

## **Educating Lawyers for the Future**

University of Canberra Law Commencement Function

10 March 2015

*Chief Justice Murrell*

### **Introduction**

I acknowledge the traditional owners of this land and pay my respects to their elders, past and present.

I thank Professor Pratchett and the University for inviting me to speak this evening.

This is my first visit to the University.

Although I know relatively little about current legal education and almost nothing about this law school, I plan to launch out bravely and speak about what's wrong with legal education.

I have a penchant for doing so. In my final year at UNSW law school – at that stage the law school was fully 6 years old – a group of us organised a mass meeting/demonstration of law students (such things were very common in the 70s) around the topic “What's wrong with the law school?” In our view, what was wrong was that teacher/student ratios were too high. All our learning was in tutorials and there was a threat that tutorial sizes would increase to over 20 students!

With the benefit of hindsight, we probably had little to complain about.

A lot has changed since those days.

### **The changing legal environment**

In the past decade, there have been dramatic changes to the content of the law and its delivery. To give but a few examples:

1. There has been a growth in public law. Government activity is increasingly challenged in the courts through judicial review. In some jurisdictions, including our own, there is developing human rights jurisprudence.
2. There is increasingly dense statutory regulation. This year in the ACT one hundred pages of legislation have been enacted already.<sup>1</sup>
3. There is growing reliance on information technology in the delivery of legal services. Courts are moving towards e-filing and e-trials. Last year, for the first time, we ran an electronic appeal – the bushfires appeal – in the ACT Supreme Court.

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<sup>1</sup> See ACT Government, *2015 Acts As Notified* (2015) ACT Legislation Register <<http://www.legislation.act.gov.au/a/annual/2015.asp>>.

4. Legal firms have ballooned in size and practitioners are increasingly specialised. Large law firms are part of global law firms. They offer worldwide services to global businesses that operate across different legal environments.
5. As with most other aspects of contemporary living, legal services are often seen as a commodity to be costed financially. Legal services are time-costed, and lawyers must meet tight budgets. Firms must tender for work.
6. Courts have become more accountable and management focused. There is a flow on effect to the profession, with an expectation that the profession will deal with matters efficiently.
7. Access to legal representation before the courts has become more limited; only the very rich (large corporations and government) and the very poor (who qualify for legal aid) can be assured of legal representation. Consequently, judges see many more self represented litigants. Because such litigants have difficulty understanding and focusing on the issues, there are costs consequences for both opposing parties and the courts.
8. There is a perception that access to Australia's civil justice system "is too slow, too expensive and too adversarial".<sup>2</sup>
9. Within Australia, dispute resolution mechanisms have proliferated. ADR processes are used both independently of court processes and in association with court processes. Currently, few matters proceed to hearing in our superior courts without undergoing mediation.<sup>3</sup> The Productivity Commission Report identified 54 tribunals in Australia, collectively resolving around 395,000 matters per year.<sup>4</sup> That same report identified 69 Ombudsman and complaint bodies which, in 2011–12, dealt with 542,000 complaints.<sup>5</sup>
10. Internationally, the use of investor-state dispute settlement (ISDS) processes under bilateral investment treaties and free trade agreements is a topical issue. The decisions of arbitral tribunals set up under ISDS provisions may call into question the decisions of domestic courts, potentially undermining the rule of law.<sup>6</sup>

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<sup>2</sup> Australian Government Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014) 2.

<sup>3</sup> Campbell Bridge, 'Comparative ADR in the Asia-Pacific: Developments in Mediation in Australia' (Paper presented at Alternative Dispute Resolution Conference: The 5Cs of ADR (Collaboration, Communication, Consensus, Co-operation and Conclusion, Supreme Court of Singapore, 4-5 October 2012) <<http://campbellbridge.com/wp-content/uploads/2012/12/Comparative-ADR-in-the-Asia-Singapore-5cs-Conference.pdf>>.

<sup>4</sup> Australian Government Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014) 345.

<sup>5</sup> Australian Government Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014) 312, Appendix D.

<sup>6</sup> Chief Justice Robert French, 'Investor-State Disputes Settlement - A Cut Above the Courts?' (Paper presented at the Supreme and Federal Courts Judges' Conference, Darwin, 9 July 2014) <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj09jul14.pdf>>.

## Legal education

With all these changes afoot, are law schools equipping students for the changed legal environment of the past decade?

More importantly – are law schools equipping students for the changes yet to come, changes that we cannot now imagine?

