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THE FUTURE OF AUSTRALIAN LEGAL EDUCATION: SOME CLOSING THOUGHTS

The Hon. Michael Kirby AC CMG FAAL

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LEGAL EDUCATION: RECURRING DILEMMAS

These closing observations must start with thanks and praise for the organisers, sponsors and participants in this conference on the future of legal education in Australia.

Like *Romulus* and *Remus*, to whom mythology attributed the foundation of Rome, the Honourable Kevin Lindgren AM QC, president of the Australian Academy of Law (AAL) and Justice François Kunc, general editor of the *Australian Law Journal* (ALJ), opened the conference full of ambition. A Gadigal elder reminded us about the laws and traditions of the indigenous peoples of Australia. They long preceded the settlers, who brought with them the common law of England.

Professor Martha Nussbaum, the noted philosopher from the famous Law School of the University of Chicago, launched us

[*] Derived from remarks made in the closing session of the conference on 13 August 2017.

[**] Justice of the High Court of Australia (1996-2009). Fellow of the Australian Academy of Law (2009). Editor-in-Chief, *The Laws of Australia* (2009 -).

immediately into a major theme of the conference. She insisted that lawyers in Australia, as in the United States of America, needed a broad social education in order to fulfil the increasingly complex and demanding tasks presented by the varied responsibilities that the modern lawyer typically assumes.[1] And Professor Sandy Clark (University of Melbourne) described eagerly the controversies that have surrounded admission to the practice of law in Australia, in a rapidly changing society.[2]

The AAL is a comparatively new contributor to debates about legal education. However, the ALJ has been participating in those debates virtually from the start of its publication as the national law journal of record. I could find nothing in the first volume, in 1927, that referred directly to legal education and its controversies. Instead, the pages were filled with stories of the Privy Council and the House of Lords. In effect, the judges of those famous courts were still, for the most part, the final judges of Australia. Their reasoning and their values maintained their stamp on the judiciary and legal profession of this country. They exemplified the critical notions of fidelity, diligence, industry and incorruptibility – the hallmarks of the judiciary and legal profession of England. They did so whilst pursuing legal values that were sometimes more conservative

[1] Martha C. Nussbaum, "Why Lawyers need a Broad Social Education" (2017) 91 ALJ 907.
[2] Sandford D. Clark, "Regulating Admission: Are We There Yet?" (2017) 91 ALJ 907.

and self-satisfied than the needs of a new continental nation like Australia might have suggested.

The first article I could find in the ALJ specifically addressed to legal education appeared in Volume 3, in 1929.[3] It recounted the plans of the newest law school of the nation, at the University of Queensland, to provide a comprehensive curriculum beyond that formerly offered by lectures provided by practitioners at the Supreme Court of Queensland.

Almost a decade later, a further reflection on legal education was provided by Professor R. Yorke Hedges on the progress that had been made in Queensland.[4] Although English by birth, he was plain speaking about his reservations concerning the "conservative elements [which] are all-powerful" in legal education in England.[5] He hoped that the independent law schools of Australia would strike out on their own distinctive directions and copy instead the "impressive… methods" that were then being pioneered at the Harvard Law School in the United States.

In the United States, by 1938, law was increasingly being taught as a kind of science, by reference to a close scrutiny of

[3] "Legal Education in Queensland" (1929) 3 ALJ 70.
[4] R. Y. Hedges, "Legal Education" (1938) 11 ALJ 388.
[5] Ibid at 391.

the countless judicial decisions on the discipline.[6] Yet Professor Hedges cautioned that 40% of the entrants to the legal profession in the United States, although well-equipped from an academic point of view, had "no practical experience at the time of their admission".[7] Resolving this apparent conflict between the scholastic understanding and professional performance of law has remained an ongoing topic of debate in legal education in Australia. This conference has been no different.

