

THE FUTURE OF AUSTRALIAN LEGAL EDUCATION

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'A Place for Critical Perspectives in Legal Education'

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This dynamic – I up here, amplified, and you down there in ordered rows – models very well the conventional approach to legal education that I, and all contemporary educationalists, find fault with.

This is a live demonstration of Duncan Kennedy's 'Legal Education as Hierarchy', and leads neatly into my opening anecdote.

Introduction

Earlier this year, a senior legal practitioner walked into a lecture theatre to teach. The students did not fall silent at his arrival. They were, as ever, chatting animatedly. The lawyer barked at them, 'Quiet!', and the theatre did go quiet. But the lawyer persisted. 'You would be thrown out of a courtroom if you carried on like that', he said. Unsurprisingly, there was a ripple of laughter across the student body. 'It . is . not . funny', the lawyer said icily. The students went quiet, and dutifully and passively stayed that way for the next hour.

What is not *funny* is that the private profession – solicitors, barristers and judges – continues to exercise ownership of and control over legal education in Australia. That it has a sense of ownership is understandable, but no longer legitimate. Quoting Alex Steel from earlier this afternoon, it is a 'deeply deluded' view.

Yet even today, at this conference, the focus of attention – for where new technology will operate, where new pressures will bear on practising law, where post-degree learning might take place – the focus is the private law firm and bar. The driving consideration is 'what the firms want'.

For centuries, lawyers trained lawyers. As law became a degree-based course of study, it remained very much in the hands of the profession, and still largely focussed on preparation for private legal practice. But it is now 50 years since university graduate admissions to practice first outnumbered non-degree admissions in NSW.

Law studies in Australia had left the purely vocational path, and stepped into the broader world of academic inquiry and contextual analysis. Law began to be,

and is now, taught by academics in a university environment, to students who are studying in the context of concurrent degrees in other disciplines.

I make two related points today.

The first is that the idea of private legal practice pervades law schools and legal education, determining content and method, reflecting what Professor Nussbaum called this morning 'the subservient origins' of legal education. This fails both to prepare students for the diversity of legal practice, and to serve the interests of justice.

The second is that *if* the content of legal education must, for the time being, be prescribed for private legal practice, then the method of delivering it can break away from the implicit strictures and put law in its larger social context, through explicit and extensive use of theory.

Private legal practice in the curriculum

The first part of my paper is, to an extent, a continuation of the theme addressed this morning by Professor Nussbaum and Professor Clark.

Professor Nussbaum reminded us of what Chicago University President Harper said over 100 years ago – 'A University School of Law is far more than a training institute for admission to the bar'. Professor Clark's paper then reminded us that the subjects to be taught in a law degree, update and renewed or not, are conceptualised as those that are necessary or important for admission to practice.

In an Australian context, in the 21st century, I side with the 19th century, US, view of President Harper. I am joining Alex Steel's assault on the LACC and the Priestley 11, to much the same effect from a different perspective.

Perhaps differently from before – and by 'before' I mean whenever people in this room were young – students today do not come to university with a clear and determined vocational ambition. Quite simply, few 18 year olds come to law school because they know they want to work in private legal practice, or even necessarily in law.

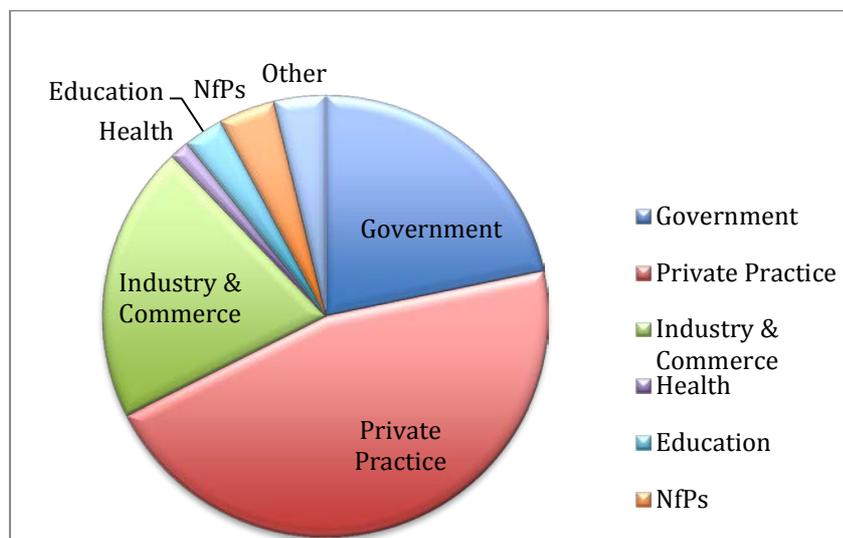
For those students who *do* contemplate generally working in the law, private legal practice is not where all, or even most of them, aspire to work. A *minority* of law graduates these days go into private legal practice.

