

SESQUICENTENARY OF THE UNIVERSITY OF SYDNEY

LAW FACULTY

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I grew up in a country in which the Prime Minister, Sir Robert Menzies, was able to travel to England for six weeks by boat with the Australian cricket team, stay for a month or so watching cricket and then return, taking another six weeks to do so. Such conduct is inconceivable today.

All aspects of life have speeded up. Where we once spoke of words per minute, we now speak of characters per second. Olympic sports like luge, cycling and canoeing are measured in milliseconds. Other sports have changed their rules or reinvented themselves to provide a “fast food” alternative, such as the introduction of tiebreakers in tennis. Sir Robert Menzies would never have approved of one-day cricket.

When the staff, students and graduates of this University Law School gathered together to celebrate the centenary of the Law School in 1990, they could never have imagined how quickly a half-century

would pass. However, what we commemorate today is the resolution of the University of Sydney Senate to establish a Law Faculty. The creation of a faculty in 1855 was entirely technical, although in 1858 a barrister was appointed as the first part-time lecturer and from time to time thereafter LLBs and LLDs were awarded. It was not until 1890 that the first Professor of Law was appointed and the Law School moved into distinct premises – hence the centenary in 1990.

Nevertheless, bearing in mind the *Trade Practices Act*, if I were a member of this faculty I would be wary of deploying the term “sesquicentenary” in trade or commerce assuming, contrary to the contemporary fashion in higher education, that you are not already so engaged.

On the occasion equivalent to this in 1990 for celebrating the centenary, the speech was delivered by Sir Anthony Mason. He concentrated on the then recently announced decision that the Law School was, after many years of debate, finally and definitely moving to the main campus. In 2005, with the plans much further advanced than they were at that time, I feel reasonably confident in proceeding on the same assumption.

There have always been two schools of thought on this matter. I myself have always been a proponent of a site on campus. The debate about the geographic location of the University of Sydney Law School encapsulates in physical form a wider debate about the nature of legal education.

Blackstone's Commentaries were the first lectures on the common law ever delivered at Oxford, where he became the first teacher of the common law. For centuries the education of common lawyers was conducted by a medieval apprenticeship system in attorney's firms or, in the case of barristers, by the Inns of Court, then often referred to as "the Third University". Oxford and Cambridge taught only civil, canon and Roman law until Blackstone. It is not as if that was unrelated to private practice. The jurisdiction of the ecclesiastical courts was more significant and wide-ranging than common lawyers care to remember.

Over the centuries since Blackstone, there have been debates in England, the United States, Australia and other common law nations about whether a law school is a place for professional training or for learning an academic discipline. The answer, of course, is that it must be both. The balance between the two is a matter upon which reasonable minds can and do differ. There is no single correct solution.

There can be no doubt that one of the basic functions of a legal education is to teach students to learn to think like a lawyer. That is not necessarily incompatible with teaching them to think. I am afraid I am a little old fashioned about the role of education. Undergraduates come to university as minds to be formed, not as consumers with wants to be satisfied. Nor, can I accept those contemporary education philosophies that treat education as some form of therapy.

However, the basic duality of function remains. Teaching students to become fully trained members of a profession is a matter which must continue to be given primary weight. It is not, however, incompatible with that objective to seek to ensure that graduates do not emerge with a narrow concept of the role and function of the law, nor with an inward looking, inbred intellectual perspective. The profession benefits from ensuring that its members have intellectual horizons beyond the law. The physical location of the Law School raises these issues in a dramatic form. I am convinced that both functions can be properly performed from a campus location.

I emphasise the broader public interest which will be served by ensuring that legal academics and law students participate fully in the

intellectual life of the University. They will, thereby, enhance the ability of the University to serve its primary mission for the advancement and dissemination of learning. There are few areas of discourse which do not benefit from a legal perspective. There are no areas of the law that should not be informed by other perspectives.

One significant recent development in this regard is the fact that a majority of law graduates do not intend to and do not in fact enter private practice. Law has increasingly become a general degree of utility in a wide range of commercial and governmental occupations. About 2,000 new lawyers are admitted to practice every year. Less than half take out practising certificates. This trend supports the decision to move the campus.