Over the 90 year history of the ALJ, especially in the recurring legal conventions organised by the Law Council of Australia, important actors on the legal stage have come together to exchange criticisms, suggestions and occasional insults. Every now and again, responding to political pressures, governments have appointed inquiries to examine the suggested resistance, or inability, of Australian universities to respond to professional demands about the contents of an "acceptable" legal education.[8] More often than not, such inquiries treated the curricula of universities as sacrosanct, falling as they did within the realm of "academic freedom".[9] However, as time passed and as the number of universities offering degrees in law grew

[6] Id, 390.
[7] Id, 391.
[8] Such an inquiry was established in May 1974 by the Government of New South Wales. See appointment of NSW Committee of Inquiry into Legal Education and Qualifications of Practitioners (1974) 48 ALJ 227.
[9] Thus the terms of the reference of the NSW Committee stated that "it was not to have the power to consider the curricula of tertiary institutions providing courses in law".

to almost 40 in Australia, the need to rationalise the essential curriculum for admission to practice became the subject of economic, political and administrative demands and subsequently federal requirements, backed up by national reports;[10] new institutions;[11] and demands for continuing legal education following university graduation.[12]

There have been countless local and many national meetings and deliberations about the contents of legal education in Australia. However, the conference recorded in this volume has offered an important new attempt to give a voice to many of the stakeholders that regularly participate in the legal education debate. The AAL and ALJ have performed a great service by bringing this conference together, as has Thomson Reuters Australia, the publisher of the ALJ.

Both in plenary and breakout sessions the conference witnessed a wonderful variety of information, opinions and predictions for the future. No single participant, even one as conscientious as myself, could provide a truly comprehensive summation. The breakout sessions made it impossible to attend every eye-catching discussion. The most that can now be offered are a few reminders of some of the important and

[10] Pearce Report (1985) 59 ALJ 437; 62 ALJ 32.
[11] Australian Legal Education Council (1978) 52 ALJ 117; National Advisory Council on Legal Education and Professional Admission to Practice (NAC)" (1997) 71 ALJ 95; Australian Legal Resources International (ALRI) (2000) 74 ALJ 9.
[12] (1980) 54 ALJ 575; (1985) 59 ALJ 437.

recurring ideas that this observer felt specially worthy of mention as the conference moved to its close.

ABIDING THINGS

Values and Broad Education: This conference has reminded us, once again, of what great law teachers of the past have been telling us for decades. Martha Nussbaum explained why a broad conception of legal education was essential because of the multifarious issues in society to which the law must now respond. To produce a special cohort in society that would fulfil successfully the tasks that belong to lawyers, it is essential that they should think critically about their discipline and about society.[13] Attempts to return law to a narrow, subservient, mechanical function must be resisted.

As I listened to Professor Nussbaum, explaining why this was so, I remembered an earlier teacher of mine, Professor Julius Stone. Fifty years earlier, he had repeatedly insisted on the same message. Because law was often about values and ethics, it needed practitioners who perceived the social problems and had the tools to resolve them accurately and, where possible, justly.

[13] Nussbaum, above n.1, 891.

These lessons needed to be taught to every new generation. They were true for Australia, as for the United States, England and everywhere else. Encouraging law degrees (including JD degrees) which combined prior engagement with a solid education in the liberal arts was necessary and proper. But it may have implications for the costs of legal education and for its practical availability to all those who seek it.[14] The recurring scrutiny of what a legal education was meant to provide, to the individual and for society, has run, one way or the other, through most of the papers presented at this conference.

Conceptualisation of issues: A connected theme addressed what legal education does best and what it encourages in its practitioners and pupils. I refer to questioning and criticising the contents of current legal rules. Without ignoring the sometimes irksome necessity to ensure that law students learn basic information about the rules and procedures of law and where they can discover those rules, it is critical that a university education in law should also promote questioning about the rules and procedures, measuring them constantly against ethical conceptions.

