

Educating Our Students For What? The Challenge of The Market

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If practice be the whole he [sic] is taught, practice must also be the whole he will ever know: if he be uninstructed in the elements and the first principles upon which the rule of practice is founded, the least variation from established precedents will totally distract and bewilder him: *ita est scripta est* is the utmost his knowledge will arrive at; he must never aspire to form, and seldom expect to comprehend, any arguments drawn *a priori*, from the spirit of the laws and the natural foundation of justice.¹

As Blackstone recognised, if students are taught only the 'is' of law without regard to the 'ought', they acquire no understanding of justice. Legal education in Australia as in other common law countries, is dominated by the profession. Despite the desire of law schools to be accepted as fully-fledged and autonomous constituents of the university, the profession exercises considerable influence over the curriculum by determining what subjects need to be taught to qualify for admission.² The admitting authorities specify technical expertise alone, not critical, reflexive or theoretical knowledge. My concern is that this deference to the profession takes insufficient cognisance of the changing nature of practice. I am particularly concerned about the contemporary domination of the market.

The Changing Nature of Legal Practice

The practice of law is subject to increasing pressure to retain its commitment to professionalism in the face of powerful business imperatives. Although the global financial crisis has sounded a clarion call about allowing the market to have free rein in respect the way corporations conduct themselves, the dominance of the market is irrevocably changing the practice of law.

Neoliberal political values, which have become the norm everywhere, privilege private good and promotion of the self over collective good and public service. The focus is on the maximisation of profits and economic rationality, values that run counter to the ethics of professional practice and public service. While I do not wish to appear overly nostalgic for a past age, these developments present challenges for law schools. Recent developments in Australia highlight the urgency of the challenge.

¹ Sir William Blackstone, *The Sovereignty of the Law*, selections from Blackstone's *Commentaries*, ed. and with an introd. by Gareth H Jones, Macmillan, London, 1973, p 22.

² The eleven subjects are Criminal law and Procedure; Torts; Contracts; Property - Real (including Torrens System Land) and Personal; Equity (law) (including Trusts); Administrative law; Federal and State Constitutional law; Civil Procedure; Evidence; Professional Conduct (including basic trust accounting); Company law.

In the 1970s, the phenomenon of the mega-firm emerged. Mergers were first of all confined to the one city, but then extended to other States and other countries. The aims of amalgamation were clearly not directed to service so much as profits, particularly the cutting of overhead and infrastructural costs.

Some of these large firms now have hundreds of associate lawyers, many of whom are vying to become partners and share in the profits in an increasingly managerialist environment. Bureaucratisation and hierarchisation have meant that the rewards of an equity partnership are available to fewer lawyers. Hence, competition policy has become the *raison d'être* of law firm life, so far as both individual lawyers and the law firms themselves are concerned.

However, the mega-firm is not the end of the story. The 21st century has seen a ratcheting up of the imperative in favour of the pursuit of profits with two significant developments in Australia. First, in 2001, law firms in New South Wales were permitted to be incorporated, a development that was followed by other jurisdictions. Secondly, in 2007, Slater and Gordon became the first firm to be listed on the stock exchange.

While it is undoubtedly the case that a law partnership has always had a business dimension, this seemed to coexist equably with service, at least before billable hours and bureaucratisation became the norm. Incorporation and listing on the stock exchange are not about service but are unequivocally about profit-making. The corporate law firms, that is, those that act for large corporations and multinationals, as well as being themselves corporatised, always have one eye to how to hold onto their valuable clients, who have become increasingly fickle and demanding. If the law firm declines to do their bidding, even if ethically questionable, the corporate client will go elsewhere or resort to in-house counsel. The shredding of records by one large Australian law firm, Clayton Utz, in the course of tobacco litigation illustrates the point.³

The significance for law firms of what it means to work in the shadow of large corporations cannot be gainsaid. The impact on law firms of the substantial and sometimes obscene salaries paid to CEOs has not received a great deal of attention. However, if corporate lawyers are busily effecting takeovers, mergers and international contracts that are helping to generate huge profits for their clients, the lawyers begin to feel resentful and believe that they too should benefit financially. The effect is to ratchet up the emphasis on profits, time sheets, adherence to a long-hours culture, and so on.

How can students be prepared for withstanding the pressure of this competitive corporatised culture in which lawyers now speak of themselves as 'businessmen'?⁴

Students and Legal Education

The values of the market have also impacted directly on law students as a result of policy changes in the government funding of universities. As a direct result of the imperative to privatise public goods, there was a shift towards the idea of education as a private good, for

³ *McCabe v British American Tobacco Australia Services Ltd* [2002] VSC 72 (unreported).

⁴ Margaret Thornton & Joanne Bagust, 'The Gender Trap: Flexible Work in Corporate Legal Practice' (2007) 45(4) *Osgoode Hall Law Journal* 773, 804.

which users pay (higher education was free in Australia from 1973 until 1988). Drawing on public choice theory that law graduates would gravitate to well paid corporate law practice, funding for the discipline of law has been drastically cut. The amount contributed by government for the discipline of law is now around 15 per cent of the estimated per capita cost of legal education. Hence, under a user-pays model, Australian students, like those in North America, are accumulating substantial debts and feeling the pressure to embark upon well paying jobs as soon as possible. The status of the corporate law firms together with the high salaries they pay makes them an attractive destination in accordance with the tacit government policy. The user-pays model of higher education results in a turning away from public interest law practice.

Furthermore, this new environment encourages students to lobby for changes to the curriculum. Students want more commercial law and practice-oriented subjects, which they believe will enhance their competitiveness in the labour market. The domination of the legal labour market and the legal culture by the corporate law firms, together with student demand, makes resistance difficult. As a result, there has been a resiling from critical and reflective subjects in favour of applied knowledge.⁵ In a context where credentialism and the desire to graduate in minimum time is viewed as all important, students have become increasingly impatient with ethical reflection. Some law schools have responded to the market pressure by opting to specialise in commercial and business law, providing further evidence of the deference towards the corporate law firms. The focus tends to be on technocratic knowledge, rather than interrogating the ethics at the heart of corporate practice.

Conclusion: An Ethical Dilemma

At every turn, we see the promotion of the power of corporate law by multiple actors in multiple sites – the state, the law schools, students and the profession itself.

What can law schools do to minimise the problems posed by corporatisation? It is acknowledged that there is an increasing focus on ethical and the prudential legal practice as the market seeps into the soul of society. In addition to specialised subjects, ethics may be spread across the entire curriculum. Research into ethics is a burgeoning field; it is no longer seen to be merely ancillary to clinical programmes. Centres devoted to the study of ethics have also emerged and Chairs in ethics have been established.⁶

But can this ad hoc, uncoordinated and individualist approach really address what has to be recognised as a systemic problem? While it is acknowledged that we all must do what we can and a few individual students may heed our words, the central role of the market within legal practice is unlikely to be displaced. For real change to occur, it is for the legal profession itself to put its own house in order; law schools cannot do it for them.

⁵ Margaret Thornton, 'The Demise of Diversity in Legal Education: Globalisation and the New Knowledge Economy' (2001) 8(1) *International J Legal Profession* 37; Margaret Thornton, 'The Law School, the Market and the New Knowledge Economy' (2007) 17(1&2) *Legal Education Review* 1-26
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1135989.

⁶ Eg, Kim Economides is Professor of Legal Ethics at the University of Ethics, UK.