Each year the federal Department of Education and Training commissions a survey, previously the Australian Graduate Survey and now the Graduate Outcomes Survey.

The 2014 AGS report for full time employment in 'Law' tells us where 2013 law graduates went. You might expect that a significant majority went into private legal practice.

The truth is:

Private Practice	45.8
Government	21.7
Industry & Commerce	20.3
NfPs	4.1
Education	2.9
Health	1.4
Other	3.7



This diverse range of professional destinations for law graduates, and the associated diversity in required knowledge and skills, are a function of our times.

Differently from before, career destinations of law graduates reflect the proliferation of government departments and agencies | the dramatic rise in state regulatory activity and oversight | the growth in non-government and community organisations | globalisation, as John has just pointed out, and Australia's increased engagement in international relations, trade, politics and organisations | and the heightened awareness that all those entities have to the risk of legal liability.

It is clear now – and has been clear and commented on for many years – that a law degree ought be preparation for a wide range of practice contexts, of which private practice is only one. It is a large one, but far from the only one.

Private practice looms large in the popular imagination as emblematic of a lawyer's work, an idea sustained by older generations who only know that kind

of lawyering, and fuelled by representations in popular culture. But it is not the whole picture of who and where lawyers are these days.

Private practice looms disproportionately large, too, in the daily life of law schools, a presence sustained most obviously by the sponsorship of professorial chairs, libraries, classrooms, student law societies and events, and by alumni of earlier generations. And the idea of private legal practice has an insidiously powerful presence in legal education, through the curriculum.

This is so in two ways, each of which is a legacy of the historical roots that legal education has in the preparation of law students for practice. The first is reliance on case law, on cases that have commonly been run by private practitioners, and contested by private interests that have the resources to litigate and thereby make law.

The second way that private legal practice is present in – and actually defines – legal education, is through the prescriptive regulation of the content of the law degree. John has just given a very helpful comparative overview of the Australian prescribed content.

The origin of that prescribed content is the 1982 McGarvie report, titled, significantly, *Report on Legal Knowledge Required for Admission to Practise*. The very narrow conception of legal practice that underpins the prescribed content is well illustrated by the requirement for the topic of ‘Evidence’: every law graduate, regardless of where their career in law might take them, must have studied the *res gestae* rule and ‘judicial warnings, comment and directions’. This is the ‘black letter’ teaching in Australian Law Schools that John has just referred to.

There is much that a law degree’s prescribed content does not value as ‘knowledge required for admission to practise’, such as international law, labour law, family law, taxation, succession and estates, social security, human rights, discrimination law, and the law of finance credit and debt. And legal theory.

The prescribed content does not require lawyers to know legal theory! A graduate of an Australian law degree would not know what John has just been talking about with his references to fundamental legal theorists Hart, Dworkin and Raz. Let alone Aquinas, Austin, Marx, Weber, Fuller, Figgis, Waldren, Nussbaum, Menkel-Meadow, Matsuda, Naffine or Davies.

The effect is that the prescribed content offers no ostensible *reason* for learning law other than to know it, no ostensible reason to think of law in other than positivist terms, deliberately abstracted – as Professor Nussbaum reminded us was intended – from its social and historical context.

Critical teaching

And so to my second and related argument. For as long as we *must* teach the prescribed areas of law then we are obliged to teach them in a way that not only meets the prescriptions, but that also serves our students' aspirations; the diversity of students' future legal working environments; and the interests of justice.

John is generous when he says that 'Australian Law Schools tend to neglect the European developments in Sociology of Law and Social Theory'. I am not sure he mean to imply that Australian Law Schools pay attention to developments in Sociology of Law and Social Theory at all.

Theories of law in society open lawyers up to the different forms that law can take, to the many complex and nuanced way that power and social norms are present in life.