When I attended law school in the late 1950s, I was not encouraged to ask the question “why?” in relation to obviously

[14] Nussbaum, ibid, 900.

unjust and even unethical provisions in the then state of the law and the consequent curriculum for legal education:

* “Why did the Australian legal system not recognise indigenous native title?

* Why did a wife need to prove the domicile of her husband in order to establish jurisdiction to bring a proceeding for divorce? And why was divorce limited to narrowly defined grounds of matrimonial offences?

* Why did Australia’s immigration law adhere so faithfully and so long to the ‘White Australia Policy’, a form of Apartheid-lite?

* Why were gay people, like myself, oppressed (right up to the 1990s in Tasmania) by overreaching provisions of the criminal law?

Our teachers, apart sometimes from Julius Stone and his Department, did not themselves ask these questions. If a hapless law student had done so, he (and virtually all of us were male) would have been put firmly in his place: This was not the business of the law. Law had nothing special to justify engagement with such topics. These were questions for politics, philosophy or sociology; not for lawyers. Hopefully, we

have now learned from the errors of this approach to law. The law students of today, whilst learning the rules, must also exercise the duty of questioning. They must contribute throughout their lives to the continual process of law reform.[15]

It was in my work at the Australian Law Reform Commission (ALRC) that a fine Australian law teacher, Professor David St.L Kelly taught me the obligation to conceptualise: to see and analyse the myriad of instances of judicial decisions and statutory provisions and to derive their common themes. Viewing the immediately applicable rules of law in their context is a central obligation of a legal education. Lawyers who have learned to conceptualise do the job better.

History and its uses: A further crucial task of legal education, at least in a common law system, is instruction in the history that lies behind the classifications, judicial decisions and statutes of the law. Sadly, compulsory courses in legal history have largely been abandoned. This is doubtless an understandable punishment for the poor way in which generations of Australian law students were taught the intricacies of English legal history.[16] For all that, it is still often important to know the relevant English legal history and our own, in order to

[15] M.D. Kirby, "The Decline and Fall of Australia's Law Reform Institutions – and the Prospects of Revival" (2017) 91 ALJ 841.
[16] M.D. Kirby, "Is Legal History now Ancient History?" (2009) 83 ALJ 31.

understand the basic principles of the law as it operates in Australia.

In *Combet v The Commonwealth*[17], Justice McHugh and I (in separate dissent) attempted, without winning converts, to make this point when explaining the importance of the Australian constitutional provisions governing appropriation of the people's money, raised by taxation, for purposes approved by both Houses of the Federal Parliament. Alas, on that occasion, the Executive Government was granted yet another exception from securing clear parliamentary approval. A similar issue would arise again in relation to an appropriation of the people's money to conduct a plebiscite on legislation for same-sex marriages in Australia, despite the fact that one House of the Federal Parliament (the Senate) had twice rejected such an extra-constitutional procedure as discriminatory, unnecessary and undesirable.[18]

Where once legal history was a subject of compulsory study by law students, as a discrete topic, it has now largely dropped out of the curriculum of most Australian law schools. To this extent, a duty is imposed on those who teach particular topics

[17] *Combet v The Commonwealth* (2005) 224 CLR 494 at 554-556 [91]-[95] per McHugh J. (diss) and 605-617 [257]-[300] per Kirby J. (diss).
[18] Cf A. Twomey, "A Tale of Two Cases: *Wilki v The Commonwealth and Re* Canavan (2018) 92 ALJ 17 at 18-19. Wilkie *v The Commonwealth* (2017) 91 ALJR 1035. Broad general language of an Appropriation Act was held sufficient to authorise Executive expenditure in the face of the express, repeated rejection by the Senate of its legislative enactment.

of law to ensure that the background of judicial, statutory and constitutional history is understood, especially where it involves important lessons derived from an awareness about the struggle of the people of a nation against those who wish to rule them.

