

**LEGAL EDUCATION - DOES IT MAKE GOOD LAWYERS?**  
**40TH ANNIVERSARY OF THE FOUNDATION OF MACQUARIE**  
**LAW SCHOOL**  
**MACQUARIE UNIVERSITY**  
**ADDRESS BY THE HONOURABLE T F BATHURST**  
**CHIEF JUSTICE OF NEW SOUTH WALES**  
**15 NOVEMBER 2012**

1. Thank you for your kind introduction Professor Simons and thank you to the faculty for inviting me to celebrate the 40<sup>th</sup> Anniversary of Macquarie Law School with you. I would like to begin by congratulating the law school on its many achievements since its inception in 1972. Over the last forty years, Macquarie has grown to be one of the country's best law schools. It has produced many distinguished alumni, including partners of major law firms, leading academics, politicians, barristers and at least seven judges and magistrates.

2. Many are here tonight, including Justice Preston, who is Chief Judge of the Land and Environment Court, Judge Berman of the NSW District Court, Judge Dive of the NSW Drug Court and Lloyd Babb SC, the NSW Director of Public Prosecutions. Also amongst the notable alumni present are Justice Bergin, who is the Chief Justice in Equity of the NSW Supreme Court and Stuart Clark, who is a managing partner at Clayton Utz. Both share the dubious honour of having been amongst my first readers at the bar. I apologise to the distinguished alumni whom I have undoubtedly omitted to acknowledge. Macquarie's alumni are testament not only to the quality of education at this law school but also to its strong commitment to interdisciplinary study.
  
3. As you know, my speech tonight concerns the question of whether legal education makes good lawyers. Legal education is of course a life long process, but I will restrict myself to speaking about university education, rather than subject you all to the inordinately long speech that would be necessary to even attempt to cover the field more broadly.

4. It struck me when I was preparing my remarks that my chosen topic might be read to imply negativity, as though I were posing the question - law graduates: now really, are they any good? Let me assure you, nothing could be further from my mind. Particularly since my appointment to the bench, I have had the opportunity to work with the many young graduates, including from this law school, who populate the Court as tipstaves and researchers. They leave me in no doubt as to the skills and competence of young lawyers. Indeed, if anything, their ability to wield uber-competence to control all aspects of judicial life makes me a little nervous.
  
5. It is extremely appropriate that I consider this topic here at Macquarie Law School. Since its inception, this law faculty has been committed to innovation in the delivery of legal education. Macquarie's ongoing dedication to interdisciplinary education is just one example of this commitment. In large part of course, this reflects the vision of the law school's founders and, subsequently, of the faculty. However, it is also reflective of the

context in which the law school was founded: a time when theoretical and critical perspectives were beginning to change the “black letter law” focus of legal education in Australia.

6. These changes were not always well accepted. Indeed, Macquarie's openness to legal critique, including radical and feminist scholarship and the US based “critical legal studies movement”, led the influential 1987 Pearce Report into legal education to recommend that the law school be “phased out or radically restructured”<sup>1</sup> – although I should note that the report was highly complimentary of Macquarie’s teaching in other respects. Following an internal enquiry, the faculty’s response was to hold fast to its commitment to developing students’ critical faculties, by including relevant historical, social and critical perspectives into substantive subjects.<sup>2</sup> Today, that decision has been widely vindicated, with subjects that consider critical perspectives on the law increasingly common within many Australian law schools.<sup>3</sup>

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<sup>1</sup> N James ‘A Brief Critique of Legal History in Australian Legal Education’ (2000) 24 *Melbourne University Law Review* 965, 973-974.

<sup>2</sup> *Ibid*, 975.

<sup>3</sup> *Ibid*, 978-979.

7. The increasing acceptance of critique and theory is one way in which legal education in Australia has evolved over the last forty years. There are of course others. For example, one of my enduring memories of law school is of my Public International Law lecturer, a Dutch Professor whom I will not name. He was in fact replacing our regular lecturer, the esteemed Professor Julius Stone. On the particular occasion I have in mind, he began his lecture by bounding in and announcing: "I hear Professor Stone has been teaching you the laws of war". He then paused for dramatic effect, pulled a handgun from his jacket and brandishing it above his head, said "there is only one law of war you need to know." No doubt we should all be grateful that the time when firearms were used as props in law lectures is long past, although in my case I must admit the incident marked the high point of my engagement with the Geneva Conventions.

8. I should emphasise I was not referring to the late Professor Nygh. He was in fact lecturing at Sydney, in Conflicts of Law, during my time at law school. He was an outstanding lecturer

and of course went on to become one of the most distinguished academics at this University.

