

“The NJCA and ANU College of Law: Mutual Interests in Legal Education”

ANU College of Law Commencement Dinner

16 February 2017

Australian National University

Chief Justice Murrell

Introduction

I acknowledge the traditional and continuing custodians of this land. I pay my respects to their elders past and present.

I thank Professor Bottomley, and the faculty for inviting me to speak this evening.

I come here wearing two hats, both my notional Supreme Court wig, and as Chair of the NJCA (National Judicial College of Australia). Both have a strong relationship with the ANU College of Law, but there are opportunities to build closer relationships.

Three weeks ago, I spoke at the ceremony to mark the opening of the legal year. Our ceremony to mark the opening of the legal year is an opportunity for the judiciary and profession to reflect on our roles and aspirations before we are absorbed into the hard work of the legal year.

Similarly, this commencement dinner provides the opportunity for you to reflect on the role of the College and your collegial aspirations before you are overwhelmed by emails from students.

When thinking about the plans that the Supreme Court and the NJCA have for the forthcoming year, I see many intersections with the ANU College of Law. Topics of mutual interest that I propose to address tonight are:

1. Our mutual interest in law schools producing the best possible law graduates.
2. Our mutual concern about the situation of Indigenous people in the legal system.
3. Our mutual interest in education; you educate what are generally youthful law students and the NJCA educates more mature law students (the judiciary).

1. Producing the best possible law graduates

Fit and proper to be admitted to the profession

There are many jokes to be had at the expense of lawyers' good character. I'm sure you all know that telling a lawyer joke is doomed to fall flat because the lawyers won't find it funny and other people won't think it's a joke.

But if you ask members of the public what they think of individual lawyers, for example their family lawyer, you will probably get a positive opinion about the individual lawyer's character. People will describe the individual lawyers that they know as honest, hard-working and compassionate people of integrity, true professionals, who don't merely hold down a job but follow a calling.

Apparently, codes of professional ethics were first formulated by medical practitioners 2,500 years ago.¹ They were thought to come from sacred sources.² A professional person's sense of professional obligations was strengthened by this knowledge.³ But in this secular age, we can't rely upon the gods to reinforce professional behaviour. Consciousness of professional responsibility depends upon the development of the professional person's own moral compass.

Admission standards protect the community from people who are seeking an income, not following a calling. They protect the public from "unprofessional" lawyers.⁴ They instil public confidence in the legal profession and, through the legal profession, in the judiciary and the justice system generally. Consequently (as was first said by Justice Isaacs in 1909):

There is therefore a serious responsibility on the Court — a duty to itself, to the rest of the profession, to its suitors, and to the whole of the community to be careful not to credit any person as worthy of public confidence who cannot satisfactorily establish (their) right to that credential....⁵

¹ Justice Susan Kiefel, 'Ethics and the Profession of the Lawyer' (Speech delivered at The Queensland Law Society, The Vincents' 48th annual symposium, 26 March 2010) 2

² Ibid.

³ Ibid.

⁴ See, eg, *Re Appln by Saunders* [2011] NTSC 63, [5].

⁵ *Incorporated Law Institute of New South Wales v Meagher* (1909) 9 CLR 655, 681 (Isaacs J), quoted with approval by Martin CJ in *Re Deo* (2005) 16 NTLR 102 at [6].

If a law graduate can't start out by demonstrating good character at the point of admission to the profession, then there is little prospect that the situation will improve.

Admission

The new law student may well be fit and proper to be a first year university student but will they be fit and proper to be admitted as a lawyer down the track?

What are your students thinking about on the first day, the first month, the first year that they are at law school?

Putting aside all the undoubtedly correct but wildly inappropriate answers to this question, they are thinking about exploring their boundaries. They are thinking about meeting new people and learning new ideas. They are thinking about all their readings (but probably not doing them). They are thinking about the closest place to buy coffee. (Now this last thought is the mark of a true professional — certainly, it is a thought that has remained with me throughout my professional career.)

The first year law student is not thinking about that fateful day five years later (or maybe six or seven) when a bevy of overworked, humourless and elderly Supreme Court judges will gather to consider their applications for admission to their Court.

How will those judges view the half-dozen applications from students who have failed to declare their income and been overpaid by Centrelink?