International law: Many contributors to this conference pointed to the important developments in international law, both public and private. In recent decades, these developments have come to influence profoundly the contents of the law that must now be taught to students. The *Charter* of the United Nations of 1945 and the *Universal Declaration of Human Rights* of 1948 marked a new era in which individuals have been increasingly recognised as having rights and duties in international law. The enormous growth in global and regional trade, travel, communications and problems has rendered this subject infinitely more important today than it was, even when Julius Stone taught it to me in 1960.

Not only is a basic knowledge of treaty law now required in order to be an effective legal practitioner. An awareness of rights, obligations and remedies in international law is an essential ingredient for any law course pretending to be comprehensive. Stone's predecessor in international law, Professor A.H. Charteris, explained in 1938 that he had "Once

met a man in the country [who] said he thought what was wrong with the Sydney Law School is that it did not have half enough equity". Charteris's response was that "the cultural value of equity was all right; but it was perfectly absurd to go to that extreme" in propounding such primacy for it.[19]

Some of those with whom I served in the High Court of Australia might possibly have shared the view of Charteris's "man in the country" of the 1930s. The response of many influential and even contemporary Australian judges has been one of indifference or even distaste about the implications that may now be derived for Australian law from the growth of international law.[20] A future task of legal education will surely be to help Australian lawyers to see this development as significant. But also as unstoppable and, ultimately, beneficial for the content and the rule of law.

Costs and access: Access to the law remains today, as it has always been, an abiding weakness of our legal system. As many sessions of this conference showed, it is a necessary topic in any approach to the content of legal education that aspires to be relevant to the majority of citizens as clients and subjects of law. Access includes the ability of ordinary people

[19] Professor Charteris quoted (1939) 11 ALJ 392.
[20] See e.g. *Kartinyeri v The* Commonwealth (1998) 195 CLR 337 at 384-386 (per Gummow and Hayne JJ), 417ff (per Kirby J diss); *Al-Kateb v Godwin* (2004) 219 CLR 592 at 586-597 per McHugh J (diss) and at 617 ff per Kirby J (diss); and *Roach v Electoral Commissioner* (2007) 233 CLR 142 at 220 [163] per Hayne J. (diss) and 224 and 225 [181] per Heydon J (diss).

to have disputes that are significant and important to them determined in the courts, tribunals or in other ways that are lawful, fair and rational. The legal problems and the needs of poorer members of society are not the same as those of wealthy people or corporations. What can legal education do about this fundamental problem? Should it even try?

The growth of online instruction in law has a number of advantages and some disadvantages.[21] It remains to be seen whether those who embark upon legal practice by this path will be more empathetic, and available, to their fellow citizens of lesser means. Will the suggested oversupply of lawyers, graduating from Australia's expanding list of law schools, eke out modest lives because that is all that society can afford to pay them? Or will they look elsewhere for remuneration - to government, to commerce, to in-house counsel, to teaching, to legal publishing etc. And if they do so, will they secure the financial rewards they expected for all their efforts in completing their legal education? Several of the participants in this conference addressed themselves to these practical concerns.

CHANGING THINGS

[21] M.D. Kirby, "Online Legal Education in Australia: the New CQU Law Degree" (2011) 34 *Australian Bar Review* 237. See also Nussbaum, above n.1 (2017) 91 ALJ 894 at 906.

Cultural realities: A glance at the topics that were debated in legal education in 1938, and a comparison with the topics of today, will show the many changing features of the lawyers' world. The Privy Council is no longer a part of the Australian judicature. The House of Lords has now changed to the United Kingdom's Supreme Court. Ironically that court is today more insistent on the influence of Australian decisions than is sometimes the case in reverse.[22]

The composition of the legal "industry", as it is now commonly described in this age of economists, has changed enormously. Not only are most Australian law students now women (whereas fifty years ago there were but a handful of women in classes dominated by males). Additionally, Asian-Australians and those coming from non-Anglo-Celtic backgrounds make up a significant cohort of legal professionals. So far, less progress appears to have been made in the promotion of women to the judiciary, to appointments as silks and to senior partnerships in the large legal firms. Learning from their sisters, Asian-Australian lawyers are now standing up. They are asking to be noticed.[23]

[22] See e.g. "United Kingdom Supreme Court Disavows the Doctrine of Extended Common Purpose" (2016) 90 ALJ 379 concerning *R v Jogee* [2016] UKSC 8 and now see *Miller v The Queen* (2016) 90 ALJR 918; [2016] HCA 30; see also (2016) 90 ALJ 379-380, 706-707.

