How should academia, the practising profession and the courts assist each other in the education of Australian lawyers?

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ABSTRACT

This paper identifies four proposals for increased engagement between academia, the practising profession and the courts for the furtherance of Australian lawyers' education. These proposals are, in sum: increased involvement between professional regulation bodies and university students; greater emphasis on critical thinking and problem-solving skills, through taught law courses and pro bono activities; greater student engagement with the operation of courts and tribunals; and the training of solicitors from law firms by those within community legal centres in relation to their pro bono activities. The philosophical foundations of the law support such steps, which would be of direct advantage to students and broader benefit to the community.

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I INTRODUCTION

Voluminous amounts of literature already exist around law school education. This is partly due to the fact that law schools have faced a number of challenges in recent decades, including the proliferation of their number, differing funding models, and the demands of a changing marketplace. There is less material on the continuing education of legal professionals,[1] despite the fact that all Australian practitioner regulation bodies require continuing professional development for practitioners' ongoing certification.[2] For their part, members of the judiciary receive the benefit of a number of institutions dedicated to the education and training of judges throughout their tenure. Domestically, these include the Australian Institute of Judicial Administration, the National Judicial College of Australia, and the Judicial Conference of Australia.

To the outsider, or even the law student, it is easy to perceive law school, the legal profession, and the courts as discrete units. However, these units are necessarily connected: for example, the practitioner regulation bodies and the courts control admission to the profession, partly on the basis of university qualifications. Yet on a daily basis, these linkages are largely invisible. In the author's view, this has played a role in the apparent transition of the practice of law from being a profession to a vocation.

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[1] See, e.g., J Conison, 'Defining Continuing Legal Education: Law School Education and Liberal CLE' (2007) 15(1) *Legal Education Digest* 10, 10.

[2] ACT Law Society, *CPD Guidelines* (1 April 2015) <http://www.actlawsociety.asn.au/documents/item/1124>; New South Wales Bar Association CPD Policy (Bar Council Resolution, 23 August 2012) <http://www.nswbar.asn.au/for-members/cpd>; *New South Wales Professional Conduct and Practice Rules 2013*, r 57; *Legal Profession Regulation 2005* (NSW) r 176; *Legal Profession Regulation 2007* (NT) sch 2; *Administration Rules of the Bar Association of Queensland* (Qld), Part 4; *Queensland Law Society Administration Rule 2005* (Qld), pt 6; *Legal Practitioners Education and Admission Council Rules 2004* (SA) r 3A, app C; *Practice Guideline No 4 – Law Society of Tasmania Continuing Professional Development Scheme 2015* (Tas); *Victorian Bar Continuing Professional Development Rules 2010* (Vic); *Continuing Professional Development Rules 2008* (Vic); *Legal Profession Rules 2009* (WA) div 2 pt 2.

This claim is not founded in elitism. Rather, it reflects the fact that the law is fundamental to a just and democratic society and that as such, a life in the law requires commitment to particular values. Testament to this is the fact that admission to the ranks of legal professionals as an officer of the court requires, first, that an applicant be of 'good character'; and second, that the applicant give an oath or affirmation to the effect that she or he will "truly and honestly conduct [herself or himself], in the practice of a lawyer of this court, according to law to the best of [her or his] knowledge and ability". The particular ethics of law are also vital to its proper practice; jurisprudence, too, connects law with philosophical notions of the 'good life' and how this may be achieved in society.

Returning to the central question, this paper will make four recommendations – three focussing on law schools and the fourth on the legal profession – aimed at enhancing the education of Australian lawyers through increased emphasis on professional ethics and a holistic understanding of the law and legal process. The first recommendation is of increased involvement between professional regulation bodies and university students. The second is a greater emphasis on critical thinking and problem-solving skills, both by embedding these skills within taught law courses and through pro bono activities. The third encourages greater student engagement with the operation of courts and tribunals. The fourth, related to continuing legal education of legal practitioners, is the training of solicitors within law firms, in relation to their pro bono activities, by those within community legal centres. Each of these will be addressed in turn.

II LEGAL ETHICS AND THE ROLE OF PROFESSIONAL REGULATION BODIES

Legal ethics are fundamental to the practice of law, yet despite (or perhaps because of) the present tendency towards practising law as a vocation, there is little focus on this topic within law curricula. For the most part, legal ethics are overtly discussed only in courses dedicated to the topic within the Priestley 11 structure to ensure that graduates are prepared for admission. The subject may be touched upon briefly in introductory courses that provide an overview of the law, or specific courses dealing with equity and the law of trusts by virtue of the fiduciary quality of lawyers' duties to their clients. Other examples may exist; nonetheless, the ethics of lawyering are not in particular focus in either type of course – in the former, they are generally discussed only in the abstract, while in the latter, any substantive discussion of the ethical duty is only incidental, by way of explanation rather than examination.

