

Looking to the future of legal education – Final plenary session

This session is primarily an opportunity for those who have not so far had the opportunity to speak to address the conference on looking to the future of legal education. I wish to make only a few comments and raise a few questions arising from what I have heard so far in this conference so as to promote discussion. These are personal observations.

First, there is the fact is that the substantial majority of law graduates do not go into legal practice. Is this an important distinction for the future of legal education? What I have heard in the course of this conference suggests there is a view held by many educators that the model of legal education driven by the notion that law graduates go into legal practice, whether in private firms, government agencies, or at the private bar, is of limited relevance.

It is been said with some force in the course of the conference that the now outmoded assumption has dictated the structural content of university law courses.

As a consequence, I have heard, undergraduate law degrees need to be freed from the idea that the curriculum must be tailored to those who intend to practise law in the sense of going into legal practice.

If this is to happen there may need to be some adjustment of nomenclature: should the courses be called “legal studies” or something similar for those not going into legal practice and, if the idea be taken up, would those students not be studying aspects of the present law degree directed to legal practice. Examples would be Evidence, Civil Procedure and Criminal Procedure.

Importantly, those who do go into legal practice will still need to know at least what they are presently taught at law schools.

I have not heard it suggested that law schools should not continue to teach those who intend to go into legal practice.

Secondly and consequentially, I have heard it suggested that one of the consequences is that the judges should have a diminished role in prescribing the syllabus. This seems to make sense if there is to be a degree for those who are not going to go into legal practice and a degree with additional subjects for those who are: if those who are not going to go into legal practice are not to be admitted as a legal practitioner of a court, then logic suggests that the court would not need to be involved in their syllabus. For those law graduates who are going to go into legal practice I cannot see why the court should not continue to be involved. The Supreme Courts would admit as officers

of the court those who are going to practise in that court and the other courts. The Federal Court has no formal involvement in this process.

There may be unattractive consequences of this thought being taken to its logical conclusion: is the “prestige” of law courses presently offered, the link they have to the practice of law with the consequent imprimatur of admission to practice as a legal practitioner of a Supreme Court? If that is so will that have an effect on the number of enrolments?

If the change in the proposed careers of graduates in law is as described, then the admission of law graduates would only apply to a minority, being those who intend to go into legal practice.

Thirdly, when I refer to the legal profession in what I am about to say, I limit myself to those in or about to be in legal practice: I do not have enough personal knowledge of the other groups.

What are the changing needs of the profession? For this purpose I do not think I need to predict the size of the bar, whether there will be more or less direct access to barristers or whether there is (or continues to be) a shift in the division of work between those in firms on the one hand and those at the bar on the other. A constant will be the rapid pace of change.

I agree with what Professor Nussbaum was saying yesterday that a good lawyer, particularly a good practising lawyer I would add, needs a broad social education. I have not heard any dissent from that proposition.

But what I want to raise for consideration is the continuing education of those in legal practice. Not much time has been spent on this so far, no doubt reflecting the background and interests of the participants.

I have no figures on what happens in the firms. I assume that the larger the firm, the more sophisticated the continuing education of its members.

So far as concerns the bar, it was not that long ago that continuing professional development was regarded by some barristers in New South Wales as an imposition on their freedom to practise. I think part of the assumption was that practice as a barrister was a learned profession and therefore only those who were committed to the pursuit of knowledge were members of the bar. I think it is now generally accepted that there is, at the very least from a consumer perspective, a public interest in the pursuit of excellence at the bar. It follows that there should be some structure for continuing education. Others might think that self-preservation in the very public practice of this profession, where you are only as good as your last appearance, was and is a strong driver for a barrister to continue to learn.

The topic was addressed by the Australian Law Reform Commission in its 1999 Report No 89, *Managing Justice*, at 2.129-2.146.

What is the present structure? By way of example, in New South Wales under the *Legal Profession Uniform Law*, the Rules, the *Legal Profession Uniform Continuing Professional Development (Barristers) Rules 2015*, prescribe at least 10 hours of continuing professional development per year.

