

Internationalising the Australian law curriculum for enhanced global legal education and practice

National Symposium

16 March 2012, Canberra

Horses for Courses

Chief Justice Robert French AC

Chairman, ladies and gentlemen thank you for inviting me to open this important Symposium to discuss issues arising out of the Australian Government Office of Learning and Teaching Project on Internationalising the Australian Law Curriculum. I was comforted to read in your program brochure that the Project has been approved by the Curtin University's Human Research Ethics Committee and has an approval number. So comforted, I am pleased to be here not only in my capacity as Chief Justice, but also as Chair of the Council of Chief Justices of Australia and New Zealand. The Council of Chief Justices has a direct and continuing interest in the content and standards of legal education so far as they relate to those who seek to practice as Australian lawyers.

The purpose of the Project as described in the briefing notes for presenters at this Symposium, which have been prepared by ILSAC, is:

... to develop and model the effective integration of international and intercultural dimensions into legal education that will equip Australian legal graduates with the necessary international and intercultural competencies to work in a global legal context.

Many fields of legal practice and important elements of the Australian legal profession today have international dimensions. There is a significant number of Australian law firms with international offices.

In recent years, international law firms have established themselves in Australia. On 1 March this year, Blake Dawson entered into an association with the international law firm, Ashurst. Mallesons Stephen Jaques have become King & Wood Mallesons, following their merger with the Chinese firm King & Wood. In October 2011, Squire Sanders took over the Perth office of Minter Ellison. In May 2011, DLA Piper merged with DLA Phillips Fox. In that same month, Clifford Chance opened offices in Sydney and Perth. In March 2010, Allen & Overy opened in Sydney and Perth.

The evolution of the law firm which, with some friends, I set up in 1975, is indicative of the changing landscape of Australian legal practice. When we established Warren McDonald French & Harrison in 1975 we had imperial aspirations. The first step towards their realisation was a branch office in the small rural town of Kojonup about 250 kilometres south of Perth. By the time I left the firm in 1983 to practice at the Independent Bar, the firm had grown to a medium size general commercial, conveyancing and litigation practice. It still had its one rural office. A few years after I left, it became part of Sly & Weigall, a national firm. A few years after that, it became part of Deacons, another national firm, and a few years after that, it became part of Norton Rose, an international law firm.

In so far as fields of legal practice are concerned, there is evidently a significant incidence of cross-border transactions which involve more than one legal system. International transactional models, such as standard contracts, informed by more than one legal system have been available for some time. International dispute resolution mechanisms, particularly international arbitration, are on the rise. Many subject areas have, in one way or another, an inescapable international dimension. They include competition law, intellectual property law, environmental law, human rights law, criminal law, family law and taxation law. A most prominent example in Australia

is in the field of administrative law and particularly judicial review relating to asylum seekers.

Many Australian law graduates look for and take up opportunities to work in other countries in our region and beyond.

There is a developing global market for legal education services. That development has important consequences. One is the fee income that can be earned by universities providing such services to students from other countries. The other is the opportunity that is provided for such students to gain an appreciation of Australian life and culture, and our legal system and its values. Related to that topic are the demands for mutual recognition of relevant elements of legal qualifications gained in law schools in other countries and the associated need to maintain standards for admission in Australia.

An important aspect of internationalisation in the law is to be found in the interactions of the judiciary and the profession of different countries particularly in our region. This occurs through conferences and seminars, through organisations such as Lawasia, the International Association of Judicial Administration, biennial meetings of Chief Justices of the Asia Pacific and the Asia Pacific Judicial Reform Forum. Through such interactions common principles can be recognised and supported on such topics as judicial independence, judicial ethics, judicial education, case management, indices of court performance and courts' administration. Opportunities for continuing legal education in subject areas of common interest are also created.

All of the international dimensions which I have mentioned are present in the practice of law today to a greater or lesser degree. They generate a need for the kind of examination which the Project and this Symposium are undertaking. Beyond those practical imperatives there are intrinsic benefits in equipping Australian law graduates to

see our legal system from an external perspective and in a larger than domestic context.

Someone once said that "all politics is local".¹ In considering the internationalisation of legal education it is necessary to have regard to relevant domestic factors. Those domestic factors include the existence of a national legal profession, the step-wise progress to national admission standards, including the admission of overseas graduates and practitioners, and the tendency to harmonisation of laws. The legal education curriculum at the present time is affected by the evolving higher education quality and regulatory framework and the development associated with that framework of threshold learning outcomes for the discipline of law. Consideration of the internationalisation of the legal curriculum must also take account of the changing nature and, importantly, the diversity of university education in Australia and the changing structures of degree courses in law. There are 29 law schools in Australia. They are not all the same.

An important concern of any legal education system in Australia must be the extent to which it produces graduates who can provide access to justice for members of the Australian community. A particular aspect of that topic is the problem of delivery of legal services outside the central business districts of the capital cities of Australia. In rural, regional and remote areas there are real challenges in delivering legal services. Those challenges were the subject of a special conference on rural, regional and remote legal services held in Warrnambool last year and organised by the Deakin University Law School.

¹ A slogan commonly attributed to US politician Thomas "Tip" O'Neill Jnr in 1976. Although the slogan has been attributed to O'Neill it has been observed as appearing much earlier such as in *The Frederick News* on 1 July 1932. See Fred Shapiro (ed) *The Yale Book of Quotations* (Yale University Press, 2006) 566.

The point of referring to these domestic concerns is that while the international dimension may penetrate many areas of legal practice, it is not equally pervasive in all areas. A large range of legal services in the small business and domestic property and disputes market will not often require the invocation of international legal skills. The service priorities in the market for rural, regional and remote legal services, which is facing something of a crisis in Australia at the moment, are unlikely to rank international legal issues particularly highly.