[23] By the establishment of the Asian-Australian Lawyers' Association (AALA) of which the author is patron.

One question not explored in this conference was the extent to which cultural changes in the composition and commanding heights of the legal profession will alter the values that seep into the law itself. Will the combative traditions of the Anglo-Saxons survive the shifts in the general population, and in the legal profession, towards a larger Asian cohort, raised in a Confucian, Buddhist or Hindu culture? Does the rapid shift to arbitration and mediation already evidence, in part, such a cultural change? Or is it simply another sign that the adversarial system has priced itself out of a market, so far as most ordinary citizens are concerned?

Judges and statutes: What of the shift from a legal system predominately reliant for its rules on judicial decision-making to one overwhelmingly governed by legislation and subordinate legislation in all of its varieties? The American case book method flourished into my time at law school. But today many Australian lawyers can complete their university course in law without ever learning how to find, and to apply accurately, the *ratio decidendi* of a judicial decision.[24] Yet this was absolutely essential to legal education 50 years ago.

The shift from judge-made law to parliamentary legislation has inevitably produced a greater emphasis on legal interpretation

[24] *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 417-421 [56]-[64] .

as a crucial tool for modern lawyering that schools of law must teach. Justice John Basten led this conference in a lively debate about techniques that could be adopted that would make legal interpretation more predictable. One of the most popular "drop out" books from *The Laws of Australia* is the text: *Interpretation and the Use of Legal Sources.*[25] Its student edition is in especially great demand. Teaching skills in interpretation is an inescapable obligation for lawyering today because of the predominance of legislative expression of the law. Any law school must respond to changes of this kind. Any study of legal education must be forever asking what these changes are and how the law course should adapt in order to survive and flourish.

Technology and overload: Similarly, many of the breakout sessions in this conference addressed the ways in which technology is changing the contents and procedures of the law.

Many changes evident today could not have been predicted before the advent of digital technology just a decade or so ago. Now, on the brink of the rapid growth of artificial intelligence, new and still further changes can be anticipated. Just as the medical, dental and other professions must adapt to these

[25] P. Herzfeld, T. Prince and S. Tully, *Interpretation and the Use of Legal Sources* (TLA), Thomson Reuters, Sydney, 2013.

changes, so must the law and so must its practitioners and students.

A number of contributors to this conference addressed themselves to the increasing challenges presented by new technology. In the recent past, the problem for law students (and practitioners) was often finding the up to date law and securing ready access to it. In the age of digital technology the problem is more likely to be that of an information overload. This now bears down on the student and also on the busy practitioner and judge. As a consequence, completely new dangers have to be addressed in contemporary legal education and practice. Such as cyber-attacks on big legal firms, described by Dr Nuncio D'Angelo. Hovering over all such issues of detail is the need to preserve the rule of law and effective control over officials, in a world of mega data, government monitoring of the individual and the never ending digital analysis of ever expanding data.

Diversity and variety: Forty years ago, Professor Jack Goldring of the University of Wollongong began the first of his analyses of the make-up of the students then entering Australia's law schools.[26] His research, and that of others[27] indicated that the

[26] J. Goldring "Admissions Policy" in *Legal Education in Australia* (1976), 30; J. Disney et al (eds), *Lawyers* (LawBook Co. Sydney, 1977) 140.
[27] D.S. Anderson and J.S. Western, "Notes on a study of professional socialisation" (1967) 3 A&NZJ of Soc., 67.

majority of law students in Australia came from generally privileged backgrounds, attending private and religious schools, living in advantaged suburbs, deriving from families with higher than average incomes and bringing generally conservative opinions to their approaches as lawyers. Goldring was later appointed a judge and, sadly, died soon after. So his research has not been continued. It should be revived.