The first year law student is not thinking about the possibility that these old fogies will refer to their misdealings with Centrelink as “serious errors of judgment”, causing a “humiliating, but proper” refusal of admission.⁶

Nor is the first year law student thinking about the many useful quotes that they have “borrowed” from the supposedly foolproof college summary that was probably written in 1997 and is now in the hands of half the cohort.

And the law graduate who is seeking admission may simply not recall the small disagreement that they had with their former partner when they were a rolling drunk first year student... surely an entirely adequate explanation for their failure to disclose to the admitting authority the incident and the associated domestic violence order, which they consented to not because it was justified but because it seemed like the easiest option at the time.

⁶ *Saunders v Legal Profession Admission Board* [2015] NSWSC 1839, [99] (Schmidt J).

Who will enlighten these eager — and hopefully malleable — first year law students? That happy task falls to you.

I urge you to impress upon new students the need to start where they mean to finish by prioritising honesty and integrity from day one as a law student. A strong culture of ethics within a law school can embed good professional values in young people who are not yet morally mature.

Statutory Interpretation

In an age of rapid change, change in the law is most readily achieved by statute. The Honourable Michael Kirby, wrote in 2009:

Although we still describe ours as a common law system (to distinguish it from the countries of the civil law tradition), the label is now looking somewhat dubious. The distinctive feature of contemporary Australian law derives from the overwhelming importance of the laws made by or under parliament.⁷

Legislative production is at plague proportions — at least in the ACT where the table listing new and affected ACT legislation in 2016 runs for 87 pages.⁸

A perennial topic of concern to the Council of Chief Justices is the perceived lack of adequate emphasis on statutory interpretation in legal education.

Statutory interpretation is not a sexy topic — it may seem even less interesting to students than learning about snails in bottles, or the ethics of the profession (or examples of the lack thereof). But the daily task of judges is to apply and, where necessary, interpret legislation. The interpretation of legislation often makes for the most interesting cases. And yet it seems to judges that statutory interpretation is not central to legal education.

I am undecided about whether statutory interpretation is best taught as a stand-alone subject that forms part of the core curriculum or whether it should be incorporated across different topics to reinforce that it is not a discrete area of law but a tool that is relevant to all areas of law. Unfortunately, the experience of the NJCA is that, while the latter concept is theoretically meritorious, in practice a topic that is supposed to be embedded in other topics is often forgotten.

⁷ Michael Kirby, 'Statutory Interpretation: The Meaning of Meaning' (2011) 35 *Melbourne University Law Review* 113, 113.

⁸ See ACT Parliamentary Counsel's Office, *Legislation Update* (2016) <<http://www.legislation.act.gov.au/Updates/Update2016.pdf>> 36–123.

Despite the apparent dryness of the topic of statutory interpretation, in fact, there is no shortage of interesting and socially relevant cases that are likely to engage students. For example, the 1904 case of *Re Edith Haynes* in which a female articled clerk sought mandamus to compel the Barristers Admission Board to allow her to do the articled clerks' exams, a necessary prerequisite to gaining admission.⁹ The Court agreed with the Barristers Admission Board that it would be futile to allow Ms Haynes to sit the examination because, although by statute "every person" could apply for admission, women were not part of the statutory "every person".

One of the members of the Court, Burnside J, said this:

...throughout the civilised world, so far as we know, we have not been able to ascertain any instances... where the right of women to be admitted to the Bar has ever been suggested. That being so, it is said here that it should exist, because the words in the Statute are 'every person.' That does not appear to me to be very forcible... It is not a common law right. It is a privilege which has... been confined to the male sex... and I am not prepared to start making law. When the Legislature in its wisdom confers the right on women, then we shall be pleased to admit them.¹⁰

It took the election of Australia's first female parliamentarian, Edith Cowan, for the legislature to confer the right to legal practice on women in Western Australia. Nearly twenty years after Ms Hayne's case, Cowan introduced the *Legal Status of Women Act*, which passed into law in Western Australia in 1923.¹¹ It took another seven years before the first woman, Alice Cummins, was admitted to the roll of practitioners in that state in 1930.¹²

That's something to remember as we welcome our first female Chief Justice of the High Court. She will chair a Council of Chief Justices of which 50% of the members are women.