Admittedly, not all of those who study law will become legal practitioners. Nonetheless, legal ethics are connected with the philosophical notion of the common good. This is demonstrated, for example, by the lawyer's primary duty to the court and the administration of justice: institutions tasked with ensuring the principled development of rules for society's operation and governance. It can hardly be a bad thing to better inform citizens, whether intended lawyers or not, of the significance of these institutions to democratic society, although it is only lawyers who have a special duty to maintain them. As for future legal practitioners, it is not sufficient to introduce the ethics of lawyering at the final stage of their education, almost as a kind of afterthought.

As noted above, professional regulation bodies across Australia (being each State and Territory's Law Society and Bar Association, or equivalent) play a role in the structuring of university law programmes, by sanctioning certain courses as mandatory requirements for admission to the legal profession. These are uniformly the 'Priestley 11'; there are presently no indications that this situation will change. Some professional regulation bodies also allow student membership and provide information, but beyond this, there is little engagement by professional regulation bodies with law students.

In this author's view, that is an opportunity lost. As discussed above, legal ethics are not simply tools of the trade but rather the framework and foundations for the practice of law. As the institutions charged with controlling admission to legal practice, professional regulation bodies ought from the outset to stress the importance of legal ethics both for admission and to 'lawyering'. This would assist students to comprehend the standards to be applied to their conduct, which promotes professional responsibility and is obviously to their benefit in relation to admission. Professional regulation bodies are also a source of information about the practice of law and what it is like. Many offer continuing professional development seminars and materials, updates on legal issues, and advice, including in relation to ethical issues. Engagement with professional regulation bodies would afford students an easier transition into practice by ensuring that they know what options they have and what support is available to them.

The establishment of 'outreach' programmes from professional regulation bodies (both of solicitors and barristers) to universities through formal partnerships would provide

benefits not only to the students but to the profession as a whole. Engagement could take the form of a series of annual lectures for each year level within the law degree, containing content appropriate to the degree of sophistication of students' understanding of the law and proximity to the commencement of their careers. This approach would, of course, need to take into account the fact that many students study dual degrees and may otherwise not strictly follow study plans. The lectures could cover such topics as what practising in particular areas of law is like; ethical issues; career development; and wellbeing and work/life balance. Lectures could be delivered either in person or via a video connection, particularly to universities outside capital cities. Attendance at a certain number and type of these lectures could be made a mandatory requirement for admission, with the possibility of waiver in such cases as where an applicant had studied in a jurisdiction without a similar requirement.

Logistically, this would require greater funding for the professional regulation bodies, which may be derived from the profession, universities, or both. It is not a plan that can be put in place overnight. The benefit would be graduates with a better understanding of their career options and how to achieve them, as well as a firmer connection with the profession and more developed ethical foundations.

III CRITICAL THINKING AND PROBLEM-SOLVING SKILLS

At law school, students essentially learn the law. Teaching law is largely a descriptive, rather than a deconstructive, exercise. Some law schools engage more than others in 'practical' legal skills, which may be more likely to involve the development of new legal arguments than strict black-letter application. However, students are not often asked in foundational law courses to question the justice of existing laws. This type of critical thinking should not be relegated to the radical left-wing corner; rather, it is the way in which the law develops and changes.

According to Aristotelian philosophy, there are two types of justice: distributive and corrective. The latter is concerned with justice between parties, based on their respective baseline rights and obligations to one another, and is most appropriately applied in the development of judicial precedent. The former deals with what may be considered fair according to broader societal values and is more commonly the domain of legislation.[3] Analysis of both types of justice may lead to a better result for a client in an individual case; a more advantageous commercial environment; a less punitive criminal justice system; or multitude of other outcomes. Questioning why the law is as it is; whether it is just and if so, according to what conception; and how, if it is significantly unjust, it might be changed, is essential for the practice of law, both to advance the case of an individual client and to contribute to the development of the law more broadly.

[3] See Ernest J Weinrib, *Legal Formalism: On the Immanent Rationality of Law* (1988) 97 *Yale Law Journal* 949, 977-81.

