



**TITLE:** Lighthouses of Reflection: The Democratic Role of our Institutions<sup>1</sup>

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### **The Connection: Universities and the Judiciary**

When I was asked to speak at this conference and I considered the theme "Employers of Choice in a Global Market" and the individual topics of the three day program, I wondered what someone from the judiciary could offer that might be useful to a university Human Resources and Industrial Relations Conference.

As Chief Justice of the Supreme Court of Victoria the business of attracting, retaining and developing the best judges and the best judicial staff is very dear to my heart. Our task like the universities could also be argued to take place in a competitive global environment and, of course, as it is for universities, the issue of quality in our work is an ongoing and central consideration. Other matters such as "leadership", "work and life values in a world of choice", "health in the workplace" and whether being the best really matters are all organizational issues that universities and a superior court could arguably have in common.

However, the more I thought about the conference theme as it related to the universities and the judiciary, the more I was drawn to examining what roles these institutions played in shaping our society and serving its people.

I began to think about Australia as a democratic nation embodying liberal and humane values and playing a constructive and responsible role in the world community. How are our institutions - the universities and the judiciary - related to these goals and do they have a key role in the pursuit of these aspirations?

The more I thought about it the more I became convinced that the universities and the judiciary *do* have a key role in defining, building, supporting and protecting democracy and liberal values in the 21<sup>st</sup> century and I wish to talk about these things today because I think they *are* relevant to this conference and its themes.

The connection between such matters and "Human Resources and Industrial Relations" may, to some, appear tenuous. However, I think these "big picture" issues are critical to the purpose of this conference because an exploration of the role of universities in the life of our nation and its people is integral to any consideration of the themes of this conference. Neither universities nor the judiciary can properly explore and embrace best practice as employers and best practice in human resources management and industrial relations if the key purposes of these

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<sup>1</sup> The author acknowledges the assistance of her Legal Associate, Ms Cecilia Riebl.



institutions are unclear or not accepted by those who constitute these institutions and those who these institutions serve.

There needs to be "goal congruence" not just between those who make up the institution; there needs to be shared perceptions about the goals and functions of institutions like universities and the judiciary, shared perceptions between the providing institutions and those they serve.

To achieve all this is clearly difficult. Much has been written about this issue and the debate in relation to universities is very intense. My concern today is to make some suggestions about just *some* of the goals that can properly be assigned to universities and the judiciary. I leave the task of comprehensive identification of goals to others.

In particular I want to look at the role universities and the judiciary can play in providing support to those charged with making a democracy work: its people.

An effective democracy requires an active, informed, rational citizenry capable of shaping a civil, just, free and humane society. Democracy involves a faith in the capacity of the people of the nation to understand and monitor the basic institutional mechanisms that operate to order and utilize the nation's resources for the physical, social and spiritual welfare of all its citizens.

This faith in the capacity of so-called "ordinary people" is often questioned because our world seems to be expanding expedientially in its technological, social, cultural, legal and political complexities.

This faith is often shaken and always challenged by the ever present realities of poverty, inequality, injustice and evil in nations which espouse liberal democratic values and trumpet the democratic nature of their political systems.

However, what else are we to do but focus on how we can use this faith in our democracy to ensure that our citizens, our institutions, our representatives and our systems place our people in control and the welfare of all citizens as the objective of our social and institutional arrangements?

Such a conception sees "ordinary people" with the capacity to undertake all the "ordinary" activities of life: work, family, education, leisure, culture and spiritual life and then some more - real engagement in the decisions which determine the nature of civil society and ongoing involvement in monitoring the institutional arrangements designed to ensure their controlling influence.

Now while this seems a very tall order, it is, I would argue, what "our game is about". It is the presumption upon which our basic social, political and legal systems are based and I therefore pose the following question:

*How can our universities and our judiciary most effectively support our citizens in taking up the challenge to use democracy as the mechanism to pursue a civil, just, free and humane society?*

In addressing this question I would like to briefly touch upon the historical and changing roles of universities and the courts, the changing nature of society in a



globalised world and the responses of the universities and the courts to these changes. Finally, I would like to make some suggestions about the nature of the debate that is now needed.

However, before embarking on this course, I would like to suggest some critical forms of assistance that universities and the judiciary might be able to provide to our citizens in their role as “effective participants” in a 21<sup>st</sup> century liberal democracy.

