

Theme: Knowledge, Skills and Values in Legal Education

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The changing face of knowledge skills and values in Australian legal education

There has been considerable change in legal education in Australia over the last 20 years. There has been a large increase in education providers, a huge growth in student numbers, and importantly, there are now far more law students than can hope to practice law. As a result, there has been considerable thought given to the object of law degrees, and in particular how to balance knowledge, skills and values in curriculum design. Currently Australian law degrees are content driven, but there has been a recent change in focus to the development of skills and values. This paper reflects on the objects of legal education, provides an overview of the legal education debate in Australia and comments on the current attempt to create threshold learning outcomes in relation to legal skills and values.

The objects of legal education depend on one's view of the place of education, and University education, in society. Hannah Arendt's reflection on education, written in response to what she viewed as a crisis in education, is a useful starting point:¹

Education is the point at which we decide whether we love the world enough to assume responsibility for it and by the same token save it from that ruin which, except for renewal, except for the coming of the new and young, would be inevitable. And education, too, is where we decide whether we love our children enough not to expel them from our world 'and leave them to their own devices, not to strike from their hands their chance of undertaking something new, something foreseen by no one, but to prepare them in advance for the task of renewing a common world.

Arendt's description of education as 'the renewal of our common world' connects our traditions to our aspirations. But neither our traditions nor our aspirations are a given. They are shaped by our education. There is, then, a profound ethical responsibility in education - to participate in the shaping of students' understanding of the past and their responses to the future. This requires an education that is concerned with the development of students as citizens, treating students with respect; teaching in a way that facilitates reflective, critical learning, and an education that equips students to continue the learning process after they leave University.

Universities fulfil many functions under the general ideal of being centres for learning.² They train professionals and educate citizens who in various guises (as political representatives, administrators constitute the public intellectuals in society. They are, separately, centres for scholarship and research.³ The modern Australian University aspires to fulfil all these functions. "The mission statement of any Australian University is likely to mix elements of Newman's focus on

¹ Hannah Arendt, 1977: 196

² Newman, *The Idea of the University* (1960) at p78. The ideal of the University has had many subsequent formulations. For example, Edward Shils, *The Academic Ethic* (1983) described the task of Universities to be "the methodological discovery and teaching of truths about serious and important things"; Barnett, *The Idea of Higher Education* (1990), p4: "Universities are about the development of elaborate conceptual structures, or theories.

³ See generally, Twining, *Blackstone's Tower*

teaching and intellectual formation, Humboldt's focus on advancing knowledge, the elite technical training of the French *grandes ecoles*, and the new language of community engagement."⁴

The first and second functions of training professionals and educating citizens focus on teaching, with the second having a broader philosophical orientation and being more consciously aware of the public benefit of education as contributing to the maintenance of society and the shaping of its values.⁵ Following the Humboldt teaching and research model,⁶ Australian Universities have tied the third function of research and scholarship to teaching. This has had the advantage of keeping the best scholars in the classroom, but as Glyn Davis has pointed out, these scholars are not necessarily the best teachers.⁷

Consistent with the mission of the Universities in which they are located, law schools fulfil all three functions of training, educating and engaging in scholarship and research. There has only been one significant challenge to this template for law schools in Australia. In the 1980s, academics at Macquarie University engaged in a vigorous debate about whether law schools should define themselves as a purely academic discipline engaged in the theoretical critique of the concept of law, with no necessary role in training lawyers.⁸

In 1987, a discipline assessment for the Commonwealth Tertiary Education Commission (the Pearce Report) strongly supported a scholarly approach to teaching law at the (then) 12 law schools in Australia. It accepted that legal education was highly doctrinal in content, but recommended a focus on the 'theoretical and critical dimensions of legal education', as well as a focus on the teaching of legal skills.⁹ McInnis and Marginson credit the Pearce report with leading to a significant review of law curricula.¹⁰ However, contrary to another recommendation in the Pearce Report, from 1989 to the present, the number of law schools has increased from 12 to 30, and the intake of students in existing schools has also risen sharply. This is reflective of changes in the University environment in Australia more generally, though the change in law has been particularly dramatic.¹¹ These changes have placed competing pressures on law degrees. There is a pressure to broaden law degrees because a large number of graduates do not end up practising law. And there is a countervailing pressure from the profession and from students to ensure that graduates have the requisite legal training to practise in an increasingly competitive job market.