There is no doubt, however, that the degree to which this Law School has been tied to the profession has been one of its great strengths. That bond remains, in this era of competition amongst tertiary institutions, one of its competitive advantages. The move to the campus will require the Law School to make an extra effort to retain its traditional ties and to do what it can to encourage members of the profession to continue to participate in teaching. In that regard it is of great significance that the present Law School will be, as I understand the

plan, in part retained for the use of postgraduate courses for the University.

An occasion such as this invites reminiscence, even nostalgia. I am one of many who recall their years at the University, including at the Law School, with great fondness. For most of my time we had the rather dubious pleasure of occupying the old University Chambers building. Large lectures were held up and down the street: in St James Hall next door and at the other end of Phillip Street in the auditorium of 2GB radio station which Barry Humphries, in one of his first triumphal visits to Sydney – as I recall he had just discovered the phallic qualities of the gladioli flower – recalled the celebrity heyday of the site, where the great Jack Davey broadcast, describing it as the “cashmere bouquet auditorium”. If you don’t understand that reference ask someone over 50.

Looking back now I have no doubt that my generation was privileged to pass through this Law School in one of its golden eras. The faculty had diversity and extraordinary quality. We received the benefit of it in the course structure and materials: the texts written by our lecturers, the case books they edited and the valuable notes which they prepared for each of the courses and published only for students who

attended this School, as well, of course, as the lectures and tutorials themselves.

Many were prolific in their output, although some adopted the approach so well described by Justice Heydon in *Union Shipping New Zealand Limited v Morgan* (2002) 54 NSWLR 690 at 728:

“... [A]cademic legal literature is, like Anglo-Saxon literature, largely a literature of lamentation and complaint. The laments and complaints can be heard even when academic wishes are acceded to.”

Notwithstanding the productivity of its staff, the Law School firmly opposed the development of any publish or perish tradition. The dean of the time, Ken Shatwell, led by example. In the early 1950s he published two excellent articles: one on consideration and one on mistake. Intellectually exhausted by this outpouring, as far as I know, he never published again.

The key to the success of this School during my era was the intellectual strength of its faculty. The two rival paradigms of legal education – professional training or academic discipline – were both

represented in this Law School by lecturers of great force and talent. This gave rise, although I do not remember being conscious of it at the time, to a considerable amount of conflict within the faculty. From the perspective of the students, as best evidenced in the future career of its graduates, this conflict was in fact a creative tension. Two professors in particular represented the conflict in approaches to what a law school should be: Bill Morrison and Julius Stone. The tension between them in which others, such as Frank Hutley, frequently joined, created fraught relationships. However, the students were the beneficiaries *both* of the intellectual rigour which Morrison demanded *and* of the intellectual breadth that Stone instilled.

For many years, perhaps until the 1960s, it was probably the case that the Victorian legal profession had the highest reputation in Australia. Since that time, it is the Sydney profession that has had that reputation. In some respects this reflects the move of the commercial and financial capital of the nation from Melbourne to Sydney, which commenced to occur in the 1960s. It does not, however, explain the intellectual strength of the profession in this city.

That strength is reflected in the universally accepted high quality of the Supreme Court and the Federal Court in this city. It is also reflected

in the composition of the High Court. Since the beginning of 1989, when Justice McHugh was appointed to the High Court, the majority of its members have come from the Sydney profession. Justice McHugh, like Lord Diplock in England, is the great example in this nation of the proposition that a law school education is not essential to high attainment in the law. Nevertheless, he is very much a product of the Sydney Bar, the intellectual rigour of which has always been significantly influenced by the Law School. All the others were a product of this Law School, except for Justice Heydon who read Arts at this University and had the bad taste to study his law at Oxford. He made up for it by returning to this Law School as its dean. With Justice Crennan also a graduate of this Law School, the majority will extend beyond two decades.

The intellectual rigour of the Sydney profession is attributable in large measure, in my opinion, to its synergistic relationship with this Law School. The intellectual strength of the faculty, both full-time and part-time, instilled in future practitioners a commitment to high standards of learning and performance.

