2373

# Community Engagement in Australian Legal Education: Some Contemporary Issues

By John Corker et al

FOREWORD
June 2009

The Hon. Michael Kirby AC CMG

# COMMUNITY ENGAGEMENT IN AUSTRALIAN LEGAL EDUCATION: SOME CONTEMPORARY ISSUES

## BY JOHN CORKER ET. AL.

## FOREWORD

## THE HON. MICHAEL KIRBY AC CMG*

### THE UNMET NEEDS FOR LEGAL SERVICES

For some years, a group of legal academics in Australia has been trying to persuade the Council of Australian Law Deans to adopt a formal policy on involving all law students in this country, as part of legal training, in pro bono programs of clinical legal education.

The aim would be, by 2011, to have all 31 of Australia's law schools making available to students at least one clinical education or pro bono program to help them develop professionalism and to understand the responsibility of lawyers to the broader community. The law is a peculiar occupation. It requires the faithful devotion of qualified practitioners to the interests of their clients, both in court cases and in out of court advising. However, such devotion has to be afforded in a context in which the law serves all members of the community. Thus lawyers, at least in Australia, cannot simply be the "mouthpiece" of the client. They always owe obligations to the wider community. They cannot deliberately deceive a court or knowingly assist a client to breach the law.

In the past two decades, a wider question has arisen in Australia. It is: how far do lawyers, in their duty to society, have a responsibility to engage with the wider community and particularly to assist low-income, disadvantaged, vulnerable and marginalised members of society? Everyone knows that, in all societies, such people have great difficulty in securing real access to the law. The courts may proclaim that everyone is equal before them; that they dispense justice equally to all;

---

*Formerly Justice of the High Court of Australia (1996-2009).

and that the law applies to the great as well as to the lowly. However, the plain fact is that most ordinary people in Australia cannot afford a day in court. When they go there, it is usually reluctantly and out of the sheerest necessity. Often because they have received a summons. Likewise, getting involved in a legal dispute, even outside the courts, is a prohibitively expensive business. This is because the law is a labour-intensive profession. Devoting to a problem the time of highly trained professionals inevitably costs the client a lot. And, as repeated studies have shown, the law as it impacts poorer members of the community is not always the same as the law encountered by the middle class and wealthy. There are particular areas of the law that fall disproportionately on financially disadvantaged members of society: criminal law, police offences, social security law, family law, children's law, bankruptcy and the like.

The common law system that we follow in Australia has many advantages. But it is the most labour-intensive legal system in the world. Dr. Wolfgang Zeidler, one time President of the German Constitutional Court, on a visit here for the Australian Legal Convention, acknowledged that the common law system was the Rolls Royce product of legal professionalism. He declared that, in Germany, they only had a Volkswagen product. But then, he asked, 'How many citizens can afford a Rolls Royce? How many can afford a Volkswagen?'.

Because many lawyers never venture into the areas of the law of primary importance to poorer citizens and because those that do are usually too expensive for the pocket of those citizens when they are in need, there is a huge gap in the provision of legal services in a community such as Australia. To some extent, the High Court of Australia addressed this problem in its decision in *Dietrich v. The Queen*[1]. Effectively, that decision meant that indigent persons, accused of serious criminal offences, must be provided by the state with competent legal representation if not otherwise available, or else the court may stay the prosecution. That holding addressed a particular problem highlighted by earlier decisions. However, it did so at a price of diverting funds for legal aid from civil proceedings generally into criminal trials. So far, the *Dietrich* principle has not been extended by the courts to appellate

[1] (1992) 177 CLR 292.

review. So it is highly particular and limited in its operation. The fundamental problem of providing affordable access to legal advice, especially to representation before courts and tribunals, remains unsolved. We are, as one writer has put it "treading water".

It is into this scene that successive governments in Australia, since the 1990s, have sought to encourage the advance of pro bono legal assistance (at one level) and the establishment of specialised Aboriginal, prisoner, refugee and other local community justice centres. The proposal for greater clinical legal education in Australian law schools is that students, as part of their training, should gain practical experience in such activities. Doing so, it is suggested, would be good for those who suffer from the unmet need for legal services. But it would also be good for the students, in encouraging legal analysis of real-life problems; in perceiving the impact of the law on marginalised individuals and communities; and in promoting an understanding of the defects in the law and a commitment to life-long involvement in law reform and pro bono activities.

The introduction of clinical programs in law schools has been an important modern movement, particularly in Canada and the United States. Already in Australia, by 2004, 16 of the university law schools had organised, or facilitated, pro bono or volunteering opportunities for students. Twenty three of the universities had established some type of clinical program, many in conjunction with the communities close to the university. In the United States, the movement for such activities in law schools gathered pace in the early years of the 21st century. At first, the American Bar Association standards for 'approved' law schools simply stated a norm which such schools were encouraged to observe. However, in February 2005, this standard changed in the United States from being an aspirational guideline to a mandatory requirement for every law school that sought ABA accreditation. Now, by standard 302(b)(ii), such schools must 'offer substantial opportunities for ... student participation in pro bono activities'.