I should begin by saying a little about what I mean by effective participation. Effective participation by the citizenry in a democracy must ultimately mean that the people as a whole exercise controlling power and that that power is exercised for the benefit of all groups and individuals within the nation.

This explanation requires further qualification and analysis, a task beyond the scope of the speech. I merely provide this explanation as a guide to how I am using the term “effective participation”.

So, in identifying the nature of the assistance universities and the judiciary might provide for effective participation, a detailed analysis would centre around:

- (i) access to facts/knowledge;
- (ii) identification of the values we use to move from knowledge to action;
- (iii) access to the ideas, commentary and analysis that informs decision making in a democracy;
- (iv) access to public education that is relevant in content and appropriate in delivery;
- (v) Language styles and forms that provide community access to the information, commentary and analysis required for effective participation.

Time will only allow me to touch on some of these matters. However, a proper analysis would examine the extent to which universities and the judiciary could provide support to all citizens in each of these five areas.

In each of these five basic pre-requisites for effective participation, universities and the judiciary can provide concrete and practical support because their contribution can be:

- beyond ideology;
- beyond fear or favour;
- independent and separate from government; and
- rigorous and thorough in practice and research.

The contribution can be ethical. It can encompass the interests of all people and it can be shared and communicated to the whole citizenry. Finally, the operational processes of universities and the judiciary can be transparent and open to public examination. If these institutional qualities are critical for the effective participation of all in our democratic processes, we need to look at the particular contributions these institutions can make.

## **The University Across Time**



I turn, therefore, to the institution of the University.

The word *universitas* was first used in the 14<sup>th</sup> century. Originally it applied only to the scholastic guild, later in the same century it took on its modern meaning, that is, a self-regulating community of teachers and scholars whose corporate existence had been recognised and sanctioned by civil or ecclesiastical authority.

But, while the word “university” was new, the notion of “higher education” existed in western society long before the Middle Ages. Ancient Greek society was the first to emphasise the *civil* aspect of life and culture, thereby embracing the idea of the civic institution. This evolution reflected that of the city itself, which was moving toward increasing democratisation (though it should be noted that the slave and the resident alien always remained excluded from the body politic). The moral aspect of education was also incorporated. The Athenian ideal was that of the *kalos k'agathos*, the “wise and good” man. The teachers were as much preoccupied with overseeing the students’ good conduct and the formation of his character as with directing his progress in the various subjects taught him.

On the other hand, notions of “truth” and “morality” played little part in the development of the higher education system of the Sophist, who were mostly foreign teachers in Ancient Greek society who opposed the esoteric and exclusive nature of Athenian higher education. They believed that the fundamental basis of a good education was the ability to participate in public affairs. This value system induced a form of higher education whose commercial success attested to and was promoted by its social utility and practical efficacy. It was a teaching process that was oriented in an entirely realistic direction, education for political participation.

Socrates, as inheritor of the earlier aristocratic tradition, was alarmed by this radical utilitarianism. He doubted that virtue could be taught, especially for money, a degrading substance. An heir also of the old sages of former times, Socrates held that the supreme ideal of man and hence of education was not the spirit of efficiency and power but the disinterested search for the absolute, for virtue – in short, for knowledge and understanding.

This dichotomy has occurred and re-occurred down the centuries. In the 17<sup>th</sup> century, Gallileo Gallilei (1564 – 1642) emphasised pure knowledge for its own sake – for the intellectual development of humanity, for the sake of Truth with a capital T, whereas Francis Bacon (1561-1626), his contemporary, argued for more or less immediate, practical benefits to society.<sup>2</sup>

In 19<sup>th</sup> century Australia, the *Bulletin* in 1881 described the University of Sydney as “coldly isolated, deriving its inspirations from antiquated systems, and scarcely returning appreciable benefits for the support extended to it”. Ten years later the *Sydney Morning Herald* asked, “When will the lesson be learned that above all things a University, to be truly useful, must be really popular?”

Thus the question repeats itself: what is the role of the university? Are its values utility or truth?

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<sup>2</sup> Tony Klein, from ‘The Value of Fundamental Inquiry: the View from Physics’ in *Coady – “Why do Universities matter?”* p 99



## **The Modern Australian University**

The six small, often struggling, Australian civic universities that served the country up until the middle of the 20<sup>th</sup> century, while increasingly accepted, maintained a largely utilitarian role in the early decades. Moreover, or perhaps as a result, they did not encourage freedom of intellectual inquiry. The professors, originally appointed for life and later until retirement, were under heavy pressure to conform to community expectations. Above all, the university sought to avoid controversy: At the turn of the century in Melbourne a professor of medicine was instructed not to lecture on “protoplasm” lest he offend the churches and a professor of philosophy was warned that his lecture on morality in state schools should not broach party politics or sectarianism.