The proposal is therefore that a greater component of critical thinking be introduced into mainstream law courses. This may involve the legal profession by two means. First, in terms of systemic justice issues, proposals could be sought from law reform commissions and community legal centres, as two of the main proponents of law reform, for students to consider as part of particular law courses to which they relate. Similarly, with respect to individual legal issues, contributions may be sought from private firms, government legal agencies, barristers or, again, community legal centres with casework functions. These practices could identify novel legal issues and (with the client's consent and altering identifying details) posit these situations for students to contemplate and seek to resolve. Both types of referral could be given directly to individual university law schools or through some central agency – for example, professional regulation bodies.

How each law school might incorporate these simulated issue/case referrals into its curriculum would differ: questions might be asked in exams; students may be tasked with writing papers individually or in groups; or the issues proposed could be the subject of discussions in lectures or tutorials. It would be important to emphasise that these were 'real world' problems, so as to make the practice of law tangible to students. This is particularly important for those fatigued by the duration of their studies and desirous of really 'doing something'. Particularly insightful and useful responses could be collected and, with the consent of the students involved, provided to the source agency for their information, use, and possible direct engagement with the students.

Such an enterprise would give all students – not only those fortunate enough to be able to find work experience in a legal practice – insight into real legal issues and the opportunity to engage with them in a meaningful way. It would also enable the wider community to benefit from their innovation and present opportunities for students to connect directly with the profession in their fields of interest and talent.

VI Student Engagement with Courts and Tribunals

As noted earlier, not every law student will become a practising lawyer. Of those who do, a relatively small number will appear regularly in courts and tribunals, whether as advocates or instructors. Nonetheless, it is imperative that students of law have a proper understanding of how courts and tribunals function, and how both procedural and substantive laws operate. For those who will practise, these laws are the tools of their trade; for the rest, their implementation is illustrative of the manner in which democratic values can be operationalised and thereby ensured.

It is, however, relatively uncommon for law students to spend any significant amount of time observing courts and tribunals in action. Although it is not uncommon to see school groups attending courts to view proceedings, this is almost unheard of with respect to tertiary students. University students may occasionally be encouraged to attend court for the purposes of assignments, but this, too, is rare.

Yet procedural rules, in particular, are difficult to grasp fully without observing their application. It is one thing to be told, for example, that the purpose of the *Uniform Civil*

Procedure Rules 1999 (Qld) is "to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense"[4] and another to comprehend how this is really put into practice. Students can be told to read cases, but lengthy judgments of appellate courts do not put on display the cut and thrust of everyday hearings, nor expose students to the vast diversity of matters with which courts deal, in the same way as watching a day on the applications list does. Moreover, individual rules rarely operate alone: for example, a summary judgment application may be crossed by an application to strike out the originating claim, leaving the judge with complex and intersecting questions to disentangle.

Although many of these matters may be learned by working in a law firm, by so doing, law students are restricted in the development of their understanding to the particular area of law with which that firm deals and the manner in which it does so. Rather than having a holistic view of the how the justice system operates, student law clerks are likely to develop a kind of practice-based tunnel vision, which does not assist them to understand and value the underlying principles of the law's operation. This both limits their potential to be the best lawyers that they can be and may impede their ability to see how the same rules apply across diverse areas of legal practice.

Moreover, there is much in the way that courts and tribunals work that is not set out in legislation. Matters of administration are largely determined within each court and tribunal, and are not touched upon in law school as they are not black-letter law. Students are therefore left with a skeletal understanding of the law, which may not

[4] Rule 5(1).

remedied except by particular self-motivation. It should be remembered that, although learning the law, students remain among the categories of the uninitiated, for whom attendance at court is an alien and perhaps intimidating experience. Without overt encouragement, many may not perceive the benefits of attending court or may feel uncomfortable in doing so.

It is therefore proposed that university law schools work together with courts and tribunals to increase student attendance. This is particularly important for law schools located in areas where courts and tribunals do not sit permanently or at all, so that these students, too, have the opportunity to see the justice system at work.

The proposals here are twofold: first, partnerships could be established between universities across each State and Territory and the registries of each court and tribunal located in that jurisdiction. The purpose of these connections would be the organisation a yearly programme of student court visits, based on the units being studied. This would familiarise students – including, but not solely, those intending to practise 'back-end' work – with the court precincts, reducing the 'fear factor' that affects many law students just as much as complete outsiders to the law. It might also help to break down misconceptions of what court work is like and open up possibilities in the minds of students who would otherwise direct their futures away from litigation. From a pedagogical perspective, it would enable students to see and understand first-hand the manner of operation of procedural rules, as well as the variety of matters that come before the courts. Modern technology should also enable live streaming of hearings to

the classrooms of universities located in towns and cities distant from the main court and tribunal precincts. In a similar manner as with the proposal above, attendance at a number of these visits might be made a requirement for admission.