9. Perhaps more fundamentally, the pedagogy of law schools has changed a great deal over the last 40 years. Law students are now encouraged to actively engage with and interrogate the material they are learning. Class discussions are commonplace. By contrast, when I was at law school, only one lecturer, the late Justice Hutley, who taught succession law, attempted using the Socratic method. It has to be said that his approach was not popular. In fact, many students, unused to being questioned, found it extraordinary stressful. One student so despised his teaching that, when drafting a will as part of his final exam, he ended his paper with the words: “and I leave my mad Alsatian dog to Mr Hutley, that it may bite him in perpetuity”. I trust that today’s class discussions do not end in such brutal threats.

10. Justice Hutley aside however, the norm during my legal education was to be passively presented with vast swathes of

information and then painstakingly draft scores of notes, in the often vain hope that they would help you remember. I have no doubt that the changes in educational approach since that time have created more aware and engaged legal graduates, and therefore in my view, better lawyers.

11. In other respects however, legal education has not altered radically over the last forty years. Legal education has long striven towards, and continues to pursue, two central goals. The first is to teach substantive content - to give students a solid grounding in the key doctrinal areas that constitute our legal system. This grounding in substance prepares students to be competent and capable legal professionals. Although law school can by no means teach students all they need to know about the law, the doctrine learnt provides both the foundations on which future knowledge is built and, by providing instruction in the common law method, the framework through which it is understood.

12. The second goal of legal education is to teach students how to think and learn effectively, by developing their intellectual skills of reasoning, logic, research, independent thought, and critical enquiry - the hallmarks of the classic "liberal" university education. This academic training is necessary not only so that students are able to develop the intellectual skills needed for successful professional practice, but also to produce lawyers who understand the underlying justifications and context of law and legal institutions, the role of lawyers in society and the importance of the rule of law. In turn this creates lawyers who are able to critically evaluate and, where necessary, contribute to reforming the legal system. When both these goals are reached, legal education does, in my view, produce good lawyers. Importantly, it also equips students with skills that are useful in other professions and prepares them to contribute to the intellectual life of society, as citizens as well as professionals.

13. Balancing these twin goals has not always been easy. Early English legal education was almost exclusively



vocational, with those wishing to become lawyers undertaking what were effectively apprenticeships at the Inns of Court. That is not to imply that such education did not develop intellectual skills of analysis, logical reasoning or critical enquiry. At their height, the Inns had the status of a “third university”, akin to Oxford and Cambridge.<sup>4</sup> Intellects of the like of Francis Bacon and Lord Reading were products of the Inn system.<sup>5</sup> Largely speaking however, the development of what are sometimes rather grandiosely called “higher order” intellectual faculties was a by-product of an education that focused almost exclusively on learning rules of law.

14. A similar focus on vocational training dominated early legal education in Australia. Law did not become established as a university degree in NSW until 1890<sup>6</sup> and it was not until 1968 that the number of university graduates admitted to legal practice exceeded the number of non-graduates in NSW.<sup>7</sup>

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<sup>4</sup> R Stein, “The Path of Legal Education from Edward I to Langdell: A History of Insular Reaction” (1981) 57 *Chicago Kent Law Review* 429, 432.

<sup>5</sup> *Ibid*, 438-439.

<sup>6</sup> L Martin, “From Apprenticeship to Law School: A Social History of Legal Education in Nineteenth Century NSW” (1986) 9 *UNSW Law Journal* 111, 140.

<sup>7</sup> M Chestern and De Weibrot, “Legal Scholarship in Australia” (1987) 50 *Modern Law Review* 709, 711.

Those vocational courses produced many outstanding lawyers. One that immediately comes to mind is the Honourable Michael McHugh QC, who is one of the most distinguished High Court Justices of recent times.

15. However, as law became increasingly institutionalized as a university degree, as the number of fully tenured academics increased, and particularly in the wake of the Pearce report, it became increasingly accepted that legal education must focus on providing a general intellectual education as well as professional training.<sup>8</sup> The challenge for law schools in this context has now become how to appropriately balance and integrate these two goals - a challenge that has sometimes been described as the “Pericles or the Plumber tension”, although this might be a bit of an overstatement.