It was not until the years between the two world wars that claims for academic freedom were more forcefully made in Australian universities. Academics began to speak out on a range of domestic and international issues, including Aboriginal rights, immigration policy, the rise of fascism and the dangers of appeasement. While universities remained concerned to avoid public disputation that might damage the institutional reputation, the idea of the university as a place of open inquiry and public discussion and leadership began to emerge.

After WWII a surge of economic growth and innovation in Australian institutions gave the universities a new importance: In the late 1940s seven universities taught some 30,000 students; by the early 1970s there were seventeen universities and more than 200,000 students.

Underpinning this growth was in part pragmatic concern: science, engineering and medicine were the keys to national security, economic competitiveness and welfare. Economics, psychology, sociology and the social sciences would contribute to the solution of social problems. However, significant emphasis was also placed on the importance of the “civic university”. The Murray Report (1957) provided the rationale for its expansion when it said that Australia needed “a very large number indeed of highly educated men and women”. This should be “a full and true education”, and only the university could provide the “breadth of education” to produce “rounded human beings”.

While the public and “even statesmen” could be vexed by the inconvenient exercise of academic freedom, this was inherent in the duty of universities as “guardians of intellectual standards and intellectual integrity”. Their duty was to “seek the truth and make it known”. Hence the Murray committee was “confident that no Australian Government will seek to deny them their full and free independence in carrying out their proper functions as universities”.

By the 1970s, three educational goals had emerged: the first emphasised equality, diversity, devolution, and participation; the second, national and social unity; the third, effective means of managing what had become, because of rapid growth, a huge and nearly ungovernable education sector.

Perhaps in an effort to address the third of these goals, the 1980s and 90s marked another major shift in the face of the university. After four decades of rapid expansion in higher education, the government had set a course toward a unified national



system at the tertiary level. It negotiated directly with higher education institutions, without the traditional buffer of consultative councils, and moved directly to amalgamate institutions and otherwise to rationalise the system.

The organisational rationale was based on the contribution of higher education to the national economic interest and strategies linked higher education to the training needs of the economy. System integrity, efficiency and output measures and indications of privatisation (a private university, tertiary fees, sale of educational services) characterised the political thrust. A corporate style of management became current, using criteria of rationalisation, effectiveness, and economic efficiency to guide organisational decisions.

The emphasis on management techniques has undoubtedly compromised broader social objectives. The enormous amount of debate current in Australian education has heightened national interest but has hardened ideological lines. The immediacy of political decisions for education and the momentum of present activity will continue to produce system change.

### **The Courts and Their Performance**

But what of the courts and their performance?

The Chief Justice of the High Court, the Hon. Murray Gleeson not long ago reflected on some aspects of the judiciary and its "mystique"<sup>3</sup>. The Chief Justice observed that the members of the judiciary "... generally speaking, still conform to a relatively high degree, to commonly held standards of performance and personal conduct". Chief Justice Gleeson observed that, "This is against the trend".

The media more often than not does not hold back in what is sometimes trenchant criticism of judges and the courts. Complaints are made about the inadequacy of a sentence, the outcome of a particular case and, it seems, often without the benefit of the judges' reasons and seemingly without the benefit of having heard the evidence upon which the court based its decision. There are complaints that judges are "too black letter" and out of touch with the community. On the other hand judges are criticized for being too liberal and engaging in judicial activism.

Ultimately I suggest that all a judge can do is her or his very best and to decide cases in accordance with the law *without fear, favour or affection*.

Two recent examples of the independence and leadership demonstrated by the judiciary are readily available: First, the recent judgment of the High Court in *Al-Kateb v Godwin*<sup>4</sup> and the judgment of the Supreme Court of the United States concerned with the *Guantanamo Bay Detainees v Shafiq Rasul & Ors v George W Bush, President of the United States & Ors*<sup>5</sup>

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<sup>3</sup> Gleeson, M. the Hon., Summary of Remarks at Conference Opening, Supreme and Federal Court Judges' Conference, Auckland, New Zealand, 27 January 2004.