This all suggests that legal education may have objects which are in tension. The International Legal Education and Training Committee of ILSAC, which produced a report in 2004 (the ILET Report), recognised the problem with the observation that:

Internationalisation of legal skills could be an issue that concerns only a few law schools that are positioned in major cities, and whose graduates work in CBD practices, major corporations or government departments.²

There are obvious benefits to be derived from legal education which presents an international perspective regardless of the prospect that graduates exposed to such education will undertake international transactions, or dispute resolution, or to practice in other countries. Here I engage in some judicial fence-sitting or, if you prefer, multifactorial analysis. A one size fits all model is not appropriate. There should be openness to a variety of approaches. However, the balkanisation of legal education by a diversity which enriches some courses with international perspectives and denies them entirely to others, is to be avoided.

² Australian Universities Teaching Committee (Richard Johnstone and Sumitra Vignaendra), *Learning Outcomes and Curriculum Development in Law* (2003) 198 (AUTC Report), cited in 'Internationalisation of the Australian Law Degree', International Legal Education and Training Committee, International Legal Services Advisory Council, June 2004, 3.2.8.

There are different ways of bringing to bear international dimensions in teaching both public and private law. There is a general thesis which underpins that reflection. That is, that despite specialisation, few if any areas of the law can be quarantined from others. On 14 March 2012 I spoke to the Tax Institute of Australia and reflected upon the many subject areas in the law relevant to the field of taxation practice. These include the statute law which relates to the imposition, collection and recovery of taxation, and the great body of common law and statute law relating to contracts, trusts, property and corporations, administrative law and constitutional law which interpenetrate with it. Taxation and the fields with which it intersects is also apt to involve international considerations whether arising out of cross-border transactions or capital flows or the application of double taxation treaties.

There are very few subjects of legal education that cannot accommodate some international dimension. The ILET Report in 2004 quoted one respondent to its inquiries, who said:

How can you really internationalise your family law, or your criminal law? It's very difficult.³

It is not that difficult as is demonstrated by reference to some recent High Court decisions in those fields and other apparently purely domestic fields.

In criminal law, the decision of the Court in *Momcilovic v The Queen*⁴ concerned the Charter of Rights and Responsibilities (Vic) and also the construction of State drugs legislation and its interaction with

³ 'Internationalisation of the Australian Law Degree', International Legal Education and Training Committee, International Legal Services Advisory Council, June 2004, 4.1, fn 47.

⁴ (2011) 85 ALJR 1115; 280 ALR 221.

congruent provisions of the *Criminal Code Act 1995* (Cth) concerning possession and trafficking of drugs. The latter provisions are based upon the external affairs power and an international treaty. The case also concerned the operation of the presumption of innocence as a civil right. The scope and content of the presumption is the subject of decisions of foreign and international courts concerning, among other international instruments, the *International Covenant on Civil and Political Rights* and the *European Convention on Human Rights*. In other decisions of the Court in 2009 and 2010 concerning the validity of legislation directed at money laundering and organised crime, there was reference to analogous legislation in other countries.⁵ In a family law decision in 2009, the Court was required to consider the *Hague Convention on Civil Aspects of International Child Abduction* and the Family Law (Child Abduction Convention) Regulations.⁶ The Court has recently referred, in decisions in the fields of tort and restitution, to the Restatements of the American Law Institute on the law of torts and causation⁷ and on restitution.⁸

A judgment of the Court, delivered on 1 December 2011, discloses facts which nicely illustrate the international dimension of some contemporary legal practice. The case was *Michael Wilson & Partners Ltd v Nicholls*.⁹ It involved a legal practice incorporated in the British Virgin Islands but carrying on business in the former Soviet Union from offices in Kazakhstan. An Australian solicitor joined the firm as a director, and an Australian barrister and solicitor joined as associates. The Australians ultimately left the firm. They were connected with three companies, two of which were incorporated in the British Virgin Islands and the third in a Free Trade Zone in the

⁵ See, eg, *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 344-345 [25]-[29]; *Souh Australia v Totani* (2010) 242 CLR 1, 32-33 [37].

⁶ *LK v Director-General, Department of Community Services* (2009) 237 CLR 582.

⁷ *Amaca Pty Ltd v Booth* (2011) 86 ALJR 272; 283 ALR 461.

⁸ *Equuscorp Pty Ltd v Haxton* [2012] HCA 7.

⁹ (2011) 86 ALJR 14; 282 ALR 685.

United Arab Emirates. The plaintiff firm alleged that the Australians had directed clients away from the plaintiff and to their own benefit by having one or more of their associated companies act for the clients.

The plaintiff law firm initiated an arbitration in London involving the former director of the company. It also initiated proceedings in the Supreme Court of New South Wales against the two former associates. It sued the associated companies in the Eastern Caribbean Supreme Court. Complaints of criminal conduct were made to the United Kingdom, the British Virgin Islands and Switzerland.

The issues in the case, which ended up in the High Court, involved breach of contract and fiduciary duties, apprehension of judicial bias and whether the proceedings in the Supreme Court of New South Wales were an abuse of process having regard to the ongoing arbitration in London. The case covered contract, equity, civil procedure and, probably, professional conduct, four of the Priestley 11 subjects.

Admitting authorities, in particular the Supreme Courts of the States and Territories, will be concerned to ensure that law graduates have an adequate knowledge of substantive domestic law over often intersecting areas of the kind set out in the Priestley 11. Whether that list should be amended or replaced is a matter for ongoing debate. There are many ways of delivering those subjects. But when it comes to the internationalisation of legal education my propositions, mixing animal metaphors, are:

1. It's a matter of horses for courses; and
2. As Charles Kingsley wrote in *Westward Ho* in 1885:

There are more ways of killing a cat than by choking it with cream.