In 1994, the Law Council of Australia created a 'Blueprint for the Structure of the Legal Profession'. The Blueprint included a list of 10 areas of law that needed to be studied for admission. The Council proposed that these subjects be taught "in the context of an overall course of study which provides: a well rounded education in the law; a level of scholarship usually associated with a course leading to an undergraduate degree; a good grounding in the analytical, communication and other skills required of a lawyer in a modern society; and which placed the theory in a practical context".¹² The Law Admissions Consultative Committee, headed by Justice Priestley, expanded the

⁴ Glyn Davis, "The Rising Phoenix of Competition" (2006) 11 *Griffith Review* 13, 19.

⁵ This has been recognised recently by the Vice Chancellor of Macquarie University, Stephen Schwartz: "Universities train the intellectual personnel needed to keep society running. But there is an underlying moral purpose outside of this which includes 'assessing our values and testing our knowledge.'", in "Higher Education and the Public Interest" *The Financial Review*, p10 (12/05/2006).

⁶ Add reference ...

⁷ Glyn Davis, "The Rising Phoenix of Competition" (2006) 11 *Griffith Review* 13.

⁸ For a summary of these debates, see volume 5 of the *Australian Journal of Law and Society* (1988-89) which is devoted to the question of critical legal education, and includes key documents from debates among law school staff at Macquarie.

⁹ Pearce, Campbell and Harding, *Australian Law Schools: A Discipline assessment for the Commonwealth Tertiary Education Commission*, Vol 1 (1987).

¹⁰ *Australian Law Schools After the 1987 Pearce Report* (1994).

¹¹ See Generally, Glyn Davis at 21. Since the 1950s, the proportion of the community with a University education has increased 23 fold. In 1950, there were 30,000 students in Universities in Australia. In 2006, there were over 940,000 including 228,000 international students. In 1988, the Labor Minister for Education, John Dawkins consolidated 63 Higher education providers into 36 Universities. In doing so, the distinction between technical training and traditional University education disappeared at a formal level.

¹² Law Council of Australia, *Blueprint for the Structure of the Legal Profession: A National Market for Legal Services* (1994), 3.

list to 11 core subject areas, and these 11 subject areas remain the core content components of all Australian law degrees.

In contrast to the heady debates of the 1980s, in some law schools at least, there has been little resistance from the academy to this prescription from the profession. The lack of resistance may simply be because academics have been able to teach more or less how they like within the general content requirements of the Priestley 11. However, it may also be that with decreased funding, a higher proportion of casual staff, increased staff-student ratios, and an expectation that academics will self-fund more and more of their teaching and research activities, the focus on legal education has turned away from deeper philosophical questions of what is the mission of a law degree, and how it fits within the University and Society, to more prosaic and pragmatic questions of how to competently teach a standard, relatively uniform degree.

Despite this fairly gloomy picture of the law school environment, the importance of the objects of legal education remains as important as ever. In 2000, in its report *Managing Justice*, the Australian Law Reform Commission emphasised the “critical role” education and training played in shaping the “legal culture”.¹³ This, of course, begs the question what legal culture law schools want to participate in shaping. As education providers, law schools are not directly involved in the legal culture, but hope to equip those who will participate in the culture with the knowledge, ideas and values necessary to make their contribution a meaningful one.

In the current law school environment, there have been various formulations of the objects of legal education, ranging from a focus on legal skills¹⁴ to a focus on a broader range of analytical skills associated with a liberal education. In 2000, a special edition of the *International Journal of the Legal Profession* was devoted to ‘theory in legal education’. The central theme of the collection was that “theory ... should not be seen as separate from substantive law and legal education; and that theory is intrinsic to, and constitutive of, legal education and scholarship.”¹⁵ Many legal educationalists in Australia have also called for a broad set of objects for law degrees including the teaching of skills, doctrine and theory in an integrated program.¹⁶ The discussions generally assume that law degrees are the training ground for legal practitioners and this frames how the scholarly aspects of a legal education are incorporated into the degrees.¹⁷

A legal education should equip students with a foundation of legal knowledge that distinguishes them from students educated in other academic disciplines. This means law degrees will include a detailed knowledge of the legal institutions of the State, the origins of the common law and Australian legal systems, the political processes that generate laws, the systems of dispute resolution, and knowledge of key areas of legal doctrine. The prescriptive content need not constrain the scholarly mission of a legal education. In fact, the certainty of the knowledge base in a law degree relieves law academics of the need to determine *what* to teach, and frees them to focus on the more important issue of *how* to teach it.