An officer might also be installed in each court and tribunal precinct (at least in those cities that also play host to universities) to guide and provide information regarding the day's hearings to students who attend of their own initiative. Given the existing teaching and research commitments of most university lecturers, it could also be these officers who accompany and provide information to university students during the scheduled court visits. Universities ought nonetheless to play a role in both funding and promoting both aspects of the visit programme.

Secondly, as with the Schools Program that operates in the Queensland Supreme and District Courts,[5] it would be of great benefit to university law students if judges, magistrates and tribunal members were occasionally able to speak with them regarding the functions of their court or tribunal, and their roles within them. It is acknowledged that judges, magistrates and court staff have busy schedules and substantial workloads, and that such opportunities may therefore be few. One means of arranging this interaction could, however, be an informal lecture given outside sitting hours by one or several judges to entire cohorts of students from one or multiple universities. This would enable students to hear and ask questions about practical matters related to the operation of the justice system, directly from those at its apex. Given the centrality of openness to

[5] See Sir Harry Gibbs Legal Heritage Centre, *Information Session with a Judge* (2015) <http://legalheritage.sclqld.org.au/node/147>.

our justice system, there can only be benefit in those who will form a part of it having every opportunity to expand their understanding.

V COMMUNITY LEGAL CENTRES AND INTRA-PROFESSIONAL TRAINING

Finally, many law firms, particularly larger ones, engage in pro bono legal practice by providing support to community legal centres ('CLCs'). Firms send their lawyers to CLCs, which usually offer specialised clinics or themselves operate within a specific area of expertise. This tends to occur on a regular basis, although it is not usually the same firm lawyers that attend.

Firms that engage in this type of pro bono work generally pride themselves on it, often advertising it prominently in materials to attract law graduates, in annual reports and at law society events. Indeed, the hours dedicated by law firms to pro bono work is of great assistance in addressing issues of access to justice, particularly where funding for CLCs is limited.

However, there exists potential for law firms to add greater value in providing these services. For the most part, the areas of law in which pro bono services are required are not often those in which law firm employees have expertise. Further, because of their lesser workload, it is usually relatively junior firm lawyers that assist with pro bono services. On the other hand, the CLCs running these services usually have a great deal of expertise in the relevant areas, but simply lack the human resources to prepare and deliver advice themselves.

Under the current pro bono model, it is possible to remedy the mismatch between those who hold and those who deliver the information by training. It is recommended that all firm lawyers who intend to participate in pro bono service delivery receive intensive training in the particular areas of law in which they will be working, as well as in respect of the particular client group with which they will be working. This will both enhance service provision and increase firm lawyers' understanding of the importance and impact of the work that they are doing.

Clearly, this training will require further use of CLC resources, which are already thinly stretched. Given that the law firms that engage in these schemes are well-resourced and will themselves receive a form of benefit (despite the pro bono label) in the up-skilling of their employees and advertising benefits, it seems appropriate that the firms themselves cover the costs. Training programmes would need to be designed through equal consultation between the firms and CLCs, considering where gaps exist and what is required. The benefit of this proposal would be an increase in the quality of pro bono legal work, assisting those most disadvantaged and vulnerable in society to access legal assistance of the high standard they deserve. This would again reinforce the centrality of legal ethics, connected as they are with achieving the common good throughout our society.

VI CONCLUSION

Most of the proposals in this paper represent something of a challenge to existing ways of thinking and doing legal education. Their implementation would require substantial adjustments to be made. However, it is imperative that some shifts occur, for several reasons including to retain the interest of young law students; to open their eyes to opportunities; to enhance civic and continuing professional education; to create relationships of camaraderie and mentoring within the profession; and to uphold the integrity of the law.

There is nothing quite like a judicial valedictory ceremony to demonstrate the collegiality that exists within the legal profession. On those occasions, representatives and large portions of the local Bar and Law Society will gather together to give thanks for long and dedicated community service. Remarks are usually littered with anecdotes offering insight into the judge's personality, often characterised by humility, integrity, diligence, patience and neutrality. These sentiments are usually met on the retiring judge's part by acknowledgement of the support received from the legal profession, both in practice and on the bench.

To a young lawyer, these occasions are inspiring, demonstrating not only the intellectual heights of the law but also its firm values and the cohesive nature of the profession. It is essential that these latter be reaffirmed in the education of Australian lawyers, so that the law may remain the bulwark of democratic society that it must be.