- Political theory explains the different forms and purposes of state law.
- Legal pluralism exposes the ways in which society is actually organised and regulated, raising questions about lawyers' role.
- The natural law / positivism debate challenges lawyers to reflect on morality and law's relationship with it.

All of this is absent from the prescribed core of an Australian law degree. It leaves all students – *whether* heading for private legal practice or elsewhere – under-equipped to navigate through the complexities of law in society, and without a real understanding of law and its relationship to, dare I say, ideas of justice.

Nowhere in the prescribed content is there a reference to justice! There is a hint of it in the requirement to know 'rules concerning duty to the law, the Courts and clients'. Otherwise the topics assume the formal idea of 'justice according to law' – what is law is just – explored perhaps in prescribed topics such as 'Aims of the criminal law', 'Negligence', 'Remedies', 'The nature of equity', and 'Principles underpinning accusatorial justice'.

Implicit in the content and delivery of the standard legal curriculum is law's certainty and prescription, an idea of law that supports the prevailing social arrangements and promotes a limited idea of justice, a conventional model of lawyering, and a conventional path to legal practice.

Teaching law for justice means making these implicit features explicit, and broadening course content and delivery through critical perspectives, contextual examples and experiences, and democratic teaching.

We do our students, their future workplaces and clients, and society, a profound disservice when we teach them law – and represent law to them – as only

doctrine and rules. I was attracted to the remark of Justice Allsop this morning commenting on the teaching of law as a formal, structured system: ‘few things are more dangerous to civil society’.

In the spirit of Ernst Freund [Nussbaum], then, *our* country, too, ‘needs lawyers who can think broadly about social issues’ and *our* lawyers, too, need ‘excellent technical legal instruction and *also* the input of [at least, I would say] social science and political philosophy’.

My pitch today is particularly for critical theory. My modest proposal is that a law graduate needs to know about critical theory in law as much as – or dare I say, more than – they need to know about judicial warnings, comment and directions.

Although critical theory is not given the privileged status of prescribed *content* of a law degree, I do not mean to add it on to a degree as a topic in the elective margins. Rather, critical theory can inform *how* we teach the prescribed content, bringing critical perspectives to bear on the subject matter.

It might be said that the currently prescribed content does not prescribe *method*, and so does not preclude a critical approach. Demonstrably, however, that is the effect of an ostensibly value-free, practice-focussed, positivist prescription of legal topics abstracted from social and historical context, the uncritical nature of which is compounded by the case law method.

To teach critical perspectives is to teach against the grain. If the first part of my paper is a call to the regulators to back off, this part is a call to the teachers to step up.

- Critical perspectives on *legal doctrine and process* can explain how law may be seen and appreciated differently, and may operate differentially, exposing and opening to challenge the many conceptions of justice in law, and the implicit values and biases in legal procedures.
- Critical perspectives help lawyers see the oppressive dimensions of *law and the legal system* – as well as its occasional liberating capacity – with greater clarity and insight. Marxism, feminism, critical race theory, critical disability theory, critical legal studies, are all ways of understanding how power operates in and through law; critical perspectives on law tell us how our clients see and experience law.
- Critical perspectives on *legal ethical rules* can identify the system-bound nature of the standard amoral conception of the lawyer/client relationship, opening possibilities for conceiving lawyers as moral agents, with an autonomous function in seeking justice from law.
- And critical perspectives are understood best, or maybe only, in the *social contexts* of law’s operation. This requires an appreciation of the many

ways that law is experienced by those for whom law is chronically unjust, and provides material with which to examine embedded conceptions of justice in law.

I offer these few, brief examples:

- in *Corporations Law*, a feminist critique examines a woman's liability, as a non-participating director, for the debts of her husband's business
- in *Contracts*, a Marxist critique exposes the inequality implicit in contractual principles of freedom to contract and informed consent.
- in both of *Criminal Law* and *Evidence*, race and cultural critiques enable us to understand how rules and procedures affect indigenous peoples and migrants very differently compared to the larger Australian population.
- In each of *Torts*, *Property* and *Trusts*, a disability critique will help us see the many assumptions, against interest, that legal rules make about ability, capacity, autonomy and dependence.

For as long as we are constrained by the prescribed topics, then we need a critical, contextual and analytical approach to our teaching. I don't agree with what I understood Alex Steel to say, that the research imperative is a reason for not teaching well. This approach to teaching is the necessary 'future for legal education', if we are to prepare law graduates for the wide variety of places they may take their legal knowledge, and seek to do justice.