The only certainty is that we are educating for an unknown future, one that we cannot now grasp.<sup>7</sup>

Although (and because) the future is unknown, we do know that our future lawyers will need:

1. Electronic document management and IT skills. These days you have to be quick at Snapchat and have a Twitter following to get by.
2. Communication skills. Self-awareness and emotional intelligence. The capacity for leadership and interdisciplinary teamwork.
3. Creative and strategic thinking. The ability to recognise and solve new problems.
4. A framework of values capable of assessing the issues of the future – whatever they may be. A personal morality that prioritises transparency, acceptance of personal responsibility, honesty and fairness over self-interest and mere compliance with the rules. A real understanding of the rule of law.

*Does current legal education respond to those needs?*

Steve Mark has said that the traditional model of legal education has five main characteristics:<sup>8</sup>

1. The delivery method is one-way: the “talking head” teacher conveys his or her expertise.
2. It focuses on “hard law” core content, the “Priestley 11”.
3. Law is seen as an autonomous discipline, disconnected from other disciplines such as business.
4. Law schools are seen as feeding into the legal profession.
5. The law school experience is isolating for both teachers and students.<sup>9</sup>

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<sup>7</sup> Sir Ken Robinson, ‘How Schools Kill Creativity’ (Speech delivered at TED Talks, 2006) <[http://www.ted.com/talks/ken\\_robinson\\_says\\_schools\\_kill\\_creativity?language=en](http://www.ted.com/talks/ken_robinson_says_schools_kill_creativity?language=en)>.

<sup>8</sup> Steve Mark, ‘Legal Education and the 21<sup>st</sup> Century Law Graduate’ (Speech delivered at the Continuing Legal Education Association of Australasia 2008 Conference, Raising the Bar - Professional Development for Legal Education Professions, Sydney, 16 October 2008) <[http://www.olsc.nsw.gov.au/agdbasev7wr/olsc/documents/pdf/legal\\_education\\_21st\\_century\\_law\\_graduate.pdf](http://www.olsc.nsw.gov.au/agdbasev7wr/olsc/documents/pdf/legal_education_21st_century_law_graduate.pdf)>.

That traditional model is operating in a new marketplace:

1. There has been a dramatic increase in the number of law schools, apparently driven not by a demand for law graduates but by financial imperatives; law schools are relatively cheap to establish and operate, and are in high demand because law is fashionable.
2. A lack of demand for law graduates in the legal profession. A recent analysis by The Australian Financial Review reveals that solicitor job advertisements have declined from a three-month average of more than 6000 in 2008 to less than 2000 in 2014.<sup>10</sup> On the other hand, the analytical skills of law graduates may be valued in non-legal or quasi-legal work environments, particularly by business and government. A law degree is “the new arts degree”.
3. Online learning focus, if not driven then at least supported by financial considerations. Interestingly, UK and US law schools have not rushed to embrace the online model.

In the context of our current marketplace and the identified future needs, I would like to examine the delivery of legal education, the content of legal education and the experience of law school in a little more detail.

### 1. *Delivery of legal education*

It is well-known that the mid-20<sup>th</sup> century “talking head” method of delivering tertiary education is teaching at its worst.

During the latter part of the 20<sup>th</sup> century, law schools did change their delivery method. In the halcyon days of the 1970s, the Socratic, case-study tutorial was introduced. Before HECS was dreamed of, fully funded undergraduates at UNSW would languish on the law school lawns wearing their tie-dyed T-shirts and bellbottoms. In their tutorials of only 20 students, they would analyse *Donoghue v Stevenson* and reflect on the development of tort law.

But winter was coming. In the past decade, economic and other drivers have pushed the delivery of legal education towards “the convenient, cost-efficient, expedient virtual class.”<sup>11</sup> E-delivery does encourage the development of IT skills (at least among the faculty), but it does nothing to enhance the generic skills required for a profession that is all about people and communication.

Paradoxically, as legal education has become more available (there are now about 36 Australian law schools), it has become more remote.

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<sup>9</sup> Mary Keyes and Richard Johnstone, *Changing Legal Education: Rhetoric, Reality and Prospects for the Future* (2004) 26(4) *Sydney Law Review* 537.

<sup>10</sup> Edmund Tadros, ‘Massive’ Pool of Law Graduates Divides Industry’, *Financial Review* (online), 3 April 2015 <[http://www.afr.com/p/national/legal\\_affairs/massive\\_pool\\_of\\_law\\_graduates\\_divides\\_OkBvywN8ZZh7E0ThQh5EL](http://www.afr.com/p/national/legal_affairs/massive_pool_of_law_graduates_divides_OkBvywN8ZZh7E0ThQh5EL)>.