Notwithstanding these precedents overseas in societies sharing many common features with the legal system of Australia, the Council of Australian Law Deans has not yet embraced a similar standard for Australia. A draft policy considered in March

2008 had recommended that by 2010, all Australian law schools should have a clinical or pro bono program along the lines of the North American models. However, for a variety of reasons, the Australian Law Deans did not adopt the recommended policy. The question is presented why this is so and whether it should change.

## THE ARGUMENTS AGAINST PRO BONO

It is not common to see collected the arguments that members of the legal community, and indeed the general community, deploy in resisting the proposals for core training in pro bono lawyering. However, various explanations can be collected for such reluctance, that sometimes borders on hostility. Not all of them are meritless or irrational. Several of them have underlying merits that have to be understood if the concept of clinical experience and pro bono education is to find a secure foothold in the core curricula of Australian law schools:

- First, there are critics who acknowledge the serious unmet needs for legal services and who regard those needs as a disgrace to a society pretending to adherence to the rule of law. From their viewpoint, imposing obligations on unqualified and not fully trained lawyers to fill the gap, which a comparatively wealthy society refuses or fails to meet, is the wrong way to go. It is simply another way of letting governments off the hook for a failure to provide much more substantial legal aid funding, affording access to fully trained and competent lawyers, rather than to students with a necessarily immature appreciation both of the law and of proper modes of legal reasoning.
- The critics regard the deployment of law students, often now without the benefit of practical legal training in the form of articles of clerkship (that were formerly available) to undertake one-on-one legal advising as dangerous both to the client and to the student concerned. Unless intensive supervision were provided, such advising would risk inappropriate, incomplete or misleading assistance that would often need significant and expensive steps to correct. According to this view, the poor and the vulnerable deserve better than such

second-class assistance, however much it might be enjoyed by the novice lawyers and salve the conscience of a neglectful society.

- In contemporary circumstances of tight budgets controlling law schools, and pressure to increase the cohort of full-fee paying students, the introduction of clinical advising and pro bono education would impose potential resource implications on the law schools concerned. Especially so in smaller and poorer resourced schools, this would deflect them from the proper expenditure of their scarce resources upon basic legal education, vital to the preparation of lawyers for a life in the profession. This consideration has frequently been voiced in the United Kingdom in resistance to the North American model.
- The introduction of clinical experience and pro bono education would also risk displacing other subjects from core curricula of law schools where, already, areas of study long regarded as essential to the preparation of a lawyer (such as legal history[2] and jurisprudence or legal values) have been dropped because of the demands of other allegedly more 'contemporary' and 'relevant' subjects. Given the very great expansion of statutory law in recent times; the growing importance of subjects such as statutory interpretation; the demands for courses in new 'practical' topics; and student resistance to subjects long considered essential to the preparation of a lawyer, the introduction of a time-intensive deployment of students in clinical activities and pro bono education could not be achieved without still further erosion of the instruction in core topics, which should be resisted.
- A special danger of clinical activity and pro bono education at an early phase would be the risk that students would be intensively instructed in particular areas of the law at the cost of their acquisition, and understanding, of other generally operating subjects of life-long importance. Advising, particularly by immature advisers, would inevitably be time-intensive. It could therefore distract students from preparation of their minds to absorb a vast amount of information on the basic structure, history, purposes, substance and application of the law.

[2] M.D. Kirby, "Is Legal History Ancient History?" (2009) 83 ALJ 31.

- Whilst immature clinical experience might have immediate attractions to the novice, keen to acquire practical skills, this should be kept under firm control whilst the student is acquiring the basic disciplines of the legal profession. Students will be soon enough exposed to 'grown up' legal practice where they have the legal responsibility and intellectual background to engage in advice to citizens. The deployment of immature students to give such advice will risk damage to the already fragile reputation of the legal profession. If students wish to take part in community organisations, there are those that will admit them and sometimes put them to use as volunteers, such as Amnesty International, the Council for Civil Liberties, and the legal centres themselves.
- In fact, the North American model of clinical experience and pro bono education is viewed in some Australian quarters as an instance of the volunteerism that is common in North America because of concepts lying deep in the culture of the United States in particular. Those concepts tend to discourage government involvement and to promote private initiatives. They are reflected today in Australia in the moves to privatise many activities that were formerly performed by government. These include prisons and other previously public corporations. In Australasia, and to some extent in Britain, the contrary philosophy is deep-seated in society, namely the community's own responsibility to protect the weak, the poor and vulnerable. Those with a different culture look with scepticism and caution upon the attempts to import the North American culture into a community such as Australia.
- In any attempt to change settled ways, the legal profession always has to overcome inertia. As an occupation that often tends to attract persons of a conservative disposition, it is unsurprising that there should be resistance to the importation of the notion of clinical activities by students and teaching pro bono lawyering. Such lawyering is often attached to the expanded facility for private sector performance of government advising, as a condition for the award of government contracts. The deployment of pro bono lawyers in large legal firms, or their rotation as a reward with interesting work, can only be a short-term palliative to the unattractive features of much modern legal practice.

