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What Lawyers Don't Read

by Moria Raynor

Is law an industry, a profession, an academic discipline, or a political philosophy? Whose 'satisfaction' with lawyers' performance matters-peers', publics', clients', courts', or governments? It's important to know. The Standing Committee of Attorneys-General is working towards agreement on a national scheme for admitting lawyers to practise. This could be revolutionary-and the people always suffer in revolutions.

The plan is to progress towards a 'national legal services market', an ideal to which all Australias legal professional bodies have agreed, in principle. The particular proposal, put up by both the lawyers' national representative body, the Law Council of Australia, and the 'Priestley Committee' (a committee of all Australian Chief Justices), departs significantly from tradition, though the tradition has long been divorced from the reality.

First, it has been proposed that control of lawyers' admission, and thus of the standards of skill and competence, and so their education and training, should pass to a national body. The proposed National Appraisal Council for the Legal Profession (NAC), would be funded by another levy on lawyers and on Law Schools. NAC could force the states to comply with its requirements and meet its standards for lawyers' training and competencies. The proposal would explicitly give the executive arm of Commonwealth Government-with the connivance of the states-effective control over the whole of the Australian legal profession.

Does this matter? Well, you might think so, if you knew legal history, and if you had a philosophical view of what law is, what lawyers ought to be and what they should know and understand. But lawyers don't learn legal history any more. Most don't bother to undertake the (optional) study of the science of jurisprudence. So let me spell it out.

Historically, lawyers are specialist advocates and legal advisers who are exclusively licensed by the courts, not by the executive part of government, to be the courts' 'officers', their autonomous experts, in advocacy, in advising on the law, and assisting the administration of justice.

In the tradition we inherited from England, legal professionals have had a monopoly on the right to appear in the courts and give legal advice since1292. Since the 15th century, judges have set the standards for lawyers' education and training, independently of universities and the church-the most powerful institutions of the times.

Until quite recently, lawyers' education and training has been delivered through a system of apprenticeships-'articles of clerkship' or 'reading' with a qualified legal practitioner. This system was never perfect. Once the monopoly had been created, the quality of education offered through the Inns of Court started to deteriorate. Achievement became symbolic, the training pragmatic and oriented to the preservation of the status quo and its crafty contortion to address new, recurring problems-the source of the extraordinarily complex array of 'legal fictions' from which our basic property, tort and contract law developed. Poor training resulted in a diminution of skills, and inconvenience for the courts. So, since the 19th and early 20th centuries, universities have increasingly come to provide at least the academic part of legal education and training. Nonetheless, university qualifications have not been universally required. Forty years ago, half of the admitted lawyers in NSW did not have law degrees, though virtually all of the Tasmanian and Western Australian ones did. A handful of Law Schools and legal academics (they have spawned since) all taught much the same, generalist, legal course until the late 1970s.

The practical component of legal training was still delivered through the articles system, but by the end of the 1970s the states had begun to set up training institutes to provide more rigorous training. By then, all the states had long regulated the legal profession by statute. In some, admission to practise was administered by statutory bodies

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The academic side is largely provided by universities-but it is a very mixed bag. They all now package their courses to meet very different needs and expectations of students-they now market to their 'clients'.
There is far more choice in the courses of study, as there was not when I first studied law. This means that lawyers do not, necessarily, share a common core of knowledge before they go into practice. Indeed, there are some notable omissions.

The Priestley Committee has recommended that a practising lawyer's academic study should cover 11 areas of knowledge: criminal law and procedure; tort; contracts; property; equity; company law; administrative law; Federal and State constitutional law; civil procedure, evidence and, finally, professional conduct. But when I completed my undergraduate degree in 1969 I had to pass 'core' subjects that have, inexplicably, now become optional: legal history, constitutional history as well as constitutional law and jurisprudence.

This choice-and these omissions-have come about because many law students do not intend to practise. About 35 per cent of law graduates either don't practise, or use their qualifications in an array of occupations: in-house employment in corporations; as barristers; in community-based or government-funded legal aid services; in government, management, or in highly specialised areas of boutique practice. They wish to choose a targeted course. But in so doing, I think they, and their teachers, are at risk of missing the point.

How can anyone 'study' law without appreciating both its history, and its intellectual and philosophical basis? How can one decide to practise law without a fundamental appreciation of the ethical responsibilities of a lawyer? These are now taught in 'short courses', just prior to admission.

A lawyer must know the law, as a discipline-what it is, and how to find out what it is. A lawyer must know the law, as a profession. This includes the historical and philosophical reasons for their duties to a client: to accept work and continue to act until dismissed; to communicate and obey the client's instructions; to maintain a confidence, and meet the duty of care. A lawyer must appreciate the fiduciary relationship with the client, and the ethical duty not to misuse it; must avoid conflicts of interest whether they be with other clients, other people, or the lawyer's own financial and other interests. A lawyer must embrace the duty to be fair and candid, and not to pervert or abuse the legal system: High Court Justice Callinan has been severely criticised by the Federal Court for advising a course of litigation for strategic purposes, when he was a QC, knowing that there was no hope of success. Is there not a similar duty not to misuse relatively privileged access to the courts, by the wealthy? A lawyer must, above all, respect the law, the courts, the judicial process, and the office of judges.

These ethical principles are just one small part of the pre-admission competencies proposed both by the 'Priestley' areas of practical legal education and the Australian Professional Legal Education Council. The model proposed by Victorian Attorney-General Jan Wade's discussion paper presently in circulation proposes that the responsibility for legal education and training for admission should be vested in a statutory body-which is no surprise. It posits a university degree, or equivalent, teaching the 'Priestley 11 Areas of Knowledge'-no jurisprudence, no legal history, no ethics other than a 'short course' prior to admission in 'professional responsibility and ethics (preliminary)'.

The proposed post-admission practical legal training would include important practical skills: trust accounts, advanced professional conduct and ethics in practice, personal work management, legal writing and drafting, interviewing/communication techniques, negotiation and dispute resolution, legal analysis and research and advocacy. Those who wish to take out a full practising certificate must also acquire measurable competencies in practice management and business practice, legal and business accounting, and one year's work experience in four areas of transaction-based work (e.g. property, wills and probate) and litigation and personal rights-based work (e.g. criminal law, commercial litigation).

Such training should produce technical competence, but where is the gravitas? In 1976 the then Governor-General, John Kerr, wrote that: 'I doubt whether Law Schools can provide, except in relation to general professional ethics, an overall ideology for lawyers. In their various ultimate interests and specialties they will espouse and develop ideologies which rationalise their respective relationships with the economic system and their selected role in it.'
Yet no constitutional lawyer is a good lawyer, who does not know constitutional history, and John Kerr's role in weakening constitutional conventions, and bringing forward a republican form of government in Australia. Nor is any lawyer a 'real' lawyer, in my view, who lacks an understanding of our legal history; the reasons why lawyers have-and must not lose-their tradition of principled independence; knowing how Common Law and Equity developed, and lawyers' special role in protecting individual rights and the public interest.

In 1909, F.W. Maitland delivered a course of lectures on the 'forms of action' from which our litigation remedies are derived. All lawyers should read them. He makes it utterly clear why there can be no 'right' unless it has a remedy, and why it has always been a lawyers' role to develop the law to create one. It is instructive to remind ourselves of this, at a time when cost is taking justice beyond the reach of the majority of our citizens: 'The forms of action we have buried, but they still rule us from their graves.'

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