Lecturers like Bill Morrison were demanding in ways that few who passed through his hands will forget. On the other hand, insofar as the profession has escaped the perils of intellectual inbreeding, to which the

law appears to be particularly subject, it is due in large measure to lecturers like Julius Stone, and the endless stream of disciples that he was able to attract here being, as he was, one of the great legal scholars of the 20th century anywhere in the common law world.

Others made similarly significant contributions. Ross Parsons established courses in corporations law and taxation law of the highest quality and forged links with the broader commercial community in this city, of which the Law School remains the beneficiary today. Pat Lane enthralled us with his encyclopaedic knowledge of constitutional law always knowing the precise page of the Commonwealth Law Reports. What would later appear to be his obsession for concentrating on the text of the Constitution – for some time a desperately unfashionable approach – may be coming back into fashion. Gordon Hawkins at the Institute of Criminology was almost as successful as Stone in maintaining contact with the best United States scholars in his criminal law field and began the tradition of counteracting the sensationalism that often attends public discussion of crime, by contributing a sensible, balanced, informed opinion to the public debate.

Throughout the period that I was at the Law School the influence of and contribution by practising members of the profession was

immense. Frank Hutley, once a tutor as one of only three full-time members of faculty, continued to lecture as counsel and judge. I owe him a personal debt. Without his intellectual honesty I would probably have been denied the University Medal on the basis of not having attended enough lectures.

There were numerous practitioners who returned to contribute to the education of the generation of students to which I belong: Murray Gleeson on corporations law; Harold Glass on evidence; Gordon Samuels on pleading; Zeke Solomon on international law and, of course, Meagher and Gummow and Lehane before they became “Meagher Gummow & Lehane”, and assumed the role of extirpaters of heresy, knowing that fallen angels can insinuate heresy anywhere, even in the impressionable mind of a Diplock, let alone in that of the unspeakable Denning.

I know that I speak for all of those present here today that our attendance manifests the debt that we owe to this Law School. We wish the greatest of success to all those who continue to be involved in this important centre of education. I know that with the support of your Chancellor, Justice Santow, the School is dedicated to maintaining both the strength of its intellectual tradition and its ties to the practical world of

the profession and the community. The move to the campus will create new challenges, particularly, for the maintenance of the close bond between the Law School and the profession. I have no doubt that those challenges can be successfully met.

Over the course of about 150 years, since the University decided to establish a law faculty, the legal system of this State has been the product of two forces: of continuity and of change. These forces have always been with us and they will always be with us. The Law School plays a vital function with respect to both those forces. First, as custodian of some of our most important legal traditions and, secondly, as a centre for deliberation about changes that need to occur. We on the bench, and in the practising profession as a whole, depend to a significant degree on independent scholarship for many purposes, including for the development of the law and of the mechanisms for the administration of justice. We must always be conscious of our traditions, but equally conscious of why it is we do what we do.

During the Second World War, the British pressed into service for home defence whatever armaments they had available, including artillery of great vintage. Mobile units were deployed up and down the coast and trained in the traditional manner of the Royal artillery.

Concern developed about the apparent lack of efficiency of the processes. The methods which the soldiers had been trained to perform in the loading, aiming and firing routines were subject to careful study. Something was extremely odd. A moment before the firing, two members of the gun crew ceased all activity, stepped back from the piece during its entire firing sequence and stood at attention. The investigator called in an old retired Colonel of artillery to ask him why all this energy and time was being wasted. The Colonel worked it out. "They are holding the horses", he said¹. We in the law have to understand why we do traditional things, in order to ensure that we are not just holding imaginary horses.

I look forward to the continued association between the Court and the profession and this Law School in the years ahead. I know it is in good hands. Ron MacCallum as dean has made a contribution to learning in the field of industrial law that is unsurpassed. However, your contribution is much more than that. The way in which you have overcome your disability to establish yourself as a scholar of such high renown, and as an administrator of such capability, together with the extraordinarily personable style of your discourse, makes you an inspiration to us all. I, and we alumni all, wish you and your faculty well.

¹ Elting E Morison *Men, Machines and Modern Times* MITQ Press Cambridge Mass. 1966 pp17-18.