16. Particularly since the 1990s however, new goals have come to be seen as central to legal education. In particular, it is now argued that legal education must include an explicit focus

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<sup>8</sup> Ibid, 715.

on professional skill building, in areas such as oral and written communication, dispute resolution, team work, legal drafting, advocacy and professional responsibility.<sup>9</sup> Of course, skill development has always been part and parcel of what is taught at law school. In particular, skills such as legal reasoning and problem solving, research and written communication have long been fundamental to legal education. However, these skills, as well as the more generic professional skills I have just mentioned, have often been absorbed by osmosis rather than explicit instruction. Further, post-graduation Practical Legal Training has traditionally been seen as carrying significant, if not primary, responsibility for the development of generic professional skills.

17. What I will somewhat reductively call this "third" goal of legal education, arises – at least in part - from a number of changes to the legal education sector. First, there is a perceived need to be responsive to a growing market demand for professional skills in the context of an increasingly

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<sup>9</sup> Australian Law Reform Commission, "Managing Justice: Review of the Federal Civil Justice

commercialized legal profession, characterized by mega firms, transactional work, international outsourcing, and the growing use of in-house counsel. While legal practice has always had commercial imperatives, it is undeniable that commercialization has changed the type of work done by many lawyers. It is not surprising that this has led to a re-consideration of what lawyers, particularly young lawyers, actually need to be able to *do* - as distinct from simply *know*.<sup>10</sup>

18. Secondly, there is a desire to be responsive to the increasing diversity of students' careers. Today, more and more students are starting law school with no intention of ever becoming lawyers, instead seeing a law degree the way the Arts degree was traditionally perceived, as providing a general education fitting one for professional employment. Equally, many graduates, whatever their goals, end up finding careers outside legal practice, including in business, finance, consultancy, journalism, government and the community

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System" (2000) (Report No 89) at [2.78] – [2.82].

<sup>10</sup> Australian Law Reform Commission, "Review of the Federal Civil Justice System" (Discussion Paper No 62) at [3.22].

sector.<sup>11</sup> This arguably leads to a greater need to teach skills that are not specifically legal.

19. The commercial imperatives felt by law schools themselves only compound this pressure. In the last 40 years, the number of law schools in Australia has exploded – there are now 32 - at the same time as funding for higher education has decreased. Law schools are therefore understandably eager to gain a market advantage by differentiating themselves and by being responsive to the demands of students and the profession.
20. I have absolutely no doubt that improving student skills in such essential areas as effective drafting, dispute resolution, teamwork and communication can only assist in producing good lawyers - as well as graduates who are more employable in a range of professions and adapted to a changing legal market. The risk however, is that as legal education attempts to

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<sup>11</sup> Between 2005 and 2010 the number of law graduates starting work in law firms dropped from 49.1% to 43.7%, while the proportion taking jobs in industry or commerce rose from 13.5% to 20.1%. 24.5% started work in the government sector, 2.7% in the not for profit sector and 3.9% in

pack more and more in, the two fundamental goals which I discussed earlier are neglected, or the appropriate balance between a vocational and academic education lost.

21. In that context, I would like to use the remainder of my time to talk about two legal education reform proposals and the impact, in my view, that they may have on legal education's success in producing good lawyers. I propose first to discuss the suggestion that law schools should place less focus on the "Priestley 11" group of compulsory law subjects and secondly proposals that would relax the requirement that a qualification in law requires the equivalent of three years study.

### **Priestley 11**

22. As most of you will know, the "Priestley 11" refers to the eleven broad areas of knowledge that law students must demonstrate competence in, in order to be admitted to practice. The Priestley 11 does not mandate that universities must teach certain subjects, but rather requires that law students be

instructed in the fundamentals doctrines of: Criminal Law and Procedure; Torts; Contract; Property; Equity; Administrative Law; Constitutional Law; Civil Procedure; Evidence; Company Law and Professional Ethics. The requirement was instituted in order to address problems created by the different admissions standards required by States and Territories, and followed the recommendation of a committee chaired by Justice LJ Priestley in the early 1990s.<sup>12</sup>

23. Proposals to reform the Priestley 11 are not new. They are persistent and are often linked to the increasing focus on a "skills based" legal education. In 2000, a review by the Australian Law Reform Commission of the federal justice system heavily criticized the requirements, arguing that they represented a "solitary preoccupation with the detailed content of numerous bodies of substantive law".<sup>13</sup> Similar criticisms have been made by several other studies and commentators. It is argued that the Priestley 11 focus on outmoded areas of law,

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2011) (accessed 11 November 2012).

<sup>12</sup> Law Admissions Consultation Committee, "Background Paper on Admissions Requirement", (October 2010), 3.

