach common understandings has been important in the development of legal education.

The Review also made available for the first time detailed information from each Law School relating particularly to the subjects that it was teaching that could be drawn on by other Law Schools for their own advantage. Exchange of information on subject content and teaching methods should be something that Law Schools undertake as a matter of course. I am not sure that this is an established course of conduct. It is particularly relevant to the issues relating to teaching of statutory interpretation that are discussed by Professor Clark and Justice Basten.

There seems to me to be more research in law by legal academics than was the position 30 years ago. Much of this is jointly undertaken by members of staff from different Schools. I think that the suggestion that legal academics should not engage in research is not a view that would now be seriously put. The nature and purpose of such research continues to be debated. Should it still be directed primarily to the practice of law or should law be treated as another of the social sciences?

Promotion criteria within universities that lay emphasis on academic citation of research in international journals continue to cause problems for legal academics. Why citation in a judgment should not carry at least, if not more, weight than citation in a journal article continues to trouble me. Likewise the value of writing legal text books, which is not taken into account in measuring a Law School's research contribution, needs to be recognised. These continue to be essential to the practice of law whether they are published in hard copy or on line. This failure to recognise what is an appropriate form of legal research could well be an issue that the Academy could take up on behalf of legal academics. Meanwhile, the universities' criteria diverts legal academic research away from practice oriented or doctrinal research as it is seldom cited in journal articles.

Issues relating to the relationship between the profession and the Law Schools have tended to look at it from one viewpoint: do the Law Schools perform their role in training persons for the profession appropriately. This is of course important. However, there is another take on the relationship – does the profession contribute as it should to the Law Schools? It is often overlooked that the legal profession is dependent upon the Law Schools for its life blood – new lawyers. In the past the profession recognised that it had a role in contributing to legal education at the undergraduate level (as well as post graduate) by teaching students -- perhaps not well but it was a contribution to legal education. With the professionalization of law teaching and the advent of many new law schools, this contribution has largely been confined to a regulatory role.

The major issue that bedevils all Law Schools is the level of resourcing. The profession makes no contribution to this. Its regenerative stock is provided to it for free. Should the profession make a monetary contribution to the Law Schools? Should it at the very least be prepared, as other professions have done, to negotiate on the part of the Law Schools for an appropriate share of the universities' resources on threat of discontinuing accreditation of a Law School?

The past was not a time that legal education should look back on with any pride. There was no golden age of legal education that can provide the light for the future. Many of the lessons to be drawn are negative – how things should not be done.

It is appropriate and timely for the Academy in an era of increasing numbers of Law Schools and law students to organise a conference such as this to look to what legal education should be doing in the future and what the relationship of Law Schools with the profession should be in a time when ever fewer law graduates will be members of the legal profession.

The past may have been a different country – but so is the future.