A legal education should also produce graduates with an understanding of the place of law in society and with an ethical framework which “prepares the graduate for intelligent participation in the politico-legal life of the community”.¹⁸ For this, graduates should have the capacity to engage in

¹³ ALRC, *Managing Justice: A Review of the Federal Civil Justice System* (2000), [2.3].

¹⁴ See, eg, Guthrie and Fernandez (2004) 29 *Alternative Law Journal* 276, 279: The central aim of law degrees is ‘the education and training of legal practitioners, recognising that such training has utility for a range of other occupations. With this in mind, the distinguishing attribute of a legal education should be the ‘development of practical legal judgment and skills’.

¹⁵ Avrom Sherr and David Sugarman, “Theory in Legal Education” (2000) 7 *International Journal of the Legal Profession* 165, 167.

¹⁶ See, eg, Mary Keyes and Richard Johnstone, *Changing Legal Education: Rhetoric, Reality and Prospects for the Future* (2004) Sydney Law Review 38; Guthrie and Fernandez (2004) 29 *Alternative Law Journal* 276;

¹⁷ See, eg, ALRC, *Managing Justice* (2000); etc.

¹⁸ Brownsword, “Law schools for lawyers, citizens and people in F Cownie (ed) *The Law School: Global Issues, Local Questions* (1999) at 29.

debates arising in and around the practice of law. They need a global perspective and a deep understanding of the key ethical questions facing society. With these considerations in mind, Robert Unger has suggested that law school education should be “a sustained conversation about our [socio-economic and political] arrangements”.¹⁹

In a legal education, students should learn not only how to think like a lawyer, but also how to think in different frames outside of the law so that they have “the capacity to form their own independent judgements on ... matters”.²⁰ There have been numerous calls for, and formulations of, the place of ‘theory’ in law degrees to satisfy this capacity for independent thought.²¹ A legal education should, therefore, consider law as a discipline, a way of thinking, and a theoretical and social construct. There is great value, Ian Duncanson has noted, in ‘re-examining the discipline’s truths from different sites of knowing’.²²

Finally, legal education offered by Universities should teach students how to engage in self-directed learning. This requires a solid grounding in the skills of self-directed learning, such as reasoning and communication, research and intellectual discipline. A focus on developing these skills relieves the pressure to cover a particular canon of doctrine in the course of the degree, as graduates will have the capacity to learn on the job. It has long been recognised that legal doctrine is constantly changing and graduate lawyers need the ability to *find* the answers to legal questions, and not simply *remember* them.

In 2010, the Australian Learning and Teaching Council funded a project to establish Academic standards in all undergraduate degrees in Australia. Two law discipline scholars, Professors Sally Kift and Mark Israel have consulted widely with law schools in Australia and have developed national accreditation standards for law degrees which mirror many of the above prescriptions. These have not yet been adopted as the accreditation criteria for law degrees in Australia. However, the focus on skills and a broader range of educational outcomes is likely to be a standard requirement of Australian law degrees in the next few years.

¹⁹ Robert Unger, “Legal Analysis as Institutional Imagination” (1996) 59 *Modern Law Review* 1, 8 in Roger Brownsword, “Law Schools for Lawyers, Citizens and People in Fiona Cownie (ed) *The Law School, Global Issues, Local Questions* (1999).

²⁰ Cownie, “The importance of theory” (2000) 7 *International Journal of the Legal Profession* 225, 227.

²¹ See eg, Charles Sampford and David Wood, “The Place of Legal Theory in the Law School” (1987) 11:41 *Bulletin of the Australian Society of Legal Philosophy* 98; Avrom Sherr and David Sugarman, “Theory in Legal Education” (2000) 7 *International Journal of the Legal Profession* 165; Fiona Cownie, “The Importance of theory in law teaching” (2000) 7 *International Journal of the Legal Profession* 225.

²² Ian Duncanson, ‘Interdisciplinarity in Law’ (1996) 5 *Griffith Law Review* 77, 81.