<sup>13</sup> ALRC, above n 9, [2.82].

create a false dichotomy between academic legal education and practical legal training, and neglect skill development.<sup>14</sup> In turn, suggestions have been made not only to increase the focus on skills development but to “simplify the description” of the Priestley 11, effectively reducing their substantive content.<sup>15</sup>

24. Despite this critique, there has been remarkably little enthusiasm amongst law schools, admitting authorities, the Law Council of Australia, or its constituent bodies, to de-emphasise or alter the Priestley requirements.<sup>16</sup> In my view that reluctance is justified for a number of reasons.

25. First, while there is no doubt that the work of the legal profession has changed over the last twenty years, there is also plentiful evidence that a solid grounding in the substance of law continues to be demanded. Around 60% of graduates will ultimately build a career in legal practice in the private, government or community sectors.<sup>17</sup> Despite changes in the work that they may do, studies suggest that the majority of

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<sup>14</sup> see Law Admissions Consultation Committee, “Rethinking Academic Requirements for Admission” (February 2010) at [8.2];

<sup>15</sup> Law Admissions Consultation Committee, “Reconciling Academic Requirements and Threshold Learning Outcomes” (June 2011), 3.

<sup>16</sup> Ibid, 4; Law Admissions Consultation Committee, above n 12, 3.



graduates working in the law require knowledge of substantive law, legal practice and procedure, as well as generic skills.<sup>18</sup>

26. Secondly, and perhaps more fundamentally, despite the changes of the last 40 years, at its core the legal profession remains just that - a profession. Important as skill building, and indeed general intellectual training is, law should never be allowed to become merely a generalist degree. Completing a law degree is a necessary and essential step in preparing students to be admitted to legal practice. In turn, admission involves joining a professional community, whose members become empowered to advise and represent clients in all areas of the law and who have the qualifications to practice in all Australian jurisdictions. Legal practicing certificates are not granted on a partial basis. Members of the community trust that when they consult a lawyer, that person will be able to identify all major legal issues which their case engages and represent their interests within the full force of the law.

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<sup>17</sup> Law Admissions Consultation Committee, above n 14, at [9.4]

<sup>18</sup> V Brand, "Decline in the Reform of Law Teaching? The Impact of Policy Reforms in Tertiary Education" (1999) 10 *Legal Education Review* 109, 138.

Critically, the community also trusts the legal profession to be self-regulating in upholding this standard.

27. The trust the community places in lawyers entails a countervailing responsibility on the profession to admit only members whom it is confident will be professionally competent. As most legal practices range over a number of substantive areas and as, in any case, different branches of the law are by no means discrete, possessing a strong grounding in the major substantive areas of law is a necessary pre-requisite to being a good lawyer. The substantive content learnt at law school, while by no means sufficient, is a necessary foundation for the further specific knowledge that lawyers will require to be competent professionals. Admitting legal graduates to practice without a guarantee that they have received the necessary level of instruction in core doctrinal areas would be to risk the integrity of the profession and, in turn, the administration of justice.

28. Further, the Priestley 11 have the benefit of providing a nationally consistent scheme of requirements for admission.

This is necessary if we are to allow graduates to practice in more than one Australian jurisdiction, which is critical, particularly in the context of an increasingly commercialised and inter-jurisdictional legal market. Maintaining consistency is all the more important if we are ever to achieve a national legal profession. Watering down the Priestley 11 will inevitably open the door to greater differences in legal education between States and Territories, which in turn must raise questions about the ability of legal graduates to practice outside their admitting jurisdiction.

29. It is not my intention to downplay the importance of professional skill development, or to suggest that legal education should simply leave students to acquire such skills independently. However, it should be remembered that the Priestley requirements, as currently framed, do not mandate any particular pedagogical method, or prescribe a structure for subjects. In those circumstances, there is no reason why skills such as oral communication, factual investigation, research,

negotiation and teamwork cannot be taught within the Priestley framework. Indeed many law schools are doing precisely that, increasing their emphasis on skill development under what the former dean of Sydney Law School has described as the “surprisingly light hand of the Priestley 11”.<sup>19</sup>

### **Duration of Law Courses**

30. The final topic on which I would like to say a few words is the duration of law courses, and specifically proposals to dilute the current requirement that law degrees must take an equivalent of 3 calendar years. This is particularly relevant as law schools increasingly introduce postgraduate Juris Doctor programs, which are generally more intensively taught than the LLB and not undertaken as part of a concurrent degree – although of course it must be remembered that a prerequisite to admission to such courses is the completion of an undergraduate degree.