<sup>4</sup> [2004] HCA 37 (delivered 6 August 2004).

<sup>5</sup> 542U.S. [2004] (delivered 28 June 2004).



The differences of opinions of the most senior judges of Australia and the United States respectively in the two cases perhaps reflect some of the matters that I have averted to, namely, fearlessness, independence and rigour.

Sometimes the judiciary is pressed or feels compelled to speak out. Should judges speak out? Should judges be heard or seen beyond their judgments and the court room? These are issues constantly debated within and without the judiciary. The President of the New South Wales Court of Appeal, the Hon. Justice Keith Mason observed that "controversy causes pain" and was mindful of the remarks of Sir Anthony Mason (a former Chief Justice of the High Court):

Judicial reticence has much to commend it; it preserves the neutrality of the judge, it shields him or her from controversy, and it deters the more loquacious members of the judiciary from exposing their colleagues to controversy. Judges are not renowned for their sense of public relations.<sup>6</sup>

The President observed, drawing upon Ecclesiastes that there is a "time to keep silent, and a time to speak"<sup>7</sup>.

And so you might ask: Why is she here? Why is she raising these issues?

I am here in part because I was invited, but in part because of the opportunity to stimulate a polemic on the role and the ambit of our fundamental institutions. Indeed, the Chief Justice of the High Court has observed that the justice system "... is based upon values of independence, impartiality, integrity and professionalism, and that, within the limits of ordinary human frailty, the system pursues those values faithfully."<sup>8</sup> It might be said that the same values are pursued and should be pursued by our universities.

### **The democratic practice of universities**

In all sorts of ways the universities of this nation contribute to intellectual debate. Education can be thought of as the transmission of the values and accumulated knowledge of a society.

My brief examination of the history of the university makes it clear that knowledge generation and transmission can, has and will continue to take many forms. Certainly there is no such time as the "golden age" of higher education. There is no one "best way". Everything can and will be rethought as the social context and role of universities change. However in all this we must not lose sight of the essence of the meaning of learning and the public institution, that is, the continued exchange of ideas and independence of thought and expression.

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<sup>6</sup> Mason, K., the Hon., "Should Judges Speak Out?", paper delivered at the Judicial Conference of Australia, Uluru April 2001.

<sup>7</sup> Ibid

Sometimes for Judges in the context of the issues I have sought to pry out this can be difficult.

<sup>8</sup> Gleeson M., the Hon., "Public Confidence in the Judiciary", Judicial Conference of Australia, Launceston, 27 April 2002.



The first professors at Melbourne University attracted just sixteen students to classes in classics, history, literature, philosophy and science. Over a century and a half, a small, insular foundation catering to a privileged minority in a frontier town mushroomed into a labyrinthine undertaking. Today, the university's scholarship and research mirror the complexity of Australian society and its activities pervade and extend our national life. The experience extends I suspect to all our universities, even our newest.

### **The Role of the Universities and the Judiciary: a Common Pursuit?**

The universities and the judiciary embody the democratic and independent values that are fundamental to our society as we know it. Each of those institutions in one way or another fulfils a duty to explore, ventilate and articulate the issues before it and the issues within our society. The judiciary fulfils that duty by applying the rule of law. The universities fulfil that duty through the pursuit of truth.

But what I have been suggesting is that the matter does not end there. I have presented a case that universities and the judiciary have a critical role in the work in progress we call democracy.

This is not to suggest that both institutions are properly recognised and valued for this role, nor that the way in which universities and the judiciary can best fulfil this role has been properly identified and developed. Many of the following questions require intense consideration and we should embrace and encourage the debates that attach to them:

In identifying the facts and providing the information, what are the precise and differing roles of the universities and the judiciary?

How can the universities and the judiciary provide leadership and assistance in the identification of the values that we *do* and *should* apply to move to appropriate social policy and action?

How do the universities and the judiciary develop and formulate ideas, commentary and analysis so as to *inform* decision making?

How can the universities and the judiciary best provide leadership to facilitate the democratic process?

How is access to information best provided to the community to stimulate effective participation?

What forms and styles of communication can universities and the judiciary use to better provide community access to information, commentary and analysis?

Answering these questions might provide invaluable insight into how universities and the judiciary can best serve their purposes *and* it might just provide best practice in the business of serving democracy.

In the end, in their own special ways, both universities and the judiciary might stand as lighthouses of reflection critique, analysis and commentary.