In contrast to the reception that Ms Haynes received, just over one hundred years later, in the case of *New South Wales Registrar of Births, Deaths and Marriages v Norrie*, the High Court interpreted provisions of the NSW *Births, Deaths and Marriages Registration Act* as recognising that, under that Act, a person did not have to be classified as male or female, but could have an indeterminate gender.¹³

⁹ (1904) 6 WALR 209.

¹⁰ Ibid 213–4.

¹¹ Chief Justice David K Malcolm AC, 'Centenary of *Re Edith Haynes* (1904) 6 WAR 209' (Speech delivered at the Supreme Court of Western Australia, 9 August 2004) 11.

¹² Ibid.

¹³ (2011) 244 CLR 144.

Chief Justice Blow drew attention to these cases when attempting to keep students engaged during a lecture on statutory interpretation at the University of Tasmania in 2014.¹⁴

The Hon. Murray Gleeson has suggested that another means by which students might become engaged with statutory interpretation is that the people who draft legislation might be invited to share with students their experiences and technical skills.¹⁵

I don't envy the task of getting students to attend lectures by people who actually get excited about dealing with the grammatical minutiae of legislation.

2. Indigenous people in the legal system

Many students choose to study law not so much because they dream of interpreting statutes, but because they are committed to social justice — they want to make a difference.

Of course it is fundamental that the legal profession and the judiciary are committed to maintaining and promoting the rule of law, to the concept that everyone is equally accountable under the law.

However, beyond that, the profession and the judiciary are also committed to promoting equal justice in a substantive sense. Social justice issues were of concern to academics long before that concern was widely felt in the profession and the judiciary, but I think that we are now on the same page.

Although we in the ACT like to think of ourselves as a socially progressive community, unfortunately, many social inequalities remain. As the ninth *Closing the Gap Report* reminded us only this week,¹⁶ social inequalities are particularly stark for Indigenous Australians. Aboriginal and Torres Strait Islander people comprise 1.8% of the ACT population, 12% of those charged and 23% of detentions in the Alexander Maconochie Centre, i.e. less than 2% of the general population but almost one quarter of the prison population.¹⁷

¹⁴ Chief Justice Alan Blow, 'Statutory Interpretation' (Lecture delivered at the University of Tasmania, 21 May 2014).

¹⁵ Murray Gleeson, 'Statutory Interpretation' (Justice Hill Memorial Lecture, Taxation Institute of Australia, 11 March 2009) 21.

¹⁶ Department of Prime Minister and Cabinet (Australia), 'Closing the gap: Prime Minister's report 2017' (14 February 2017) <http://apo.org.au/files/Resource/dpmc_ctg-report-2017.pdf>.

¹⁷ ACT Government, Justice and Community Safety Directorate, *Statistical Profile: ACT Criminal Justice, September Quarter* (2016) Appendix 1, 139 (Corrective Services Table 2); Australian Bureau of Statistics, *3238.0 Estimates and Projections, ATSI Australians, 2001 to 2026* (April 2014) and *3101.0 Australian Demographic Statistics* (March 2016) <<http://www.abs.gov.au>>.

I am pleased to say that our shared interest in promoting success for Indigenous people is on its way to becoming something more practical. As Professor Bottomley has mentioned, only today, the ACT Courts and professional bodies signed a Memorandum of Understanding with ANU College of Law, and the University of Canberra, launching a new initiative to involve Aboriginal and Torres Strait Islander law students in the court system and profession.

We hope that this will help to bridge the understanding gap — or maybe it's a chasm — between Indigenous people and the court system. Thanks to Professor Bottomley and Dr Hopkins for bringing this initiative to fruition.

Another initiative that the Supreme Court judges have identified as a priority for this year is exploring the potential for a Supreme Court Drug and Alcohol Court to deal with offenders for whom there is a close link between substance abuse, serious and repeated offending, and incarceration.