31. Many students would of course welcome a shorter law degree. I have no doubt my student self would have. I have

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<sup>19</sup> Law Admissions Consultation Committee, above n 14, at [9.44].

vivid recollections of morning lectures at the Sydney Law School's then Phillip Street campus. They were held in an underground lecture theatre that I can most accurately describe as a dungeon. The surroundings were an appropriate metaphor for how I felt about being there. Unfortunately this was also around the time that, to my horror, Sydney Law School instituted attendance sheets. I believe it is the closest I have ever come to being imprisoned and I certainly would have welcomed an early escape route.

32. There are of course far better reasons for shortening the duration of law courses than the laziness of my 20 year old self. Study can be extremely financially stressful on students struggling to balance academic performance with paid work to support themselves. The demographic of law students has also changed. Many are now older and may have families and other commitments on which prolonged study places additional burdens. Additionally, law schools are themselves under financial pressure to use their teaching resources more

intensively. In those circumstances, if the required content can be taught in a more condensed time period – for example through summer intensives – why require graduates to spend longer at law school than necessary?

33. I acknowledge the cogency of these arguments.

Nonetheless, I believe we should be wary of shortening the duration of law school. The requirement of a minimum duration was a major outcome of the 1964 Martin Report into tertiary education in Australia and was intended to facilitate the “background intellectual training” required for students to be successful graduates, not only as professionals but as leaders within society.<sup>20</sup> The report took the view, which I share, that space must be made in law courses for the not insignificant period of time required to rigorously develop students’ intellectual skills.

34. It is no doubt unfair to expect every legal graduate to be a leader and I suspect the community would be less than thrilled

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<sup>20</sup> V Brand, above n 18, 3.

by the idea of a country even more run by lawyers than it is currently. However, ensuring that law school develops students' intellectual breadth, agility and curiosity continues, in my view, to be a crucial element of legal education. Instruction in doctrinal content is essential, as I have already said, but it is not sufficient to produce truly good lawyers. Rather legal education must aim to integrate analysis, critique and doctrinal learning, so that graduates gain a contextual understanding of the law and of their own role in society and, ideally, a commitment to the legal system's fundamental tenets of justice equality and the rule of law.

35. Many law schools, of which Macquarie is amongst the leaders, currently achieve this integration exceptionally well. If law degrees become compressed however, I fear that the generally high standard of legal education we currently enjoy could be compromised, as any content that can be is squeezed out and all that is left is the minimum necessary to meet the Priestley 11 requirements. I would also add that cutting the duration of law courses seems inconsistent with the aim of fitting skill development as well as doctrinal instruction into legal

education, as well as with other emerging goals, such as an increased focus on clinical legal education.

36. There is an additional reason why, in my view, a three year minimum period is desirable. The law is a diverse profession and houses many different professional paths. Law school should therefore not only provide students with a formal education, but prepare them to decide which path, in or outside of the law, is right for them. That decision will often take time.
37. Requiring that students spend at least three years at law school provides that time, allowing them the opportunity to reflect on which areas of the law they enjoy, to learn more about the structure of the profession, to form relationships with members of faculty who can act as mentors and advisors, and to engage in clerkships, legal volunteering and internships in diverse areas. Allowing for this reflective process is particularly important for students who have no family ties to, or prior engagement with, the legal profession and for the increasing number of students who begin law school with no pre-existing



idea of their intended legal careers, or even whether they want to be lawyers.

38. In particular, without allowing time for reflection, it may be difficult for law students to see outside the dominant focus in many Australian law faculties on undertaking clerkships, followed by a career in private practice. That is not in any way to imply that private practice is an undesirable career choice but simply that a minimum period of study of 3 years facilitates an environment where it truly is a choice. For students to end up on the path most trodden because they have not had the opportunity to explore other options would, in my view, be to the detriment of legal graduates' personal development and to the richness of the profession more generally. I have said already that promoting intellectual enquiry is a core element of legal education. Law school must also provide the framework for that enquiry to be turned inwards.

39. I have essentially proposed a defence of the status quo. That is not because I think change is undesirable. There is

always room for change and improvement, in legal education as much as in any other area. However, we are privileged to have a system that does successfully achieve the many goals of legal education and which turns out good, often excellent, lawyers. The caliber of graduates that Macquarie Law School has and continues to produce is testament to that fact. We should not be quick to compromise the core elements of that system.

40. All that remains is for me to thank you once again for your kind invitation and attention. Congratulations on reaching this milestone and my very best wishes for the next 40 years and beyond.