One question is whether this is enough, and of course the focus is not on those who are keen and committed to learn but on those who are uncommitted or even reluctant.

There is some prescription in rule 9 of the NSW CPD Barristers Rules that four categories must be covered:

- (a) Ethics and Professional Responsibility,
- (b) Practice Management and Business Skills,
- (c) Substantive Law, Practice and Procedure, and Evidence,
- (d) Barristers' Skills

None of these are defined expressions, so far as I can tell.

Another question therefore is whether these categories are sufficiently specific.

As to quality, by rule 6, CPD activities must:

- be of significant intellectual or practical content;
- deal primarily with matters related to the practice of law;
- be conducted by persons who are qualified by practical or academic experience in the subject covered; and
- be relevant to the practitioner's immediate or long-term needs in relation to the practitioner's professional development as a barrister and practice of the law.

Are the four categories in rule 9 sufficiently flexible to accommodate the future?

Should there be some requirement that those in legal practice attend lectures, seminars and courses in areas **outside** their areas of specialisation? There are areas of law where unless you know they are there, like containers afloat below the surface of the ocean, your case or your practice may be seriously damaged. Examples would be constitutional law, conflict of laws and, in Australia, federal jurisdiction.

The law societies, the bar associations, the Law Council of Australia and the Australian Bar Association all put a lot of energy into legal education of practitioners. This is very effective for those who participate. I am putting forward for consideration whether there should be some greater specificity in what practitioners should learn and whether a minimum of 10 hours per year is enough. Are the present requirements, together with concepts of a learned profession and notions of self-preservation, enough?

I do not see that the law societies, the bar associations, the Law Council of Australia or the Australian Bar Association will ever be in a position to conduct courses in substitution for, for example, a year's university teaching of evidence or civil procedure, even if those courses are seen to be relevant only to those who are going into legal practice. By way of contrast, those bodies have in recent years been very successful in teaching advocacy.

I mentioned earlier one constant, being rapid change. I want to move lastly and briefly to another constant which is that there will never be enough money in legal aid. There may well be a diminishing number of people with legal problems who consult a lawyer. 15% was mentioned yesterday.

What does this have to do with the future of legal education? My answer is that those in legal practice, particularly those at the bar, should not tie themselves only to what has so far been traditional practice. The great need for legal services, presently unanswered, is both for those who want to stay away from courts and those who cannot afford litigation.

Does more need to be done to train those in legal practice that legal practice is more than intellectually challenging and well-paid cases in the higher courts? I do not for one moment wish to take for granted the substantial amount of pro bono work that the Federal Court sees, and is grateful for, particularly in its Migration Act jurisdiction. But should continuing legal education for those in legal practice include a period at a community legal centre, for example?

Similarly, should those in legal practice work on matters, an increasing proportion of matters, that stand outside the court system. There is much to be done even before one reaches formal alternative dispute resolution. Often simple advice in an informal setting, given by a person who really listens, means that there is no dispute or that any potential dispute disappears. That has been the Federal Court's experience with the *Justice Connect* program operating from level 19 of this building.

So, in my view, in the present and future paradoxically those in legal practice will need education in what lies beyond what they are equipped for by their formal legal training. Practitioners may need to

expand their view of what constitutes legal practice and they may need help in learning that not every legal problem is in search of a litigious resolution. I am speaking here of the identified disconnect between the lives and problems of the majority of people and the formal legal mechanisms of the State.

I am not speaking here of an Online Solutions Court. Despite what one reads about the efforts in England and Wales, referred to in a speech in June this year by the Master of the Rolls, Sir Terence Etherton, I cannot see in the Federal structure in Australia that a federal court could embrace everything involved in the proposed 'Online Solutions Court', "which, so we read, will be designed to operate largely without lawyers and to dispense 'preventive justice'."

According to reports, this "Online Solutions Court" will operate in three stages. What I am suggesting is that the so-called first stage, which will assist individuals to find the right sources of legal advice and help in order to enable them to consider whether they have a viable legal dispute and secure access to preventive justice is or should be one for practitioners, educated in a wider conception of the practice of law.

Justice Alan Robertson

Federal Court of Australia

13 August 2017