Law is not an ordinary profession. Lawyers (especially when they become judges and other high officials) inescapably give effect, to some degree, to their values and attitudes. Whilst the opening of new law schools may have affected the cohort of those entering the profession of law, the question remains whether it has changed the values of tomorrow's lawyers from the patterns described by Goldring?

This is a legitimate topic for any study of legal education; but also for the operation a society served by lawyers. When the next conference of this kind is held, hopefully in fewer than forty years, it should start with a thorough understanding of the numbers, backgrounds, attitudes and values of law students. Their voices should be heard increasingly, in the topics of a conference such as this. The contrasuggestible Professor Charteris said as much ninety years ago. He described "the young ladies and young gentlemen, being child labour to

someone else, [who] scuffle away the moment [the lecture] is over and you see them no more until the next morning and there is no constant intercourse between the professors."[28]

Wellness and stress: Finally, in any dialogue with the subjects of our scrutiny, those young men and women of whom Professor Charteris spoke, must now include attention to completely new and different issues. To the issues of wellness in the legal profession. To stress, depression and even suicide. A suggestion such as this, in days gone by, would have shocked even Professor Charteris. Yet today, bundling increasing stress on young people is a subject that needs to be taken seriously. So must new sensitivities, such as to bullying, hazing, sexual and physical abuse of power and risks of corruption and misuse of office.

To get an informed idea about these topics, it is necessary to go beyond the members of the legal profession and to invite expertise from psychiatrists, systems managers, office designers and experts in "human resources". In previous generations scholarships took people like me through their entire university course, subventions later repaid through progressive taxation. Nowadays, very large cost burdens are imposed on law students in Australia, especially on JD

[28] (1938) 11 ALJ 392.

students. Their problems in coping with their courses need to be factored into the responses of legal education. No longer can these difficulties be brushed aside as immaterial to the educator. In particular, the attempt to attract large numbers of overseas students from the Asia/Pacific region, to study law in Australia, needs to be tempered by the ethical obligation to provide value for money and to treat the students concerned with sensitivity and support.

LOOK BACK/LOOKING FORWARD

This conference has coincided with the publication of Professor David Barker's book *A History of Australian Legal Education*.[29] This book and its description of the many reports and surveys examining Australian legal education over recent decades helps to place us in a better situation to answer the questions about the number of Australian law schools and what features make a "good" law school.[30] It is a valuable resource. But as Professor Michael Coper points out, it will have failed if it does not address the attention of the reader to the abiding controversy addressed in this conference: How can legal education be delivered that resolves satisfactorily the unending question about law's purpose? How do we ensure that those

[29] Federation Press, Sydney, 2017, reviewed by Professor M. Coper (2017) 91 ALJ 927.
[30] A point made by Professor Coper, referring to (2016) 90 ALJ 377 and (2017) 91 ALJ 628.

who graduate have a strong grip on basic knowledge so that they can perform the serious responsibilities that will come their way? And how can they secure a broad social training that will fit them to embrace the need to advance law reform and social justice for all?

Protecting and advancing abiding things and embracing and pursuing changing things is the obligation of Australia's lawyers. Those who conceived and organised this conference, and those who contributed to it, deserve praise and thanks. They encouraged us to look for the light that will guide us in the future. Some light was offered by Justice Virginia Bell in her witty but pointed after dinner address. Lawyers, she reminded us, are champions of individuality, liberty and justice. They must accept diversity of colleagues who have different viewpoints, without the need for "trigger warnings" for every sensitive matter that may come their way.

Lawyers must adapt to, and embrace, change in the law. They must become professional advocates of law reform. And because law is increasingly dynamic, so too must legal education – including for those who teach and for those who learn.