I have tried to collect some of the reasons for the resistance to the attempt to impose a universal requirement of student involvement in clinical activities for poor; vulnerable and disadvantaged groups. Not all of the opponents would share all of these opinions. Some would not hold to the particular reasons that I have listed. However, if progress is to be made in Australia, we will need to address most of the foregoing.

## REASON FOR SUPPORT FOR PRO BONO

Against these reasons for doubt, hesitation and hostility to the proposal advanced to the Australian Law Deans Council, several reasons can be advanced as to why Australian law courses should now accept a universal requirement, as in the United States, for student participation in pro bono activities and involvement in early clinical education for poorer citizens with unmet needs for legal services:

- That there are substantial unmet needs is indisputable. They were powerfully drawn to notice during the Royal Commission into Poverty in Australia by the report of Mr. (later Justice) Ronald Sackville. If the practicalities are that those needs will not be met from the Australian public purse, the proper deployment of law students to fill part of the gap, whilst securing skills necessary for their professional lives, should not be discouraged.
- The great advantage of clinical experience is that it teaches those involved the skills of legal analysis of a real legal issue and the application of the legal categories to resolve the problem in hand. This requires a different mode of thinking than simply learning large masses of information about the content of the law. The practical skills of a lawyer involve finding the applicable law and applying it to a novel fact situation. The sooner that skill is attempted, as part of a formal legal education, the better.
- Exposure of a trainee lawyer to the poor, weak and vulnerable in society will sometimes be a bracing experience. However, it will teach the would-be professional the variety of problems that are presented by the law. Moreover, it will engage some of the brightest young people in the land in helping fellow citizens in a difficult personal situation. The school certificate entry

requirements for law schools are amongst the highest applicable. Therefore, whilst novitiate lawyers are lacking in experience, they have, on average, very considerable intellectual ability. At the very least, they can assist those in need with basic tasks such as filling in forms, applying for benefits, lodging applications and protecting basic rights.

- Several leading cases in the courts demonstrate the objective value of such pro bono assistance and clinical experience. The important case of *Roach v. Australian Electoral Commission*[3] upheld the right of many prisoners in Australian gaols to vote in the 2007 federal election. This was a pro bono case brought substantially by the Public Interest Legal Clearing House (PILCH) in Victoria with the assistance of a large legal firm and pro bono members of the Victorian Bar. There are many such cases where right was ultimately secured by pro bono assistance. The case of *Mallard v. The Queen*[4] is an instance of a person imprisoned wrongly for a murder he did not commit. The objective value of such pro bono lawyering is impossible to contest. In the past, it depended largely on the willingness of individual practitioners offering their services free of charge. In my youth, I did so because of my involvement with the New South Wales Council for Civil Liberties. But now, there is a greater impetus for the provision of such assistance through the spread of pro bono lawyering. It should not be seen as the intrusion of alien notions of volunteerism. On the contrary, voluntary work by the legal profession has always been a feature of legal practice in Australia.
- Involving young law students in the practical experience of assisting those in need of legal help is an inherently virtuous activity. It may sometimes, at least, demonstrate the essential nobility of the law and its commitment to equality, even if this is not always delivered. The experience may also, as it did in my own case, inculcate a commitment to law reform and ongoing service to the disadvantaged in society. If law students only meet clients in large offices that charge standard fees, they may never get a taste of the variety of legal problems that affect their fellow citizens in the wider

[3] (2007) 233 CLR 162.

[4] (2005) 224 CLR 125.

community. Anything that can improve such an exposure should be welcomed.

- Whereas in the past, legal professional organisations, and leaders of the legal profession, were commonly suspicious of such activities, in recent years there has been a distinct shift in Australian professional support. The hostility is no longer universal. The recognition of the need to improve the availability of skilled legal services in the community is widespread. We may be "treading water". Many systemic problems remain to be solved. But in the meantime, the involvement of law students, as part of their training in clinical experience, can be a rewarding experience for them and a beneficial opportunity otherwise missing for a person in need of basic advice.

## AN ADAPTED MODEL

It is for each Australian law school, lawyer and law student to reflect upon the foregoing issues for they address matters of great importance for the future of the law, of legal practice and of law reform. The authors of this book have made a powerful case for the introduction of universal clinical experience and of pro bono education in Australian law schools.

However, the critics have some merit in at least some of the reasons they advance to resist this change. As is usually the case, the future will probably belong to a gradual evolution of this idea and an attempted accommodation of the criticisms in the model that finally emerges. Certainly, the Australian Law Deans, and their law schools, can learn from their counterparts overseas. And in this respect, much experience appears to be available in Canada and the United States of America. The egalitarian ethos and 'can do' outlook in those two societies suggest that it is from them that we in Australia have most to learn.

MICHAEL KIRBY

Sydney
1 June 2009.

*******