<sup>11</sup> Chief Justice Marilyn Warren, ‘The Access to Justice Imperative: Rights, Rationalisation or Resolution?’ (Speech delivered at the Eleventh Fiat Justitia Lecture, Monash University Law Chambers, 25 March 2014) 6.

Of course, there are exceptions. I understand that UC has a practical focus, encouraging trial advocacy and appreciation of ADR. I strongly support your “Law in Action” and mooted units.

But the question remains: If we have limited public funds, are those monies best expended by giving a large number of lawyers an arguably second-rate education so that they can enter the unemployment market?

And (perhaps less controversially): If the rationalisation for producing a large number of law graduates is that they will enter other fields of endeavour, are they being equipped with the skills required in those other fields (emotional intelligence, communication skills, creative and strategic thinking and strong values)?

## 2. *Content of legal education*

In 1992 the Consultative Committee of State and Territory Law Admitting Authorities, chaired by Justice Priestley, developed the “Priestley 11”, which requires law students to study 11 substantive areas of law in order to gain admission to the profession: criminal law and procedure, torts, contracts, property, equity, company law, administrative law, federal and state constitutional law, civil procedure, evidence and professional conduct.

Adherence to the Priestley 11 has been much criticised:

1. It equips law students for practising law in the traditional way; whereas many (perhaps the majority) will practice in quasi-legal areas. The latest Australian Law Students Survey revealed that about 60% of law students undertaking a double degree intended to work in a law firm and about 32% were unsure.<sup>12</sup> (Among LLB and JD students a slightly higher proportion intended to work as legal practitioners, 75% of LLB students and 74% of JD students).
2. The Priestley 11 does not even properly equip students for practising law in the traditional way. It does not acknowledge the rapidly escalating significance of statutory interpretation.
3. The Priestley 11 focuses on “hard law” content, not the generic skills required to practice law in a modern global environment, whether that practice be within the legal profession or in a quasi-legal area.

Few doubt that we need to move on from the Priestley 11.

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<sup>12</sup> Survive Law, *Australian Law Student Satisfaction Survey* (2013) <[http://www.survivelaw.com/images/survey/2013/national/alsss\\_2013\\_finalreport.pdf](http://www.survivelaw.com/images/survey/2013/national/alsss_2013_finalreport.pdf)>. See generally Marianna Papadakis and Edmund Tadros, ‘Law Graduates Still Keen on Legal Career Despite Dire Job Prospects’, *Financial Review* (online), 26 February 2015 <[http://www.afr.com/p/national/legal\\_affairs/law\\_graduates\\_still\\_keen\\_prospects\\_q0yloWopvVsjBv8nTLbp2M](http://www.afr.com/p/national/legal_affairs/law_graduates_still_keen_prospects_q0yloWopvVsjBv8nTLbp2M)>.

### 3. *The experience of law school and the legal profession*

Perhaps, at least, law schools are meeting the immediate personal needs of the Y generation? Treating them as the special people that they believe themselves to be?

Unfortunately, that is not so.

Students enter law school with a similar level of mental health issues as the general population, but quickly develop a higher rate of depression, which they maintain when they leave law school.<sup>13</sup> A 2010 survey conducted by the Brain & Mind Research Institute of the University of Sydney revealed that about 35% (of the 741 final-year law students surveyed) reported high or very high levels of stress. This compared to about 13% of the general population reporting high or very high levels of stress.<sup>14</sup>

I am not suggesting that law schools are *doing that* to students. More likely, it is the law itself that is making the demands.

I also know that many law schools are making a concerted effort to support their students.

But whatever the cause, it is a problem that we need to face, not just to support law students through their studies, but to equip them for the long term, for the harsh realities associated with being a lawyer in the modern world.

### **Conclusion**

These are big challenges, and they aren't confined to law schools – they pervade our education system.

As Sir Ken Robinson says, “Creativity now is as important in education as literacy”.<sup>15</sup>

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<sup>13</sup> See Norm Kelk, Sharon Medlow and Ian Hickie, ‘Distress and Depression Among Australian Law Students: Incidence, Attitudes and the Role of Universities’ (2010) 32 *Sydney Law Review* 113.

<sup>14</sup> Norm Kelk, Sharon Medlow and Ian Hickie, ‘Distress and Depression Among Australian Law Students: Incidence, Attitudes and the Role of Universities’ (2010) 32 *Sydney Law Review* 113, 116.

<sup>15</sup> Sir Ken Robinson, ‘How Schools Kill Creativity’ (Speech delivered at TED Talks, 2006) <[http://www.ted.com/talks/ken\\_robinson\\_says\\_schools\\_kill\\_creativity?language=en](http://www.ted.com/talks/ken_robinson_says_schools_kill_creativity?language=en)>.