There is ample evidence that offenders who complete a DAC Program rather than being imprisoned reoffend at significantly lower rates, experience health and well-being benefits and cost the community far less than if they were imprisoned, even if they go through a high quality and relatively costly treatment program.¹⁸

There are barriers to Indigenous offenders entering and completing DAC Programs. Entry criteria may be inherently biased so as to exclude Indigenous offenders, e.g. on the basis that they may be more likely to have a history of violent offences, more likely to have a coexisting mental illness and more likely to have an alcohol problem than other offenders, who may be more likely to have a drug problem (and many courts are Drug Courts not Drug and Alcohol courts). Some of these problems reflect the fact that many Indigenous offenders experience not only the social disadvantages of most serious offenders but also cultural disconnection and the results of intergenerational trauma.

¹⁸ See, eg, NSW Bureau of Crime Statistics and Research, 'New Drug Court Research Findings', (Media Release, 14 December 2011) <http://www.bocsar.nsw.gov.au/Pages/bocsar_media_releases/2011/bocsar_mr_cjb152.aspx>; Joula Dekker, Kate O'Brien and Nadine Smith, 'An Evaluation of the Compulsory Drug Treatment Program (CDTP)' (NSW Bureau of Crime Statistics and Research Report, 2010) <<http://www.bocsar.nsw.gov.au/Documents/I20.pdf>>; Don Weatherburn et. al., NSW Bureau of Crime Statistics and Research, 'The NSW Drug Court: A Re-evaluation of its effectiveness' (2008) 121 *Crime and Justice Bulletin* 1; Emma Pritchard, Janette Mugavin and Amy Swan, 'Compulsory Treatment in Australia: a discussion paper on the compulsory treatment of individuals dependent on alcohol and/or other drugs' (Australian National Council on Drugs Research Paper no 14, 2007) 70–81.

History shows that top-down attempts by the bureaucracy to improve incarceration rates (particularly incarceration rates of Indigenous people) will fail. What is needed is the individualised justice that a court can provide. The Court hopes to partner with the profession, health, police, community corrections and Indigenous people to develop an appropriate DAC Program plan that addresses the special needs of Indigenous offenders.

3. Mutual interest in education — the NJCA

Finally, I'd like to say a few words in my capacity as Chair of the National Judicial College of Australia (NJCA).

The NJCA is a not-for-profit entity that is physically based in the ANU College of Law. It provides national leadership in judicial education. We focus on developing judicial skills (such as decision-making) rather than judicial knowledge (some would say that that would be a hopeless task, but all would agree that it was a never-ending one). We try to apply best practice in adult education through interactive programs that are designed and delivered by judges (with a little help from our friends in adult education).

The ANU College of Law provides tremendous support to the NJCA by giving us an office and administrative support and — more importantly — by linking us to faculty members who selflessly provide tremendous input in a number of ways:

1. Each year we hold a joint NJCA/ANU conference. I'd like to mention Associate Professor Mark Nolan, Dr Anthony Hopkins and Wendy Kukulies-Smith, each of whom makes a great contribution to the joint conference. It's not too late to register for our conference on the weekend of 4–5 March, which will deal with challenges for evidence in the 21st century. The keynote address will be given by Justice Steven Gageler. His Honour will be speak on "Science and Truth", addressing the intersection between evidence and truth. His Honour has a reputation as something of a maverick and I expect that the keynote address will be very interesting.
2. Wendy and Mark as well as Miriam Gani oversee the work of our research assistants who compile the Commonwealth Sentencing Database, which is a valuable tool for criminal practitioners and judges.
3. The NJCA appoints Judicial Associates, who assist the NJCA in the development and presentation of programs and act as Visiting Fellows at the ANU College of Law. A few years ago, I was a Judicial Associate. In that role, I delivered several lectures and tutorials which gave me great insight into the hard slog required to prepare even a short presentation to students.

4. Each quarter, the NJCA sends out an e-newsletter to all judges and others who are interested. In future, we would like to include a short piece about something that is happening at the ANU College of Law — perhaps a piece of research that may be of interest to judges or an extract from a presentation by member of the faculty.

The ANU College of Law and the NJCA both seek to deliver high quality adult education in law. There must be many other opportunities for us to share and exchange resources. I would welcome any ideas, as would Lillian Leseuer, our CEO, who is present tonight.

Conclusion

Finally, the future of the profession is in the classes, tutorials and lectures that you conduct today. So please, look after yourselves, look after your colleagues and teach more statutory interpretation.